Introductory Matters

PART 1

The Structure of Criminal Law

CHAPTER 1

INTRODUCTION

1.1 For more than 100 years, Queensland and Western Australia have shared a common heritage of criminal law and procedure based on a criminal code drafted by Sir Samuel Griffiths, later the first Chief Justice of the High Court of Australia.

The Criminal Codes of Queensland (Code (Qld)) and Western Australia (Code (WA)) (the Codes) were enacted as Schedules to short covering Acts: the Criminal Code Act 1899 (Qld) and the Criminal Code Act Compilation Act 1913 (WA). Over time, differences have emerged as parliaments of the two states have responded to local issues and the need to provide a particular legislative solution to a current community problem. However, the foundations of criminal responsibility and the nature of many offences remain the same.

Procedural variations have developed between the two states although there are many similarities, in part because of the common heritage and in part due to the modern involvement of the High Court of Australia in matters of criminal law and procedure. High Court judgments are binding on state courts.

Each state is part of the Commonwealth of Australia and federal criminal law applies to each person as well as state law.

THE NATURE OF CRIMINAL LAW AND CRIMINAL RESPONSIBILITY

1.2 Criminal law involves the use of penal sanctions to enforce the prohibitions which the state imposes on conduct. Conduct constitutes a criminal offence when it has been so defined by the law. This broad definition of a criminal offence covers not only traditional crimes such as murder and stealing, but also the modern offences found in legislation regulating fields such as road traffic, customs and taxation.

In *Proprietary Articles Trade Association v Attorney-General (Canada)* [1931] AC 310 at 324, Lord Atkin said:

> Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be ascertained by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? … [T]he domain of criminal jurisprudence can only

be ascertained by examining what acts at any particular period are declared by the State to be criminal and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

1.3 There is often a close correlation between the moral or ethical concerns of society and the criminal law. The traditional crimes are sometimes called *mala in se*, in order to indicate that the perceived moral or social wrongfulness of the types of conduct is the reason why they are legally prohibited and punished. In contrast, the modern regulatory offences are sometimes called *mala prohibita*, in order to indicate that the wrongfulness of these types of conduct is dependent upon their legal prohibition. *Mala prohibita* are wrong because they are legally prohibited; *mala in se* are legally prohibited because they are wrong.

The distinction can help to illuminate the scope of criminal law. However, it can sometimes be difficult to apply. While certain offences, such as murder and stealing, would be regarded as offensive to most people in society, the scope of these offences can be disputed. Moreover, a divergence of opinion often exists with respect to matters such as abortion, prostitution or euthanasia. These acts may be permitted in some jurisdictions while remaining unlawful in others. Consequently, the characterisation of particular offences on the basis of the distinction between *mala prohibita* and *mala in se* is frequently questionable. The distinction has no direct legal significance.

1.4 The terms 'offence' and 'criminal offence' are used in this book in a generic sense, applying to all governmental prohibitions which are backed by penal sanctions. The term 'crime', in its popular sense of serious offence, is not used in this book. This is because the term 'crime' has a technical meaning, somewhat different from that of popular usage, under the Criminal Code (Qld): see **1.24**. In order to avoid confusion, the term 'crime' is used only in this technical sense.

1.5 The commission of an offence generally requires:

1. occurrence of the conduct specified in the offence description (for example, killing or taking property), or sometimes the omission to do an act (for example, failing to provide necessaries of life to someone to whom a duty of care is owed);
2. presence of any state of mind (such as intention) required to make a person criminally responsible for that conduct;
3. absence of any authorisation, justification or excuse which would negative criminal responsibility for the conduct.

The second and third requirements largely reflect the connection between criminal responsibility and moral blameworthiness. Generally, conduct alone is not punished.

A central focus in this text is the concepts, principles and rules through which criminal responsibility has been addressed in Queensland and Western Australia.

CONSTITUTIONAL AND TERRITORIAL ISSUES

1.6 In Australia, criminal law is primarily a matter of jurisdiction for the states and territories rather than the Commonwealth. Criminal law was a matter within the pre-federation competence of colonial legislatures to make laws for 'peace, welfare and good government'. The matter of criminal law was not reserved to the Commonwealth Parliament by the Commonwealth of Australia Constitution Act of 1900. Thus, only the state legislatures can prohibit and sanction conduct occurring within their boundaries on the simple basis that

it is harmful or wrong. Similar powers have been delegated by the Commonwealth to the legislatures of the Australian Capital Territory and the Northern Territory.

1.7 The criminal law of a state extends to its territorial boundaries. Problems can occur in cases where the offence in question comprises a number of acts or events and only some occur within the territory of the state. As long as one element of the offence occurs within the territorial boundaries of the state, that state will have jurisdiction: see the Criminal Codes of Queensland (Code (Qld)) s 12(2) and Western Australia (Code (WA)) s 12(1)(b). The element may be the consequence of an act or omission occurring elsewhere: see Codes s 12(3) (Qld)/s 12(2) (WA). Therefore, a person in Queensland who perpetrates a fraud by telephone in Western Australia, even though he or she may never have set foot in Western Australia, may be liable under s 12 in that state. Similarly, provision is made for situations involving the procuring or counselling of offences either within the territorial boundaries of the state by persons outside those boundaries, or beyond the territorial boundaries of the state by persons within those boundaries: see Codes ss 13–14.

1.8 Despite the lack of an express power to enact criminal law, the Commonwealth does possess a supplementary or incidental power to create criminal offences in areas over which it has specific constitutional jurisdiction, such as external affairs, international trade and commerce, and taxation. It can use penal sanctions in order to enforce its regulatory schemes in these areas. The external affairs power makes it possible for the Commonwealth to enact criminal offences to give effect to Australia's obligations under international treaties.

The Criminal Code (Cth) covers a variety of matters of substantive criminal law including:

- principles of criminal responsibility for Commonwealth offences;
- offences against the Commonwealth government, or Commonwealth property or personnel;
- offences committed by or against Australians overseas;
- terrorism;
- crimes against humanity and war crimes; and
- drugs offences.

Offences are also found in a variety of other Commonwealth statutes: see 9.1.

The Crimes Act 1914 (Cth) establishes schemes of investigative, arrest and sentencing powers for all Commonwealth offences. Trials for Commonwealth offences are generally conducted in the ordinary state courts: see Judiciary Act 1903 (Cth) s 68. However, prosecutions on indictment before these courts are conducted by Commonwealth officials: see Judiciary Act 1903 (Cth) s 69(1)–(2).

1.9 Potential conflict between the Commonwealth and the states and territories over matters of territorial jurisdiction has been largely addressed by specific statutory provisions, generally to the effect that state or territory law is to apply in places subject to Commonwealth jurisdiction.

The Commonwealth Places (Application of Laws) Act 1970 (Cth) and Commonwealth Places (Administration of Laws) Act 1970 (Qld and WA) make the criminal laws of the states and territories applicable to places such as military bases and airports that would otherwise be under Commonwealth jurisdiction. See also the Crimes at Sea Act 2000 (Cth) Sch 1, which

makes the criminal law of the states and territories generally applicable to areas within the outer limits of Australia's continental shelf. The law of the Jervis Bay Territory applies to Australian ships operating beyond the continental shelf: Crimes at Sea Act 2000 (Cth) s 6.

The airspace above the states and territories forms part of them so that local law applies to flights within the jurisdiction. On the other hand, offences committed on international or interstate flights are not generally subject to the criminal law of the jurisdiction over which the aircraft is travelling. The Commonwealth has given jurisdiction to the Jervis Bay Territory: see Crimes (Aviation) Act 1991 (Cth) s 15.

TWO TRADITIONS IN AUSTRALIAN CRIMINAL LAW

1.10 The historical origins of Australian criminal law lie in judge-made common law. Throughout the common law world, most criminal offences now have some form of statutory authority which at least names the offence and prescribes the maximum penalty. In some jurisdictions, however, references are still made to the common law for the detailed elements of offences and for many general rules of criminal responsibility. In Australia, the term 'common law jurisdictions' is used to describe those jurisdictions that have not codified their criminal law and still rely on common law as a major source of criminal law. The common law jurisdictions are New South Wales, Victoria and South Australia.

1.11 In some jurisdictions, criminal 'codes' have been enacted which are intended to provide a comprehensive statement of the criminal law and to supplant the common law. In Australia, these are called 'code jurisdictions'. The code jurisdictions are Queensland, Western Australia and Tasmania: see Criminal Code Act 1899 (Qld); Criminal Code Act Compilation Act 1913 (WA); Criminal Code Act 1924 (Tas). The respective Criminal Codes were enacted as Schedules to the Acts. Queensland and Western Australia use essentially the same code which is known as the 'Griffith Code': see **1.14–1.15**. Tasmania has its own distinctive code which, although influenced by the Griffith Code, departs from it in some respects.

The Commonwealth is a code jurisdiction since its Criminal Code came into force in 2000: Criminal Code Act 1995 (Cth). The content of the Commonwealth Code, however, does not draw on the heritage of the Griffith Code. Instead, it purports to codify common law principles. Parts of the Commonwealth Code have also been adopted in the Australian Capital Territory and the Northern Territory: see Criminal Code 2002 (ACT); Criminal Code (NT).

1.12 The jurisprudential difference between the common law and the code traditions is perhaps best regarded as one of emphasis rather than of kind. In the common law jurisdictions, much of the criminal law is still found in consolidating statutes: see the Crimes Act 1900 (NSW) and (ACT), Crimes Act 1958 (Vic) and Criminal Law Consolidation Act 1935 (SA). This legislation, however, leaves many gaps to be filled by the invocation of common law rules and principles. On the other hand, the criminal codes are not exhaustive. Although an attempt has been made in the code jurisdictions to provide comprehensive statutory statements of the criminal law, some gaps still remain which have to be filled by reference to the common law. In addition, the inherent vagueness of statutory language presents problems of interpretation, in the resolution of which reference is often made to the common law. On the interpretation of criminal legislation and codes, see **1.19–1.22**.

1.13 The two traditions in Australian criminal law embody not only these jurisprudential differences but also certain differences in the substantive law of criminal responsibility. Most notably, the contemporary common law of criminal responsibility has accepted a general principle that an offender must have been aware what he or she was doing. It is said that the conduct must have been intentional or at least reckless: see *He Kaw Teh v R* (1985) 157 CLR 523; 60 ALR 449 and *Kural v R* (1987) 162 CLR 50; 70 ALR 658. To use a common law term, the act must be accompanied by *mens rea* meaning a 'guilty mind'. Inadvertent negligence may suffice for the civil law of torts but not for the criminal law. In contrast, the doing of an act or the making of an omission without authority, excuse or justification is the general threshold of criminal responsibility in the codes. This means that the criminal codes of the Australian states have been largely formulated on the basis that inadvertent negligence can, for many offences, be an appropriate measure of fault for criminal liability. The Codes of Queensland and Western Australia expressly state that intention to cause a particular result is immaterial unless it is expressly declared to be an element of the offence: Codes s 23(2) (Qld)/s 23(1) (WA). This elegant solution to centuries of confusion has been abandoned in the Commonwealth Code, which reflects the common law principle.

THE GRIFFITH CODE

1.14 A criminal code for Queensland was prepared by Sir Samuel Griffith (1845–1920). Griffith was successively Premier of Queensland, Chief Justice of Queensland and the first Chief Justice of the High Court of Australia. He drafted the Code while Chief Justice of the state, and submitted it to the state government in 1897. Enacted as a schedule to the Criminal Code Act 1899, it came into force in 1901. Sir Samuel Griffith drew upon a draft code prepared for England in the late 1870s, known as the 'Stephen Code' after its principal drafter, Sir James Stephen. The Stephen Code was never enacted in England but became the basis for the Canadian Criminal Code 1892 and the New Zealand Crimes Act 1893. Sir Samuel Griffith also drew upon the Criminal Codes of New York and Italy. He added original features which mark his as the 'Griffith Code'.

The Griffith Code was adopted in Western Australia in 1902. It was then exported by Australia to its overseas dependencies — Papua in 1902, New Guinea in 1921 and Nauru in 1922. It was also adopted as a model by the British Colonial Office, which exported it to many parts of the globe — Nigeria and some other parts of British imperial Africa, Palestine, Fiji, the Solomon Islands, Kiribati and Tuvalu. The Griffith Code had some influence in the drafting of the Tasmanian Criminal Code. This Code, however, departs from the Griffith model in some respects.

1.15 Amendments have been made to the Queensland and Western Australia Codes since their enactment, including Western Australia's removal of criminal procedure to separate statutes, particularly the Criminal Procedure Act 2004 and the Criminal Investigation Act 2006. The basic concepts, principles and structure of the Griffith Code are still shared in relation to substantive criminal law, but the effect of amendment has been to make the two Codes differ in some particular respects. As a result, many section numbers now differ between the states.

CODES, OTHER CRIMINAL LEGISLATION AND COMMON LAW

1.16 With one exception all criminal offences in Queensland and Western Australia must have statutory origin or recognition.

- The Criminal Code Act (Qld) s 5: 'no person shall be liable to be tried or punished in Queensland as for an indictable offence except under the express provisions of the Code' or some other state or imperial statute. Indictable offences are serious offences which were historically created through the common law and which are triable in superior courts by judge and jury: see **1.23** on the meaning of 'indictable'.
- The Criminal Code Act Compilation Act 1913 (WA) s 4 provides that henceforth 'no person shall be liable to be tried or punished in Western Australia as for an offence, except under the express provisions of the Code' or some other state or imperial statute. This covers both indictable and summary offences.
- The general principle that there must be statutory authority for an offence is also expressed in the Criminal Code (Cth) s 1.1: 'The only offences against laws of the Commonwealth are those offences created by, or under the authority of, this Code or any other Act'.

Minor offences triable 'summarily', that is, by a magistrate without a jury, have almost always been created by statute in all jurisdictions.

The one exception to the rule that all offences must be based in statute is contempt of court. Under the Criminal Code Act (Qld) s 8 and the Criminal Code Act Compilation Act (WA) s 7, contempt of court is preserved as a common law offence triable summarily. The scope of the offence (and the procedure by which it is tried) is still governed by the common law. Nevertheless, the continued existence of the offence depends upon its statutory recognition in the Acts just outlined.

1.17 In Queensland and Western Australia, the Code is a near-comprehensive statement of the law in respect of liability for major offences. In neither state, however, is it a complete statement of the criminal law.

A few matters were deliberately left to the common law. For example, the Griffith Code contains no general provisions relating to the location of the burden of proof or the standard of proof. The only references to the burden of proof involve specific offences or defences. The general requirements must be derived from the common law: see **Chapter 2**. In addition, the vagueness of the language of the Griffith Code has sometimes led to the use of the common law as an interpretative aid: see **1.19–1.21**.

Some offences are found in statutes other than the Codes. These include many minor offences that can only be tried summarily by magistrates. For example, the Prostitution Act 1998 (Qld) and the Prostitution Act 2000 (WA) cover prostitution-related offences, and the Transport Operations (Road Use Management) Act 1995 (Qld) and the Road Traffic Act 1974 (WA) cover drink driving, careless driving and a host of minor traffic offences. There are even some indictable offences which appear in statutes other than the Codes. For example, offences relating to illicit substances are found in the Drugs Misuse Act 1986 (Qld) and the Misuse of Drugs Act 1981 (WA).

Much of the law of criminal procedure is found in statutes other than the Codes.

- In Queensland, the Justices Act 1886 prescribes much of the law governing the initiation of criminal proceedings, and the Police Powers and Responsibilities Act 2000 has codified police powers.

- In Western Australia, court proceedings are now largely governed by the Criminal Procedure Act 2004 and the Criminal Appeals Act 2004. A codification of police powers has been enacted in the Criminal Investigation Act 2006.

1.18 The Codes s 36 makes the general provisions relating to criminal responsibility applicable to offences against any statute. In Queensland, an exception is the Regulatory Offences Act 1985, dealing with property offences of low value, which contains its own scheme of criminal responsibility. Generally, though, other statutes rely on the Codes to supplement what is enacted. In some instances, this process is expressly stated by provisions such as the Drugs Misuse Act 1986 (Qld) s 116 which provides: 'The Criminal Code shall, with all necessary adaptations, be read and construed with this Act.'

INTERPRETATION OF CRIMINAL LEGISLATION AND CODES

1.19 Principles of interpretation for criminal legislation differ markedly between code jurisdictions and common law jurisdictions. In common law jurisdictions, legislation is interpreted in light of the general principles of the common law respecting criminal responsibility. In code jurisdictions, courts have insisted that codification marks a break from the past and the common law should not unduly influence the interpretation of statutory provisions. It has often been said that the language of the Codes should be interpreted in accordance with ordinary meanings and without any presumption that the previous common law was intended to be maintained. The classic statement is a passage by Dixon and Evatt JJ from *Brennan v the King* (1936) 55 CLR 253 at 263; [1936] ALR 318, quoted in *Stuart v R* (1974) 134 CLR 426 at 437; 4 ALR 545:

> … it forms part of a code intended to replace the common law, and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered.

The general principles were recently reaffirmed by the Western Australia Court of Appeal in *Roberts v State of Western Australia* [2007] WASCA 48; 34 WAR 1 at [88]–[118]. With respect to the elements of manslaughter, Roberts-Smith JA concluded at [118]: 'There is simply no need to look outside the Code to extend or limit the offence of manslaughter beyond the scope of the offence which the Code sets out.'

1.20 There are instances where the courts have invoked common law as an aid to the interpretation of the Codes. The current orthodox view is that resort to the common law is appropriate only where the language of the Codes is ambiguous or has a technical meaning, such as a special meaning acquired at common law: see *Stuart v R* (1974) 134 CLR 426 at 437; 4 ALR 545. An example of an ambiguity resolved by reference to the common law is the word 'wilfully', discussed in *R v Lockwood; Ex parte Attorney-General* [1981] Qd R 209 at **7.54C**. An example of 'technical' interpretation is the analysis of the meaning of the word 'provocation' by the Queensland Court of Criminal Appeal in *R v Johnson* [1964] Qd R 1: see **Chapter 15**. In *Johnson*, it was made clear that, when the courts refer to the common law in this way, it is to the contemporary common law and not the common law as it stood at the time of codification.

1.21 There are some instances where the courts have made freer use of common law ideas, dispensing with the narrow justifications of ambiguity or technical meaning. The most notable example is the introduction of the common law concept of 'criminal negligence' into the Codes: see *Callaghan v R* (1952) 87 CLR 115; [1952] ALR 941 at 4.48C; *R v Scarth* [1945] St R Qd 38.

1.22 Both code jurisdictions and common law jurisdictions recognise the general principle for the interpretation of penal statutes that ambiguities are to be resolved in favour of the subject. This is the principle of strict construction. It means that when a provision can reasonably be interpreted in more than one way, the preferred interpretation is the one which will give the narrowest ambit to criminal liability. The principle is one of last resort, invoked when interpretational difficulties cannot be resolved by other means.

CLASSIFICATION OF OFFENCES

1.23 In classifying offences, the crucial distinction in both Queensland and Western Australia is between indictable and simple offences. The law of procedure for the two categories of offence is quite different.

Importantly, indictable offences may and sometimes must be tried in superior courts (that is, the Supreme Court or a District Court). Trial in superior courts has traditionally been by a judge and jury, although options for 'judge alone' trials now exist in both Queensland and Western Australia: see 28.4. An 'indictment' is the name of the form of charge which initiates proceedings before a superior court: see 27.7.

Simple offences are generally tried in Magistrates Courts. A Magistrates Court operates without a jury. It will try offences 'summarily'. Proceedings in a Magistrates Court are commenced by a document called a complaint in Queensland and a prosecution notice in Western Australia.

Thus, Magistrates Courts have exclusive jurisdiction over summary offences except where, in limited circumstances, a statute expressly extends the jurisdiction of superior courts to summary offences. Superior courts have exclusive jurisdiction over indictable offences, except where a statute expressly provides otherwise.

1.24 In Queensland, the Code (Qld) s 3 divides offences into four categories. In descending order of seriousness, they are crimes, misdemeanours, simple offences (these three are broadly grouped as criminal offences) and regulatory offences. Crimes and misdemeanors are both designated 'indictable offences', triable only on indictment unless otherwise expressly stated. On indictable offences which may be tried summarily, see, especially, the Code (Qld) ss 552A–552B, discussed in 28.10. Simple and regulatory offences are designated offences for which a person may be 'summarily convicted' by a Magistrates Court. The distinction between simple offences and regulatory offences merely reflects the separate existence of the Regulatory Offences Act 1985 (Qld), dealing with some property offences of low value; for example, shoplifting or non-payment of restaurant or hotel bills, where the value of the property is $150 or less. These regulatory offences are generally subject to the same procedure as simple offences.

The distinction between crimes and misdemeanours is relatively unimportant. It reflects an old common law distinction between felonies and misdemeanours but no longer has much significance. The distinction still matters in Queensland for determining the extent of

the powers of ordinary persons to arrest without warrant, a power to make a citizen's arrest generally existing only for crimes: see the Code (Qld) ss 5, 546 and 25.20. The distinction is, however, immaterial to police powers of arrest under the Police Powers and Responsibilities Act 2000 (Qld).

1.25 In Western Australia, the Interpretation Act 1984 s 67(1) provides that offences are of two kinds: indictable offences and simple offences. Crimes and misdemeanours are indictable offences: see s 67(1a). An offence not otherwise designated is a simple offence: see s 67(2). The Code (WA) s 3(2) provides that an indictable offence is triable only on indictment unless a written law expressly provides otherwise. Simple offences are triable 'summarily' by a Magistrates Court. The Code (WA) s 5 provides for circumstances when indictable offences may also be tried summarily. When a person is charged with an indictable offence before a Magistrates Court and the offence has a 'summary conviction penalty', it is to be tried by the magistrate unless, under certain conditions, including the seriousness and the interests of justice, the magistrate considers that the charge should be dealt with on indictment.

Persuasive and Evidentiary Burdens

CHAPTER 2

THE BURDEN OF PROOF

2.1 There are three fundamental principles that govern the trial of any person accused for a criminal offence.

1. *The presumption of innocence*. Every person is presumed by law to be innocent of a charge made against them until either they admit the charge by formally pleading guilty in a court, or the charge is proved.
2. *The burden of proof*. This principle follows from the first principle. Because a person is presumed to be innocent, the prosecution must prove the case against them. If it does not, the presumption of innocence remains. In a criminal trial, an accused person is under no duty to prove innocence; the prosecution must prove guilt.
3. *The standard of proof*. The standard of proof that the prosecution must discharge in proving every element of the charge is proof beyond reasonable doubt.

In combination, these principles mean a person is presumed to be innocent of a charge brought against them and that, in order to change their legal status from innocent to guilty, the prosecution must satisfy a court beyond reasonable doubt that the person is guilty.

The general principles are assumed, but not expressly stated, in the Criminal Codes of Queensland and Western Australia (the Codes). The provisions of the Codes which do deal with the burden of proof establish exceptions to the general principle, whereby the accused carries the burden to prove some matter. The issue of insanity is one example: a person is presumed to be of sound mind until the contrary is proved on a balance of probabilities: Codes s 26.

For Commonwealth offences, the burden of proof is expressly placed on the prosecution by the Criminal Code (Cth) s 13 which also specifies the standard of proof and the occasions when the defence bears a legal burden.

2.2 Prior to the 1931 decision of the House of Lords in *Woolmington v DPP* [1935] AC 462, there was some uncertainty about the scope of the general principles. *Woolmington* established that the prosecution ordinarily carries the burden of proof with respect to all substantive elements of an offence. The following passage at AC 481–2 from the judgment of Viscount Sankey LC has come to be regarded as the classic statement on the burden of proof at common law:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Woolmington was applied to the Code (Qld) by the High Court in *R v Mullen* (1938) 59 CLR 124; [1938] ALR 129. A curious statement was made in *Mullen* by Dixon J (at CLR 136) to the effect that the text of the Griffith Code suggests that its framers may have contemplated a different principle respecting the burden of proof. The passages of the Code which concerned Dixon J were not, however, identified and the proposition is dubious.

BEYOND REASONABLE DOUBT

2.3 The issue in *Woolmington* and *Mullen* was the location of the burden of proof, not its quantum. Nevertheless, the statements of general principle in these cases affirmed that the quantum of proof required to discharge the burden is proof 'beyond reasonable doubt': see also the Criminal Code (Cth) s 13.2. This is different from the quantum of proof that applies in civil cases. In civil proceedings, the burden is on the plaintiff to prove the case on 'a balance of probabilities'. A higher standard in criminal proceedings is justified by the severe sanctions which can follow a conviction.

The standard of 'beyond reasonable doubt' is a standard of certainty rather than likelihood. However, this means virtual or practical certainty rather than absolute certainty: see *Goncalves v R* (1997) 99 A Crim R 193 at **2.17C**. There can rarely be absolute certainty about anything in life. The certainty which is required in criminal law is certainty in the sense that the term is used in the conduct of everyday affairs.

2.4 A direction to consider whether the case has been proved beyond reasonable doubt is usually given to the jury without qualification. This practice has been said to be advisable unless there are special circumstances such as the need to correct misleading statements by counsel: see *R v Punj* [2002] QCA 333; 132 A Crim R 595 at **2.18C**. The fear is that any qualification may dilute the strength of the message about the standard that the prosecution must meet.

In the majority judgment of the High Court in *Darkan v R* [2006] HCA 34; 227 CLR 373; 228 ALR 334 (**20.25C**), there was a comment suggesting that judicial reluctance to explain the expression 'beyond reasonable doubt' may have been taken too far. It was described as 'an extreme and exceptional stand' which 'has not been shared elsewhere': at [69]. However the standard remains unchanged.

REVERSALS OF THE BURDEN OF PROOF

2.5 The *Woolmington* principle is subject to statutory exceptions whereby the burden of proof is reversed. The presumption of sanity is one: Codes ss 26–27. The Codes adopt a rule, which

has a long history at common law, to the effect that insanity must be proved before it will afford a defence. Similarly, the Queensland defence of diminished responsibility must be proved by the accused: Code (Qld) s 304A. Some of the High Court judges in *R v Falconer* (1990) 171 CLR 30; 96 ALR 545 (17.49C) were also attracted to the idea of making the accused prove the defence of non-insane automatism. In the result, however, a 4:3 majority held that it is the prosecution who must disprove this defence.

A statutory example in Western Australia is provided by the Prostitution Act 2000 s 49:

> If in proceedings for an offence under this Act, it is relevant, whether or not a person was a child, it is to be conclusively presumed that the accused knew that the person was a child unless it is proved that having taken all reasonable steps to find out the age of the person concerned, the accused believed on reasonable grounds at the time the offence is alleged to have been committed, that the age of the person concerned was at least 18 years.

In *R v Hutchinson* [2003] WASCA 323; 144 A Crim R 28, it was held that s 49 displaces the ordinary common law evidential rules as to presumption of innocence and burden of proof by making a conclusive presumption of knowledge unless the other provisions of the section are proved.

For other examples of reverse-onus provisions, see Code (Qld) ss 210(5), 215(5) (reasonable belief that a sexual partner is 16 years or above); Drugs Misuse Act 1986 (Qld) s 51; Misuse of Drugs Act 1981 (WA) ss 6(3), 7(3) (lawfully prescribed drug).

2.6 Implied reversals of the burden of proof have sometimes been recognised, mainly in relation to summary conviction offences where a prohibition is qualified by an exception or proviso. There may be an implied burden to prove that the accused falls within the exception or proviso. In *DPP v United Telecasters Sydney Ltd* (1990) 168 CLR 594 at 601; 91 ALR 1 at 5, per Brennan, Dawson, Gaudron JJ:

> The rule laid down in *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at 481–2 that the burden of proving every element of an offence charged rests at all times on the prosecution was expressed to be 'subject to … the defence of insanity and also to any statutory exception'. It is made clear in *R v Edwards* (1975) QB 27 and *R v Hunt* [1987] AC 352 that the statutory exceptions referred to are not confined to those which expressly cast the burden of proof upon the accused (see, for example, Crimes Act 1900 (NSW), s 417) but extend to all cases in which an intention to do so is necessarily implied. Such cases will ordinarily occur where an offence created by statute is subjected to a proviso or exception which by reason of the manner in which it is expressed or its subject matter, discloses a legislative intention to impose upon the accused, the ultimate burden of bringing himself within it. That burden may, of course, be discharged upon the balance of probabilities. Whilst it is convenient to speak in terms of provisos or exceptions, the legislative intent cannot be ascertained as a mere matter of form. The Court of Appeal in *R v Edwards*, at 40, viewed the statutory exceptions as limited to: '… offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities.' In *R v Hunt*, at 375, even this formulation was said by the House of Lords not to be exhaustive. Each case must turn upon the construction of the particular enactment.

2.7 Where the burden is placed on the accused to prove some matter, it usually need only be discharged on the lower standard of a 'balance of probabilities'. Again, common law principles

determine this in the code states. For Commonwealth offences there is an express provision: Code (Cth) s 13.5.

An exceptional instance where a defendant is required to prove something 'beyond reasonable doubt' can be found in the Transport Operations (Road Use Management) Act 1995 (Qld) s 79(6), with respect to the offence of being in charge of a motor vehicle while impaired. A person in charge of a vehicle while impaired may still escape conviction by proving certain conditions beyond reasonable doubt, including that he or she had manifested an intention not to drive and had parked the vehicle in a place where it would not constitute a source of danger to other persons or traffic.

EVIDENTIARY (OR EVIDENTIAL) BURDENS

2.8 The prosecution ordinarily carries the evidentiary (or evidential) burden to put certain matters in issue as well as the burden of proof (or persuasive burden) with respect to these matters. Evidentiary burdens, like persuasive burdens, are largely still a matter of common law in both Queensland and Western Australia. Statutory provisions which deal with the matter have been enacted mainly to prescribe some deviation from general principles.

An evidentiary burden is not a burden to prove anything, either beyond reasonable doubt or even on a balance of probabilities. The evidentiary burden is sometimes called the 'evidentiary burden of proof': Code (Cth) s 13.3. However, this terminology is highly misleading and should be avoided.

2.9 The principal significance of the distinction between evidentiary and persuasive burdens relates to the different functions of judge and jury in a criminal trial. The jury is responsible for making the relevant determinations of fact with respect to those matters which have been put in issue by the evidence. Nevertheless, in order to avoid confusing the jury and to protect the accused, the judge is responsible for first deciding what is in issue. The prosecution ordinarily carries the burden of leading evidence which directly or inferentially supports all aspects of its case. If it fails to do so, the case is withdrawn from the jury: see 28.27. For example, on a charge of stealing, if no evidence is led which indicates that the thing alleged to have been stolen was the property of a person (see 7.6), the judge may rule that the prosecution has not discharged its evidentiary burden in relation to the charge. The jury will then never be asked to decide whether it is persuaded beyond reasonable doubt that the offence was committed.

2.10 An evidentiary burden is much easier to discharge than a persuasive burden. An evidentiary burden is simply a burden to show that there is some evidence warranting the attention of the jury. The Code (Cth) s 13.3(6) defines the term in a way which could also describe the procedure for state offences: '"evidential burden", in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist'.

Discharging an evidentiary burden with respect to some matter may require evidence be led which directly pertains to that matter. For example, the prosecution will usually be required to lead some evidence with respect to each of the conduct elements of the offence in question. There may be no need, however, to lead evidence in respect of any mental elements because the conduct itself may provide a basis for drawing an inference about the accused's state of mind.

Some matters may be so obvious that no supporting evidence is required. For example, the accused must be 'a person'. Evidence of this would not ordinarily be required. The jury can see that the accused is a person.

2.11 Like persuasive burdens, evidentiary burdens can be reversed. When an evidentiary burden on some matter is reversed, the prosecution need only discharge its persuasive burden in respect of that matter if the accused has first discharged the evidentiary burden. This means that the accused must introduce evidence with respect to it, unless the defence can point to evidence already introduced by the prosecution.

As to the difference between a reverse onus and an evidential onus see *Braysich v R* [2011] HCA 15 (**2.19C**). It was stressed that, in determining whether an evidentiary burden has been discharged, the trial judge should 'take the evidence as its most favourable to the defendant'.

2.12 An example of a reverse evidentiary burden can be found in the Transport Operations (Road Use Management) Act 1995 (Qld) s 120, which concerns the use of photographic detection devices to prove vehicle offences. Section 120(6) provides: 'Evidence of the condition of the photographic detection device is not required unless evidence that the device was not in proper condition has been given.' This phraseology reverses the evidentiary rather than the persuasive burden. A defendant need not prove the device was faulty. However, if there is some evidence that it was faulty, the prosecution must prove the contrary. In Western Australia evidence as to speed and accuracy of equipment is prima facie evidence: Road Traffic Act s 98A. This is a common legislative device, shifting the onus onto the defence to provide or point to some positive evidence of inaccuracy.

2.13 There is a general principle at common law that an accused carries the evidentiary burden with respect to all matters of mental impairment (including, for example, intoxication) and all matters of justification or excuse (for example, self-defence and duress). In *R v Menniti* [1985] 1 Qd R 520 (**20.40C**), with respect to matters of justification and excuse, Thomas J said:

> Whether the issue be one of accident (s 23), mistake (s 24), self-defence, provocation, or other matters that go to justification or excuse, the same general principles apply …
> (1) Whether there is evidence fit to go to a jury on such an issue is a question of law. If it is not fairly raised on the evidence, the judge does not allow it to go to the jury and counsel may not address upon it as an exonerating factor.
> (2) If there is such evidence, the jury is told so, and is given appropriate directions on the law and appropriate comments on the facts bearing upon that issue.
> (3) The jury is told that the onus remains on the prosecution throughout and that if it is not satisfied beyond reasonable doubt that the prosecution has excluded that defence, then it should acquit.

For Commonwealth offences, see Code (Cth) s 13.3(2)–(3).

2.14 A reverse evidentiary onus can be discharged by introducing relevant evidence with respect to the matter. However, it may be sufficient to point to evidence already introduced by the prosecution. For example, an accused on trial for assault causing bodily harm may want to argue that it was a case of self-defence in which no more force was used than was reasonably necessary. The accused could introduce evidence that the alleged victim threw the first punch.

However, evidence to this effect may already be before the court from the prosecution's witnesses as to the assault.

PRESUMPTIONS

2.15 Reverse burdens are sometimes expressed in the language of 'presumptions'. There are several different kinds of presumptions in criminal law:

1. Presumptions of law that reverse persuasive burdens because the rebuttal requires proof of the contrary. An example is the presumption of sanity under the Codes s 26.
2. Presumptions of law that reverse evidentiary burdens because the rebuttal requires only some evidence to the contrary. An example is the common law presumption of normal mental capacity: see the comments of Lord Denning in *Bratty v Attorney-General for Northern Ireland* [1963] AC 386, quoted in *R v Falconer* (1990) 171 CLR 30; 96 ALR 545 at **11.13C**. This presumption underlies the process of drawing inferences about an accused's state of mind from evidence about the accused's acts.
3. Discretionary presumptions of fact that state inferences which a jury may draw, but is not legally obliged to do. An example is 'the presumption of recent possession', which is the presumption that a person in possession of recently stolen property, in the absence of any reasonable explanation or explanatory circumstances, has stolen or received it: see *Bruce v R* (1987) 74 ALR 219.

2.16 The courts have become increasingly cautious about use of the language of presumptions to describe discretionary inferences, fearing that it might divert the jury from a consideration of the facts of the particular case.

At one time, it was common to speak of a 'presumption of intention' to describe the process of drawing inferences about an accused's subjective intent on the basis of the consequences which might objectively be expected from what the accused did. This terminology was criticised by Dixon CJ in *Stapleton v R* (1952) 86 CLR 358 at 365; [1952] ALR 929:

> The introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous. For it either does no more than state a self-evident proposition of fact or it produces an illegitimate transfer of the burden of proof of a real issue of intent to the person denying the allegation.

In *Parker v R* (1963) 111 CLR 610; [1963] ALR 524, Dixon CJ, with the concurrence of the whole court, affirmed the decision in *Stapleton*, above, and rejected the presumption of intention which the House of Lords had espoused in *DPP v Smith* [1961] AC 290; [1960] 3 All ER 161. The English courts have also moved away from *Smith*.

2.17C

Goncalves v R

(1997) 99 A Crim R 193
Western Australia Court of Criminal Appeal

Wheeler J:

The appeal

The appellant was convicted after trial on 16 January 1997 on an indictment alleging that on 8 August 1995 he wilfully and unlawfully damaged a dwelling house, the property of one Lesley Ann Jeffery, by fire.

…

Grounds of appeal

The grounds of appeal upon which the appellant relies are:

1. The trial miscarried as a result of the Learned Trial Judge's confusing and erroneous directions to the jury on both the onus and the standard of proof …

The direction as to onus and standard of proof

His Honour directed the jury briefly as to the standard of proof and then turned to the elements of the offence. He analysed the evidence in detail, referring to the audio recording of the conversation on 9 November as the 'corner stone' of the Crown case. He referred in some detail to the contentions of the Crown and of the appellant respectively concerning the issue whether the admissions on that tape recording were to be regarded as truthful, or as the ramblings of a drunk, and referred to the evidence in support of those contentions.

His Honour then turned again to the onus of proof and made it very clear to the jury that it was for the prosecution to prove guilt. He described the standard of proof as 'a high one'. He mentioned briefly the standard of proof prevailing in civil proceedings and advised the jury that in criminal proceedings that standard was not regarded as high enough. His Honour then continued:

> The standard of proof in a criminal case is proof beyond a reasonable doubt. Sometimes judges are asked, after a jury has retired, 'Could you please give us a definition of "beyond reasonable doubt"?' I hope I am forestalling that in this case by saying that it's been said by the highest judges in Australia that you can't do better than use those words. They are words of everyday usage. 'Beyond' means beyond; 'reasonable' means reasonable; and 'doubt' means doubt. All I can say is that it's not proof to the point of absolute certainty. It's simply what the words say, 'beyond reasonable doubt'.
>
> I have already said that you must have regard only to what was said on oath, and I have illustrated to you that what was said by the defendant to Mr Frayzer about other people, that is people other than himself, being involved in things is not evidence. The reason why admissions of wrongdoing are allowed to be given in court is because someone heard them and gives the evidence on oath of those admissions and they are admitted as evidence because they are against interest. If someone says that they put sand in your petrol tank, your engine fails, it's reasonable to assume that the person who is admitting the wrongdoing is telling the truth, and it's on that basis that admissions against interest are admissible. As I have already said, in this case the cornerstone of the Crown's case is the series of admissions made to Mr Frayzer and principally those on the tape, exhibit B.
>
> In the end, ladies and gentlemen, it is a matter of credibility, where you think the truth is being told under oath and where it is not, and that involves for you an everyday

judgment of the truthfulness of someone, something that you do every day in making your assessments of contemplated conduct.

His Honour then warned the jury to disregard irrelevant matters and to beware of prejudice.

Two passages in this portion of the direction are the subject of ground 1 of the grounds of appeal. The first is the sentence, 'All I can say is that it's not proof to the point of absolute certainty'.

The expression 'beyond reasonable doubt' was said to have been 'invented by the common law judges for the very reason that it was capable of being understood and applied by men in the jury box' and because it 'conveys a meaning without lawyers' elaborations': *Thomas v R* (1960) 102 CLR 584 at 604–5 per Windeyer J. It has long been said that it is generally undesirable to attempt to explain or elucidate that expression (*Thomas v R* at 583–4 per Fullagar J, at 595–6 per Kitto J, at 604–6 per Windeyer J and see more recent authorities collected in *Chedzey* (1987) 30 A Crim R 451). It is interesting to note, however, that, although the words are said to be plain, views appear to have changed over time in relation to the question of what would be considered to be an accurate paraphrase of them: see *Brown v R* (1913) 17 CLR 570 at 595–6 per Isaacs and Powers JJ.

While attempts to offer guidance to juries about the meaning of 'beyond reasonable doubt' have been strongly discouraged in Australia, in my view it cannot be said that to do so is necessarily wrong in law (as distinct from imprudent). There is a useful summary in *Pahuja* (1987) 30 A Crim R 118, in the judgment of Cox J at 131–8 of the (very few) paraphrases and explanations which have apparently been considered to be acceptable. Although other members of the court in that case did not agree with everything said by Cox J concerning the direction there in issue, that difference of view does not detract from the force of his Honour's general analysis.

The appellant submits that to suggest that proof beyond reasonable doubt was not to be equated with proof to the point of absolute certainty, is impermissibly to restrict the individual juror whose role it is to determine what he or she believes to be reasonable in the circumstances. He said that the direction would cause jurors to have to consider what was meant by the expression 'absolute certainty' and that the use of the expression would invite jurors to submit their processes of mind to an analysis of the kind disapproved of in *Green v R* (1971) 126 CLR 28 at 33.

In my view his Honour's direction did not invite the jury to analyse the expression 'absolute certainty'. Indeed, the point of the direction in relation to that expression was that it was not synonymous with 'beyond reasonable doubt' and that the jurors were to put that expression (whatever it may have meant to them) to one side, and to concentrate instead upon the question of whether they had a reasonable doubt.

Looking at the direction in context, I do not think it can be said that it usurps the function of the juror in determining whether a doubt is reasonable in the circumstances. In contrasting the standard of proof in a criminal trial with that in a civil trial, his Honour had emphasised the relatively high standard of the criminal trial. In contrasting the standard with proof 'to the point of absolute certainty' all that I think that his Honour could reasonably be understood as saying was that the standard, although high, was not an impossible or unachievable one.

In ordinary usage, it would appear that 'absolute' certainty would be certainty unable to be shaken by any fact or hypothesis, however fanciful, tenuous or remote; certainty, in short, to a degree unachievable outside the laboratory. The expression is, I think, to be contrasted

with that which has on occasion been recognised as a substitute for 'beyond reasonable doubt', which is that of 'moral certainty': *Brown v R* at 596. 'Moral certainty' is said to mean, 'resting upon convincing grounds of probability' (*Macquarie Dictionary*) or 'a practical certainty resulting from moral evidence' (*Oxford English Dictionary*). That expression, then, is concerned with practical certainties and with probabilities (although to a very high degree) and is to be contrasted with a standard which demands the 'absolute' …

[**Malcolm CJ** delivered a separate judgment dismissing the appeal on the same grounds. **Heenan J** agreed with both **Malcolm CJ** and **Wheeler J**.]

2.18C

R v Punj

[2002] QCA 333; 132 A Crim R 595
Queensland Court of Appeal

Williams JA:

1 The appellant was convicted after a trial of two offences against the Crimes Act 1914 (Commonwealth), namely forgery and attempting to pervert the course of justice. He appealed against the conviction on numerous grounds. The court heard oral argument on those grounds relating to the onus and standard of proof. At that stage the court ordered that, because of errors in the summing up, the convictions should be quashed and a retrial held; it announced that full reasons would be published later.

2 These reasons deal only with those matters which were the subject of oral submission.

…

8 Because the trial had been lengthy (the summing up took place on the nineteenth day of trial) and the evidence was rather complex (there were many documentary exhibits) the learned trial judge provided the jury with some notes which he invited them to use like a checklist. Substantially the summing up followed the outline in those notes. The first two paragraphs in those notes were as follows:

1. The burden of proving an offence is always on the prosecution.
2. Before there can be a verdict of 'guilty', an offence must be proved beyond a reasonable doubt. If there is a reasonable doubt about the proof of any element of an offence, the accused is entitled to be acquitted.

9 There was, of course, no objection to those statements; they accurately state the law.

10 Very early on in the oral summing up the learned trial judge said:

> In a case like this, the burden is on the prosecution from start to finish to prove that Mr Punj committed these offences. There is no burden on him to disprove anything, no responsibility. I think the prosecutor and [defence counsel] certainly made all of that basic approach perfectly clear to you right from the beginning.

11 The learned trial judge immediately thereafter went on to say that the standard of proof the prosecution had to achieve was proof 'beyond reasonable doubt'. He said, correctly, that 'if there is a reasonable doubt about the proof of any part of an offence, any element of an offence, the accused is entitled to an acquittal'. Then came the following critical passage in the summing up:

> Now, I am not going to use other words to explain the expression 'beyond reasonable doubt', but I can *illustrate* it perhaps this way. We often use expressions in our everyday lives whereby we think something has happened but we are *not really sure* about it, don't we? We are *very suspicious* about something, we think it is very likely that so and so committed an offence, it is on the cards, expressions like that, or probably someone committed an offence. All those ideas have with them, don't they, the idea that we are not *really sure*, we just think probably or likely or something of that sort, so in all of those cases, what someone is saying is well, I've got a reasonable doubt about it, even though I have got suspicions or whatever. Do you see?
>
> What it *really means* is this. At the end of your deliberations, if you are to convict, you must *feel sure* that Mr Punj committed these two offences, and you will not *feel sure* if you have got a reasonable doubt in your minds about the proof of the cases. Do you understand what I am saying? To take a very concrete example arising out of this very case, if at the end of all your deliberations you think that there is a *reasonable chance* that Cathy Slack did this, well, then you could not possibly say you are persuaded beyond reasonable doubt that Mr Punj did it, could you? Because of the two things. Do you see what I mean? So, the doubt has got to be a reasonable one, but once there is a reasonable doubt, an accused person is entitled to be acquitted. [my emphasis]

12 In the first paragraph of that quote the learned trial judge 'illustrated' the meaning of the expression 'beyond reasonable doubt' by contrasting being 'really sure' about something with only being 'very suspicious' about it. Then in the second paragraph he went further and told the jury what the phrase 'really means'. There he equated 'beyond reasonable doubt' with 'feeling sure'. Lastly, in dealing with an essential part of the defence case (Slack not the appellant was the forger) he could be taken as equating a 'reasonable doubt' with a 'reasonable chance'.

13 It is true that on numerous occasions throughout the summing up the learned trial judge used the expression beyond reasonable doubt appropriately. But there was a very real risk that a reasonable juror would have equated that expression, each time it was used, with being 'really sure' or 'feeling sure'.

14 For Australia the law is clear. The High Court in *Thomas v The Queen* (1960) 102 CLR 584 and *Green v The Queen* (1971) 126 CLR 28 has clearly stated the law which must be followed by all Australian judges in summing up to the jury. In *Thomas* Kitto J at 595 said: 'Whether a doubt is reasonable is for the jury to say … the vital point [is] that the accused must be given the benefit of any doubt which the jury considers reasonable'. The Court in *Green* at 32–3 said: 'A reasonable doubt is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances.'

…

18 The trial judge in *Thomas* said this in the course of his summing up: '… you consider it in an ordinary common sense manner and in the way you would consider the more serious matters which come up for consideration and decision in your lives, and if considering it in that way you come to the conclusion — you come to a feeling of comfortable satisfaction that the accused is guilty then you should find him so guilty …'. The use of the word 'feel' in that passage was the subject of criticism in the High Court. McTiernan J said at 588 that 'there was a clear misdirection and one that was likely to mislead the jury as to the degree of

certainty they ought to feel that Thomas was guilty of wilful murder in order to be justified in finding him guilty of that crime'. Fullagar J at 593 concluded:

> I do not think it can be doubted that the last quoted passage contains a misdirection. … It tends to water down and qualify the plain rule that what is required to justify a conviction is proof beyond reasonable doubt. … In truth, to 'come to the feeling' referred to in his Honour's charge is by no means the same thing as being satisfied beyond a reasonable doubt.

…

21 The summing up in question in *Green* contained phrases such as 'something nagging in the back of your mind which makes you hesitate', 'you try to assess it and you say to yourself is this doubt that is bothering me, does it proceed from reason', and 'is it a rational doubt … or is it a fantastic sort of doubt'.

22 The court considered such a direction to be 'fundamentally erroneous' (at 32).

23 The court in *Green* went on to chastise judges for endeavouring 'to explain that which requires no explanation, and endeavouring to improve upon "the traditional formula"'. Those remarks at 32 should be borne in mind by all trial judges summing up to a jury in a criminal matter. It will only be in exceptional cases (some instances being specified in *Green* at 33) where some further elaboration of the expression 'beyond reasonable doubt' would be justified.

24 Returning to the summing up in the present case. As already noted, the real risk was that an attentive member of the jury would equate the expression 'beyond reasonable doubt' wherever used in the summing up as 'really meaning' 'feeling sure', because that is what the judge told them. Also, relying on the 'illustration' they could have concentrated on the distinction between 'really sure' and 'very suspicious'. In either event, reliance on such concepts could well have deprived the appellant of the benefit of a doubt set by the standard of what the jury regarded to be reasonable in the circumstances.

25 Further, and not without real significance in this case, is the misdirection with respect to the alleged involvement of Cathy Slack. Given the defence case at trial the appellant was entitled to an acquittal unless the jury could reject beyond reasonable doubt the proposition that Cathy Slack was the forger. It is logically true that if there was a 'reasonable chance' that Cathy Slack was the forger the jury could not be satisfied beyond a reasonable doubt that the appellant was; but whilst the jury may have concluded there was not a 'reasonable chance' that she was the forger they may nevertheless have had a reasonable doubt on that issue. The appellant was entitled to the benefit of that doubt.

26 The misdirection on the standard of proof would alone have necessitated a retrial. But that misdirection compounded the error in defence counsel's final address to the jury as to the burden of proof and the limited way in which that matter was dealt with by the learned trial judge in his summing up. The summing up only referred to the fact that there was no burden on the appellant to 'disprove anything'. The learned trial judge did not say that there was no burden on the appellant to 'prove' anything. Counsel's statement to the jury impliedly, if not expressly, stated that the defence had to 'prove our facts' on the balance of probability. Nothing said by the learned trial judge in his summing up negated that.

27 Whether or not the failure to negate that erroneous statement by counsel for the appellant would alone have been sufficient to vitiate the trial need not be decided. It is sufficient to say that the cumulative effect of that failure and the misdirection on the standard of proof means that the verdicts cannot stand.

28 As already ordered there must be a retrial.

[**Jerrard JA** and **Atkinson J** gave a short judgment agreeing with the reasons of **Williams JA**.]

2.19C Braysich v The Queen
[2011] HCA 14 (11 May 2011)

French CJ, Crennan and Kiefel JJ:

Introduction

1 Following a trial before a judge and a jury in the District Court of Western Australia, the appellant, a stockbroker, was convicted on 10 November 2007 of 25 counts of creating a false or misleading appearance of active trading in securities on the stock market. The offence was created by s 998(1), read with s 1311(1), of the Corporations Law of Western Australia, as incorporated into the Corporations Act 2001 (Cth) ('the Corporations Act') by operation of s 1401 of that Act.[1]

2 The convictions should be quashed. The trial miscarried. The Crown case on each of the counts was that the appellant had caused a sale of listed shares to be made in circumstances in which, to the appellant's knowledge, there was no change in their beneficial ownership. If that fact were established he was, by force of s 998(5) of the Corporations Law, deemed to have created a false or misleading appearance of active trading in the shares. The finding of fact and the application of the deeming provision were therefore sufficient for conviction. The appellant, however, wished to rely at trial upon a statutory defence, under s 998(6) of the Corporations Law, that the purpose or purposes for which he caused the sales to take place did not include the purpose of creating a false or misleading appearance of active trading. It is common ground that he would have had the burden of establishing that defence on the balance of probabilities.

3 The trial judge ruled at the close of the appellant's testimony that he had not raised the statutory defence. On the basis of that ruling his Honour refused to allow the appellant to call expert evidence to rebut an expert witness called by the Crown in anticipation of the appellant's reliance upon the defence. Counsel was not permitted to address the jury on the defence and the jury were told that it had no application to the appellant. The defence was able to be availed of by his co-accused, who had been his client and one of the principals in the impugned transactions. The trial judge directed the jury accordingly.

4 The Court of Appeal of the Supreme Court of Western Australia (Pullin, Buss and Miller JJA) dismissed an appeal against conviction.[2] It held that the statutory defence was properly withheld from the jury and the objection to the appellant's expert evidence properly allowed. The Court of Appeal also held that, in any event, there had been no substantial miscarriage of justice and that, had it come to a different view of the trial judge's rulings, it would have dismissed the appeal.[3] In this Court, the Crown expressly disclaimed reliance upon and support for that aspect of the Court of Appeal's decision. The appeal to this Court is brought by special leave

granted on 30 July 2010 by Hayne and Bell JJ. Its outcome turns upon whether the trial judge erred in withdrawing the statutory defence from the jury and in not permitting the appellant to call expert evidence said to be relevant to that defence. In our opinion his Honour did so err.

The statutory framework

5 The indictment, dated 9 August 2007, alleged contraventions by the appellant of ss 998(1) and 1311(1) of the Corporations Act. The reference to those provisions was incomplete. The conduct said to constitute the offences occurred in 1998. The relevant offence creating provisions at that time were ss 998 and 1311 of the Corporations Law, given statutory force in Western Australia by the Corporations (Western Australia) Act 1990 (WA).

6 Section 1401 of the Corporations Act relevantly incorporates into that Act provisions of the Corporations Law of the various States and Territories which had given rise to criminal liabilities in existence immediately before the commencement of the Act on 15 July 2001.[4] That section creates new and substituted liabilities under the incorporated provisions which are equivalent to the old liabilities. It follows that the matter founding the jurisdiction of the District Court of Western Australia was the justiciable controversy arising from contested allegations of contraventions by the appellant of the 'substituted, carbon-copy' of ss 998 and 1311 of the Corporations Law.[5]

7 The relevant parts of s 998 as it stood at the time of the alleged offences were:

> (1) A person shall not create, or do anything that is intended or likely to create, a false or misleading appearance of active trading in any securities on a stock market or a false or misleading appearance with respect to the market for, or the price of, any securities.
>
> …
>
> (5) Without limiting the generality of subsection (1), a person who:
>
> (a) enters into, or carries out, either directly or indirectly, any transaction of sale or purchase of any securities, being a transaction that does not involve any change in the beneficial ownership of the securities;
>
> …
>
> shall be deemed to have created a false or misleading appearance of active trading in those securities on a stock market.
>
> (6) In a prosecution of a person for a contravention of subsection (1) constituted by an act referred to in subsection (5), it is a defence if it is proved that the purpose or purposes for which the person did the act was not, or did not include, the purpose of creating a false or misleading appearance of active trading in securities on a stock market.
>
> …
>
> (9) The reference in paragraph (5)(a) to a transaction of sale or purchase of securities includes:
>
> (a) a reference to the making of an offer to sell or buy securities; and
>
> (b) a reference to the making of an invitation, however expressed, that expressly or impliedly invites a person to offer to sell or buy securities.

Section 1311, a general offence provision, provided that a person doing an act that the person was forbidden to do by or under a provision of the Corporations Law was guilty of an offence unless that or another provision of the Law provided that the person was guilty, or not guilty, of an offence.

8 Section 998 of the Corporations Act, now repealed, differed slightly in its language from s 998 of the Corporations Law.[6] The operation of s 1401 of the Corporations Act is such that the text of s 998 of the Corporations Law is the applicable text for the purposes of this appeal.

The charges against the appellant

9 The indictment contained 26 counts against the appellant,[7] which took the following three forms:

1. That the appellant created a false or misleading appearance of active trading in the ordinary fully paid shares of Intrepid Mining Corporation NL ('Intrepid') on the Australian Stock Exchange ('the ASX'), in that he caused to be made an offer to buy [a number of] ordinary fully paid shares in Intrepid and thereby caused to be carried out a transaction that did not involve any change in the beneficial ownership of [an equal or lesser number of] the shares, contrary to ss 998(1) and 1311(1) of the Corporations Act.[8]
2. As above, save that the charge was that the appellant caused to be made an offer to sell.[9]
3. As in 1 above, save that the allegation was that he 'caused to be carried out a transaction that did not involve any change in the beneficial ownership in respect of [a number of] ordinary fully paid shares in Intrepid'. The charge did not indicate whether the transaction involved an offer to sell or to buy the shares.[10]

The appellant was convicted on all but one of the counts.[11]

10 An account of the evidence at trial and the conduct of the trial is set out in the reasons for judgment of Bell J.[12] It is sufficient for the purposes of these reasons to refer to salient features of the prosecution and defence cases and the contested rulings of the trial judge.

The prosecution case

11 The prosecution case against the appellant involved the following contentions:

- The appellant was a broker with Paul Morgan Securities Pty Limited ('Paul Morgan') in Sydney.
- The appellant's co-accused, Dean Scook, was, at the time of the transactions giving rise to the charges, a client of Paul Morgan. Two other men (Lance and Steven Masel) and companies controlled by them were also involved in the transactions.[13]
- A finance company called Walthamstow Pty Ltd ('Walthamstow'), controlled by the Masels,[14] advanced money to Scook and Challiston Pty Ltd ('Challiston'), a company controlled by Scook, between November 1997 and April 1998 under loan facility letters and bridging loans to enable Challiston to buy shares in Intrepid on the market or by placement.[15]
- Under the finance arrangements, Walthamstow would pay the purchase price of the Intrepid shares acquired by Challiston at settlement.[16]
- As security for its advances, Walthamstow held, in its own name, the Intrepid shares acquired by Challiston.[17]
- Challiston retained a beneficial interest in the Intrepid shares which it had purchased with Walthamstow's advances.[18]
- The appellant had opened a trading account at Paul Morgan in the name of Challiston and commenced taking instructions to trade on the Challiston account on market on 20 January 1998.

- The appellant, between 2 February 1998 and 27 February 1998, on 26 occasions, caused the sale of Intrepid shares on account of Walthamstow (as vendor) to Challiston (as purchaser). The appellant rebooked each of the shares to Walthamstow on or before the settlement date under a rebooking procedure.[19]
- Even though the shares were rebooked to Walthamstow after their purported sales to Challiston, Challiston remained at all times their beneficial owner.[20]
- The appellant was generally aware of the financial arrangements between Walthamstow and Challiston.
- The Crown relied upon the rebooking procedures, inter alia, to support the inference that the appellant knew that the shares were to be held by Walthamstow as security for its advances to Challiston.

The prosecution did not allege that the appellant and Scook were involved in a joint criminal enterprise. There was no allegation of joint or common purpose or of accessorial complicity on the part of the appellant.

12 Admissions made by the appellant at trial included:

- that Challiston was the buyer and Walthamstow the seller of the relevant shares;
- that Scook gave instructions for the buy order;
- that Paul Morgan was the broker for both buyer and seller; and
- the time and place of each of the buy orders, sell orders and trades.[21]

The appellant did not admit that he effected all of the relevant transactions. He denied that they did not involve any change in beneficial ownership and denied that he knew that Challiston was the beneficial owner of the shares held in Walthamstow's name.[22]

The defence case

13 The appellant's evidence-in-chief included the following elements:

- nothing was ever said to him by the Masels to the effect that any shares sold on Walthamstow's account were not beneficially owned by it;
- he was told by Scook that he wanted his purchases of Intrepid shares rebooked to Walthamstow and sales to come from Walthamstow;
- he was asked by Paul Morgan's compliance manager, Carol Simpson, to ensure that there would be a change in beneficial ownership in any sale from Walthamstow to Challiston;
- in February 1998 he effected buy orders and sell orders in relation to the Challiston and Walthamstow accounts. Buy orders were on the Challiston account and there were sell orders to the market on the Walthamstow account;
- he would always rebook the shares sold to Challiston to the account of Walthamstow on the fifth working day after receiving and effecting the instruction;
- he tried to ensure that he wrote separate orders so that shares held by Walthamstow for Challiston were sold to the market and not issued to Challiston;
- he did not ever knowingly execute a sell order with respect to Intrepid shares from Walthamstow to Challiston which did not involve a change of beneficial ownership; and
- he did not make any trade between the two companies where he knew that there was no change in beneficial ownership and went 'to quite a lot of trouble to not do that'.

14 In cross-examination the appellant said that he understood the purpose of the rebooking was '[f]or us to get paid'. He thought it was part of a finance arrangement between Messrs Masel and Scook. He accepted that he had never before come across an arrangement which required rebooking of the type in question. It was completely new to him in his many years of experience as a broker.

15 At one point in his cross-examination, the following exchange took place:

> Q. Did it cross your mind that Mr Scook — and I am here harking back of course to the business rules — was a person that you must have understood would have an interest in creating a false appearance of active trading?
> A. No.
> Q. It didn't occur to you?
> A. No, it wouldn't have occurred to me there that he was a person who wanted to create false active trading. We are talking about 29 or 30 January.
> Q. Did you not know that he was a person who was taking a very active interest in trading in IRO?
> A. No, sir.
> Q. Did you ever come to that realisation?
> A. In what period please, sir?
> Q. At any time did it occur to you that Mr Scook was a person who was doing a lot of trading in Intrepid shares?
> A.In 2003 when I got the brief?
> Q. It never occurred to you even at the end, towards 27 February, that Mr Scook was doing a lot of trading in these shares?
> A. No.
> Q. You went and spoke to Mr Scook and what did you ask him?
> A. I asked him why we were rebooking the stock and he said, 'It's the way I'd like to do it.' He said that he can go speak to the Masels and ask them to pay for the shares on T plus five and that they would then sell the shares and I'd been asked by Carol to get a copy of any agreement if there was one and he said to me the agreements were varied and that therefore it would be of no benefit.
> Q. Did you convey this then back to Ms Simpson?
> A. Yes.

16 Six character witnesses were called on behalf of the appellant. They all deposed to his honesty.

17 The Crown case against the appellant appears to have been a strong one. However, as explained below, in determining whether the statutory defence should be left to the jury, it was necessary for the trial judge to take the evidence at its most favourable to the appellant and to consider whether it would be open to the jury, in respect of each of the charges, to be satisfied on the balance of probabilities that the appellant did not have the purpose of creating a false or misleading appearance of active trading in the securities. Questions of the weight to be accorded to the evidence and the credibility of the appellant were matters for the jury.

…

Grounds of appeal

30 The grounds of appeal in this Court were:

1. The Court of Appeal erred in law in holding that it is not an error of law for a Trial Judge to direct the jury that a statutory defence open to an accused (the onus of proof of which lies on the accused) is not available to the accused and cannot be considered by the jury because in the opinion of the Trial Judge there is insufficient evidence (albeit some circumstantial evidence) from which the jury could conclude on the balance of probabilities that the defence had been made out.
2. The Court of Appeal further erred in law in holding, in effect, that if an accused does not give direct evidence to 'invoke' the statutory defence then it is not an error of law for the Trial Judge to direct defence counsel that it is not open to defence counsel to raise that defence for the consideration of the jury, and then to direct the jury that the defence (although available to a co-accused) is not available to the accused.
3. The Court of Appeal further erred in law in [not] holding that it was an error of law for the Trial Judge before the defence had closed its case to direct that the defence could not call two expert witnesses (whose evidence arguably would have supported the statutory defence) on the ground that the Trial Judge at that stage did not consider the statutory defence was available.

The grounds of appeal direct attention to the proper function of the trial judge in a trial by jury and the relationship of that function to the directions that may be given to a jury on whether there is evidence before them upon which a particular defence is open.

The evidential burden and the function of the trial judge

31 The indictment, alleging, as it did, offences against a law of the Commonwealth,[41] attracted the mandate in s 80 of the Constitution that '[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury'. That section constitutes 'an adoption of the institution of "trial by jury" with all that was connoted by that phrase in constitutional law and in the common law of England'.[42]

32 In a trial by jury the issues of fact are decided by the jury 'in the presence and under the superintendence of a judge empowered to instruct them on the law'.[43] It is an 'elementary principle of the criminal law that unless express statutory provision to the contrary be made, the onus lies upon the Crown throughout to negative defences sufficiently raised'.[44] The authority and responsibility of the judge to instruct the jury on questions of law requires the judge 'to put to the jury every lawfully available defence open to the accused on the evidence even if the accused's counsel has not put that defence and even if counsel has expressly abandoned it'.[45] It may also require a direction to the jury that there is no evidence capable of supporting a particular defence to the charge and that they are not to consider that defence in their deliberations.[46] In such a case the accused is said to have failed to meet the 'evidential burden' necessary to raise the defence. Such a direction may be made in respect of a defence which, if open, the prosecution, bearing the 'legal burden' of proof, would have to negative beyond reasonable doubt.[47] It may also be made in respect of a statutory defence, such as that created by s 998(6), which by statute the accused is required to establish.[48]The standard of proof necessary to discharge the legal burden imposed upon the accused in such a case is proof on the balance of probabilities.[49]

33 The distinction between the 'legal burden' and the 'evidential burden' has been explained in this Court as the difference between 'the burden ... of *establishing a case*, whether by preponderance of evidence, or beyond a reasonable doubt' and 'the burden of proof in the sense of *introducing evidence*'[50] (emphasis in original). It has also been explained in the 8th Australian edition of *Cross on Evidence* by reference to the distinction between the functions of judge and jury:[51]

> The concept of the evidential burden is the product of trial by jury and the possibility of withdrawing an issue from that body. Unlike the concept of the legal burden it is not a logical necessity of litigation about questions of fact: 'If it were to be said of any issue, that it was not covered by an evidential burden, the only effect would be to remove the judge's filtering power in respect of that issue'.

What the preceding passage makes clear is that the term 'evidential burden' directs attention to the function of the trial judge when instructing the jury about the issues which they are required to determine.

The question for the trial judge

34 There are some 'defences' in respect of which the accused bears no evidential burden because the negativing of such defences is an integral part of the prosecution's positive case, on which it bears the legal burden. It is not necessary here to discuss which defences fall into that category and which defences give rise to an evidential burden on the accused.

35 Where, as in the present case, a statute creating an offence provides for a defence and imposes the legal burden of establishing that defence on the accused, then the accused also bears the evidential burden. For that evidential burden to be met there must be evidence upon which the trial judge can properly direct the jury that the defence is open as a matter of law.

36 If a trial judge has to consider whether, at the close of the evidence in a criminal trial, a particular defence should be left to the jury, the question which the trial judge will have to ask himself or herself will be:

1. In a case where the legal burden is on the prosecution and the evidential burden on the accused — is there evidence which, taken at its highest in favour of the accused, could lead a reasonable jury, properly instructed, to have a reasonable doubt that each of the elements of the defence had been negatived?[52]
2. In a case in which both the legal burden and the evidential burden rest upon the accused — is there evidence which, taken at its highest in favour of the accused, could lead a reasonable jury, properly instructed, to conclude on the balance of probabilities that the defence had been established?

It is the latter question which should have been asked in this case at trial. It can be reframed by reference to s 998(6) into an inquiry whether there was evidence from which a reasonable jury, properly instructed, could find that it was more likely than not that the appellant lacked the proscribed purpose. Put another way — was there evidence from which the jury could conclude that it was unlikely, in the sense of improbable, that the appellant had the proscribed purpose?

37 The appellant was not required to produce evidence of his subjective purpose or purposes in order to meet the legal burden of establishing the statutory defence. The legal burden on

him was to prove on the balance of probabilities that he lacked the proscribed purpose. One way of doing that was to adduce or point to evidence inconsistent with the proposition that he had that purpose. He did not have to point to evidence of his actual purpose in order to invoke the defence. Any evidence that could support an inference that the appellant did not have the proscribed purpose was relevant to the statutory defence. The question whether he had discharged the 'evidential burden' was to be answered accordingly.

38 It may be observed that the appellant never had the benefit of a consideration by the trial judge of the whole of the evidence in light of the question which the trial judge was required to ask himself in determining whether the defence should be left to the jury. In fairness to the trial judge, it does not appear that he had the benefit of submissions directing him to that question. That question was only asked and answered adversely to the appellant by the Court of Appeal. An important element of the evidence relevant to the discharge of the evidential burden by the appellant was evidence of his good character.

The evidence of good character

39 Section 998(6) imposed a legal burden on the appellant to negative, on the balance of probabilities, a dishonest purpose. The appellant called extensive evidence going to his honesty. The question arises — how should such evidence have been used? In this case, the answer is not difficult.

40 In *Attwood v The Queen* the Court said:[53]

> The expression 'good character' has … a known significance in relation to evidence upon criminal trials; for it denotes a description of evidence in disproof of guilt which an accused person may adduce. He may adduce evidence of the favourable character he bears as a fact or matter making it unlikely that he committed the crime charged.

Their Honours quoted with approval the observation of Cockburn CJ in *R v Rowton*:[54]

> The fact that a man has an unblemished reputation leads to the presumption that he is incapable of committing the crime for which he is being tried.

The statement in *Attwood* and the quotation from the judgment of Cockburn CJ were reiterated in *Simic v The Queen*[55]albeit with the qualification, apparently directed to the statement by Cockburn CJ, that it 'did not purport to be a full statement of the law on the subject'.

…

44 The statutory defence in s 998(6) raises an issue of honesty. The purpose of creating a false or misleading appearance of active trading is a dishonest purpose. Evidence of the appellant's honesty was capable of supporting a submission that it was improbable that he acted with that dishonest purpose. The Court of Appeal's dismissal of the evidence of the appellant's good character as evidence which 'does not address his subjective purpose or purposes'[60] was an error. The Court failed to consider the relevance of the evidence to the question whether the appellant was unlikely to have had the proscribed dishonest purpose.

Grounds 1 and 2 — whether the evidential burden was discharged

45 The appellant's submissions pointed to a number of aspects of the evidence at trial, including his own evidence, that were said to be relevant to the presence or absence of the proscribed purpose. As already explained, in assessing that evidence and its relevance, it is

necessary to bear in mind that the purpose which he was required to negative on the balance of probabilities was a dishonest purpose.

46 Evidence upon which the appellant relied in contending that he had met the evidential burden included:

1. His evidence given in cross-examination that it did not cross his mind, nor did he understand, that Mr Scook had an interest in creating a false appearance of active trading.
2. His evidence that he acted only upon instructions from people known to him to be reputable business people.
3. His evidence that he was aware that the ASX business rules required him to consider whether the person placing an order with him might have an interest in creating a false appearance of active trading and whether the relevant order appeared to have a legitimate commercial reason.
4. Evidence from six character witnesses as to his honesty.

47 Whatever weight might be attached to these aspects of the evidence in light of the evidence taken as a whole, it cannot be said they were irrelevant to whether the appellant lacked the proscribed dishonest purpose in effecting the transactions the subject of the charges against him. A jury, if they considered such evidence at its most favourable to the appellant, could well ask: is it really likely that an honest man who is acting on instructions from reputable people, who he has no reason to believe have a dishonest purpose, is himself acting with the dishonest purpose of creating a false appearance of active trading in shares — when he was aware of the requirements of the business rules of the ASX and of the law? It may be said that the narrow focus of the question renders it artificial. However, it is framed as it is to illustrate that there was a basis rooted in logic and experience upon which a reasonable jury, considering the evidence identified above, might come to a conclusion in favour of the appellant on the balance of probabilities. The reality of the jury's ultimate decision-making would be more complex because they would have to decide whether to accept all or any of those favourable elements of the evidence and weigh them up against evidence in the case pointing in another direction. Nevertheless, the question as framed is one which counsel for the defence could fairly have put to the jury and should have been allowed to put to the jury in his closing address. It was evidence which, viewed at its most favourable to the appellant, could have led the jury to be satisfied on the balance of probabilities that he lacked the proscribed purpose under s 998(6). In coming to a contrary conclusion the Court of Appeal erred.

48 It is true that much of the appellant's evidence was directed to his assertion that he did not know of the absence of any change in beneficial ownership of the shares the subject of the impugned transactions. There is a question whether evidence directed to that assertion is to be excluded from consideration in relation to the statutory defence. It may be said that the sequence of decision-making required of the jury by the structure of s 998 would render evidence of the requisite lack of knowledge irrelevant to the absence of the proscribed purpose. The assumed sequence involves the following steps:

- If the jury were to decide that they were not satisfied beyond reasonable doubt that the appellant knew that there was no change in the beneficial ownership of the shares involved in the transactions, the appellant would be acquitted — cadit quaestio.

- If the jury were to decide that they were satisfied beyond reasonable doubt that the appellant had the requisite knowledge, then they would necessarily have rejected the evidence that he did not have that knowledge.
- It is only if the jury were satisfied beyond reasonable doubt that the appellant had the requisite knowledge that they would need to consider the statutory defence (assuming that defence to be open on the evidence). On this basis it might be argued that evidence by the appellant that he lacked the incriminating knowledge should not be taken into account in deciding whether he discharged the evidential burden imposed by the statutory defence.

49 Such logic, while attractive, should not be treated as exhaustive of the reasoning to be applied in determining whether evidence of lack of incriminating knowledge, for the purpose of s 998(5), may be relevant to the statutory defence. The jury may reach a finding adverse to an accused on the question of knowledge by a variety of paths. That finding will involve rejection of the accused's evidence in so far as it bears directly upon his knowledge. Nevertheless, elements of the evidence relating to the circumstances in which an accused person claimed not to have had the relevant knowledge may not have been rejected and may be relevant to the existence of the proscribed purpose. It is not necessary for the disposition of this appeal to determine whether, and to what extent, such evidence might have remained 'in play'. A cautious approach to ruling it out is indicated.

50 In the present case, the jury returned verdicts of guilty on the relevant counts, each of which necessarily involved a finding, adverse to the appellant, that he knew that there was no change in the beneficial ownership of the shares in each of the relevant transactions. Those verdicts cannot be relied upon in this appeal. They could only be invoked, as they were by the Court of Appeal, to determine whether, notwithstanding legal error by the trial judge, there had been no substantial miscarriage of justice. That determination by the Court of Appeal was not supported or relied upon by the Crown.

51 The appeal should succeed on grounds 1 and 2, which overlap. The submissions in support of both were ultimately directed to the sufficiency of the evidence at trial to discharge the evidential burden resting on the appellant in respect of the statutory defence under s 998(6). There was evidence upon which that defence should have been left to the jury.

Ground 3 — the expert evidence

52 The record concerning the content of the expert evidence which the appellant wished to adduce was sketchy. There were no expert reports or proofs of evidence marked for identification or otherwise before the District Court. Counsel said very little about the content of that evidence at trial. If there is a retrial, no doubt the foundation for the admission of such evidence will be elaborated with some particularity and the trial judge fully apprised of its significance. It is clear enough that the basis upon which the trial judge rejected the evidence at the close of the appellant's testimony was erroneous. However, having regard to the success of the appellant on the first two grounds of appeal, it is unnecessary to deal further with this ground.

…

[The appeal was allowed and a re4trial ordered. Bell and Heydon JJ dissented on the application of the general principles to the facts of the case. Bell J concluded:

117. The appellant, a stockbroker, was aware that trades not involving a change in beneficial ownership are not to be carried out on the ASX. He carried out such transactions. The fact that he did so in return for the payment of fees, on the instructions of valued clients, could not, without more, establish that it was probable that his purposes did not include the outcome that the conduct of transactions on the ASX not involving sales by a genuine seller to a genuine buyer was likely to produce.

118. The Court of Appeal was right to conclude that the evidence was insufficient to warrant leaving the statutory defence for the jury's consideration.]

Footnotes

1. See further at [5]–[8].
2. *Braysich v The Queen* [2009] WASCA 178; (2009) 260 ALR 719.
3. Applying the proviso in s 30(4) of the Criminal Appeals Act 2004 (WA), discussed in *Mahmood v The State of Western Australia [No 2]* [2008] WASCA 259.
4. Corporations Act s 1401(2).
5. Applying the explanation of the operation of s 1401 in *Forge v Australian Securities and Investments Commission* [2006] HCA 44; (2006) 228 CLR 45 at 92 [115] per Gummow, Hayne and Crennan JJ; [2006] HCA 44.
6. The Financial Services Reform Act 2001 (Cth) s 3 and Sch 1(1) repealed s 998 of the Corporations Act and replaced it with s 1041B of the Corporations Act on 11 March 2002.
7. The indictment was a joint indictment against the appellant and his co-accused, who was charged with 259 counts.
8. Counts numbered 260–262, 264, 265, 267, 269, 270, 272 and 276–278.
9. Counts 263, 268 and 271.
10. Counts 266, 273–275 and 279–285.
11. Count 283.
12. Reasons for judgment of Bell J at [68]–[78].
13. Lance Masel had died by the time of the trial.
14. [2009] WASCA 178; (2009) 260 ALR 719 at 724 [12](a).
15. [2009] WASCA 178; (2009) 260 ALR 719 at 724 [17](c).
16. [2009] WASCA 178; (2009) 260 ALR 719 at 724 [17](a), (b) and (d).
17. [2009] WASCA 178; (2009) 260 ALR 719 at 724 [17](b) and (c).
18. [2009] WASCA 178; (2009) 260 ALR 719 at 725 [18].
19. [2009] WASCA 178; (2009) 260 ALR 719 at 723–5 [10]–[19].
20. [2009] WASCA 178; (2009) 260 ALR 719 at 724–5 [17]–[18].
21. [2009] WASCA 178; (2009) 260 ALR 719 at 726 [20].
22. [2009] WASCA 178; (2009) 260 ALR 719 at 726 [23].

...

41. As noted earlier, s 1401 of the Corporations Act created new and substituted liabilities, under the provisions of the Corporations Law as incorporated into the Corporations Act, equivalent to the pre-existing liabilities for contraventions of the Corporations Law.
42. *R v Snow* [1915] HCA 90; (1915) 20 CLR 315 at 323 per Griffith CJ; [1915] HCA 90.
43. *Cesan v The Queen* [2008] HCA 52; (2008) 236 CLR 358 at 390 [103] per Gummow J; [2008] HCA 52, citing *Capital Traction Co v Hof* [1899] USSC 85; 174 US 1 at 13–14 (1899).
44. *King v The Queen* [2003] HCA 42; (2003) 215 CLR 150 at 168 [52] per Gummow, Callinan and Heydon JJ; [2003] HCA 42.
45. *Fingleton v The Queen* [2005] HCA 34; (2005) 227 CLR 166 at 198 [83] per McHugh J (footnote omitted); [2005] HCA 34, and see *Pemble v The Queen* [1971] HCA 20; (1971) 124 CLR 107 at 117–18 per Barwick CJ; [1971] HCA 20.

46. *Da Costa v The Queen* [1968] HCA 51; (1968) 118 CLR 186 at 213–15 per Owen J, Kitto, Menzies and Windeyer JJ agreeing; [1968] HCA 51; *Lee Chun-Chuen v The Queen* [1963] AC 220 at 229–30 per Lord Devlin; *Parker v The Queen* [1964] UKPCHCA 1; (1964) 111 CLR 665 at 681–2; [1964] AC 1369 at 1392.
47. As to the defences at common law and created by statute where the accused bears an evidential burden, despite the prosecution's legal burden, see generally *Cross on Evidence*, 8th Aust ed (2010) at [7050].
48. *Parker v The Queen* [1964] UKPCHCA 1; (1964) 111 CLR 665 at 681–2; [1964] AC 1369 at 1392.
49. See eg *Sodeman v The King* [1936] HCA 75; (1936) 55 CLR 192 at 216 per Dixon J; [1936] HCA 75; *Johnson v The Queen* [1976] HCA 44; (1976) 136 CLR 619 at 644 per Barwick CJ, 653–4 per Gibbs J, 660 per Mason J agreeing; [1976] HCA 44.
50. *Purkess v Crittenden* [1965] HCA 34; (1965) 114 CLR 164 at 167–8 per Barwick CJ, Kitto and Taylor J [1965] HCA 34.
51. *Cross on Evidence*, 8th Aust ed (2010) at [7200] (footnote omitted).
52. A question on the formulation of which there is 'little direct authority' — *Cross on Evidence*, 8th Aust ed (2010) at [7050]. See *Stingel v The Queen* (1990) 171 CLR 312; [1990] HCA 61 in relation to the defence of provocation.
53. [1960] HCA 15; (1960) 102 CLR 353 at 359; [1960] HCA 15.
54. [1865] Eng R 53; (1865) Le & Ca 520 at 530 [169 ER 1497 at 1502].
55. [1980] HCA 25; (1980) 144 CLR 319 at 333; [1980] HCA 25.
56. [1999] HCA 32; (1999) 198 CLR 1 at 26 [68]; [1999] HCA 32.
57. [1999] HCA 32; (1999) 198 CLR 1 at 15 [33].
58. [1999] HCA 32; (1999) 198 CLR 1 at 28 [72] (footnote omitted).
59. [1999] HCA 32; (1999) 198 CLR 1 at 57 [156].
60. [2009] WASCA 178; (2009) 260 ALR 719 at 751 [125](g).

Offences

PART 2

Homicide

CHAPTER 3

LAWFUL AND UNLAWFUL HOMICIDE

3.1 This chapter is concerned with the conduct elements of homicide offences. Fault elements are discussed in Chapter 4.

It is unlawful to kill any person unless such killing is 'authorised or justified or excused by law': Codes s 291(Qld)/s 268 (WA). The circumstances under which a killing may be lawful include self-defence (see Chapter 14) and accident: see 4.21, 4.25–4.28. Consent of the person killed is no defence and is expressly stated to be immaterial to criminal responsibility: Codes s 284 (Qld)/s 261 (WA).

1. The Codes provide that an unlawful killing of a person may constitute murder or manslaughter: s 300 (Qld)/s 277 (WA). However, there are additional homicide offences. The differences between the various homicide offences are examined in Chapter 4.
2. Attempting suicide is not an offence but aiding a suicide is: Codes s 311 (Qld)/ s 288 (WA).

3.2 Homicide offences involve the killing of a 'person'. For the purposes of the law of homicide, a child becomes a person who is capable of being killed when it has emerged completely in a living state from the mother's body: Codes s 292 (Qld)/s 269 (WA). See further the discussion at 3.3. Despite the restricted scope of murder and manslaughter, these offences can be committed when a child dies after birth as a consequence of injuries inflicted before or during birth: Codes s 294 (Qld)/s 271 (WA). See, for example, *R v Iby* [2005] NSWCCA 178; 63 NSWLR 278 at 3.21C; *R v Martin* (1995) 13 WAR 472 (affirmed on appeal).

Killing a child which is not yet fully born by preventing it from being born alive is a separate offence: Codes s 313(1) (Qld)/s 290 (WA). At an even earlier stage, the termination of a pregnancy can constitute the offence of abortion: Codes ss 224–225 (Qld)/ss 199–200 (WA). Certain defences to abortion are discussed at 16.30–16.32. In addition, Queensland has created a special offence of assaulting a pregnant female and causing death (or grievous bodily harm or the transmission of a serious disease) to a child capable of being born alive: Code (Qld) s 313(2).

CONCEPTS OF LIFE AND DEATH

3.3 For the purposes of the law of homicide, a child becomes a person who is capable of being killed when it has emerged completely *in a living state* from the mother's body: Codes s 292 (Qld)/s 269 (WA). It is expressly stated that it is immaterial whether the child has breathed and has an independent circulation, and whether the navel string is severed.

The Codes do not define 'a living state', so that the common law definition of life is still relevant. In *Iby* (3.21C), above, the New South Wales Court of Criminal Appeal held that it is sufficient that there are any indicia of human life: for example, brain or heart activity.

3.4 The traditional definition of death at common law was the irreversible cessation of all vital functions, including those of the heart and lungs. This traditional definition has failed to keep pace with the development of technological means of keeping organs functioning artificially. Life support machines are often used to keep the heart and lungs functioning for sufficient time to allow medical diagnosis or organ transplantation. In circumstances where vital functions are being artificially maintained, switching off the machine raises difficult questions about the point at which death occurs.

A modern medical conception of death has evolved in response to this problem. According to this view, a person is considered to be dead when there is either irreversible cessation of blood circulation or irreversible cessation of all brain function, including that of the brain stem. When 'brain stem death' occurs, the body cannot function without assistance.

3.5 The prevailing view at common law appears to be that brain stem death should now be accepted as the definition of death: see the comments in the decision of the House of Lords in *Airedale National Health Service Trust v Bland* [1993] AC 789; 1 All ER 821 at 3.22C. Unfortunately, the Australian courts have not yet given clear recognition to this conception of death. For example, in *Kinash v R* [1982] Qd R 648, the Queensland Court of Criminal Appeal was faced with the argument that the victim had been killed, not by his original assailant, but by the doctors who had turned off the ventilator after brain stem death had occurred. The court avoided expressly finding that the victim was already dead, although it was noted thatthe medical profession universally endorses terminating the use of a ventilator when death of the brain stem has occurred. Ultimately, the court applied general principles of causation to make the original assailant responsible for the death whenever it occurred.

The courts have been understandably reluctant to generate any debate over the meaning of death. It is, however, difficult to imagine that the conception of brain stem death would not be adopted by any court which felt driven to make a determination on the issue.

3.6 In all jurisdictions in Australia except Queensland, the 'brain stem' definition of death has been adopted by statute: Human Tissue Act 1983 (NSW) s 33; Human Tissue Act 1982 (Vic) s 41; Death Definition Act 1983 (SA) s 2; Human Tissue Act 1985 (Tas) s 27A; Human Tissue Transplant Act 1979 (NT) s 23; Transplantation and Anatomy Act 1978 (ACT) s 45. See the discussion in *Iby* at 3.21C.

- In Queensland, a limited statutory definition of death, including the concept of brain stem death, exists in the Transplantation and Anatomy Act 1979 (Qld) s 45. This provision, however, applies only for the purposes of the Transplantation and Anatomy Act 1979 and not for the purposes of the law generally in Queensland. Therefore, the section can only protect health care professionals who switch off a life support machine for the purpose of performing a tissue transplant.

- In Western Australia, the Interpretation Act s 13C defines death:

  For the purposes of the law of this State, a person dies when there occurs –

  (a) irreversible cessation of all function of the person's brain; or

  (b) irreversible cessation of circulation of blood in the person's body.

KILLING BY OMISSION

General principles of criminal liability for omissions

3.7 It is a general principle of criminal responsibility at common law that there is no liability for omitting to prevent harm occurring: *R v Coney* (1882) 8 QBD 534 at 557–8: 'It is no criminal offence to stand by, a mere passive spectator of a crime, even of murder.' Criminal liability at common law ordinarily requires some positive act. The common law does not subscribe to any 'good Samaritan' principle that imposes a general duty to take positive action to prevent harm from occurring. Nevertheless, there can be specific statutory exceptions. Moreover, the common law has recognised a series of specific duties to act based on special relationships or understandings between the parties or upon responsibility for a dangerous situation. A breach of one of these specific duties can give rise to criminal liability for resulting harm.

3.8 The Codes do not expressly state any general principle in respect of liability for omissions. They do contain a number of specific duties that require a person to act to preserve the life or health of another person: Codes ss 285–286, 288–290 (Qld)/ss 262–263, 265–267 (WA); see **3.13.** A person who breaches one of these duties is deemed to have caused any resulting consequences for life or health. The specific duties are very similar to those recognised at common law. Therefore, although the Codes impose no general liability for omissions, liability can attach to a breach of one of the specific duties and resulting injury to the life or health of a person.

3.9 The distinction between an act and an omission is usually clear-cut but can sometimes cause difficulty. For example, there has been some debate about the proper classification of cases where life support systems have been terminated. In *Bland* (**3.22C**), the House of Lords held that the conduct of a doctor who terminates a life support system should be characterised as an omission to maintain life. In contrast, it was said that the same conduct by an interloper would amount to an act of interference in the treatment.

The specific duties under the Codes

3.10 Several categories of duty to act are listed in the Codes. Each of them is based on a special relationship or understanding with the person who needs assistance, or upon responsibility for a dangerous situation.

1. The Codes s 285 (Qld)/s 262 (WA) impose a duty on everyone having charge of a helpless person to provide that person with the 'necessaries of life'. The necessaries of life are not defined but extend at least as far as medical aid, food, shelter and clothing: *Macdonald and Macdonald* [1904] St R Qd 151 at 170. There is common law authority for the proposition that necessaries encompass protection from the infliction of harm by third parties: *R v Russell* [1933] VLR 59; [1933] ALR 76.

A duty under s 285 (Qld)/s 262 (WA) is voluntarily assumed by taking charge of another person. Thus, the duty can be evaded by doing nothing in the first place. Once charge has been taken, however, there is potential liability if the duty is not fulfilled. The rationale is that when one person takes charge of a helpless other person, that other person may be deprived of the opportunity to obtain assistance elsewhere: *Taktak v R* (1988) 14 NSWLR 226.

2. The Codes s 286 (Qld)/s 263 (WA) impose duties to provide necessaries of life by virtue of the status of the relationship between adult and child. The range of adults who are subject to the duty is broader in Queensland than in Western Australia:
   - Section 286 (Qld) applies to any adult in charge of a child under 16. Section 286(2) expressly provides that the duty arises regardless of whether or not there was lawful custody of the child. Section 286 also makes it plain that the scope of the duty covers taking precautions to avoid danger to the child's life, health or safety, and taking reasonable action to remove the child from any such danger.
   - Section 263 (WA) imposes a duty on the head of the family to provide necessaries of life for any children aged under 16 who are members of their households, whether or not the children are helpless.

   At common law, a husband owes a duty of care to his wife. The Codes do not recognise such a duty. Of course, a person who does not fall within the strict terms of s 286 (Qld)/s 263 (WA) may nevertheless have assumed a charge within the meaning of s 285 (Qld)/s 262 (WA).
3. The Codes s 288 (Qld)/s 265 (WA) impose a duty to have reasonable skill and to use reasonable care upon persons undertaking to do acts which are or may be dangerous to life or health, including acts of medical and surgical treatment. An exception is made for cases of necessity. Although it is located in the provisions relating to omissions, s 288 (Qld)/s 266 (WA) provides a foundation for criminal liability for certain negligent acts: see **4.29**.
4. The Codes s 289 (Qld)/s 266 (WA) impose a duty upon persons in charge of, or in control of, dangerous things to use reasonable care and to take reasonable precautions to ensure that they do not endanger life or health. Like s 288 (Qld)/s 265 (WA), this provision is used mainly to establish criminal liability for certain negligent acts: see **4.29**. This section can, however, create criminal liability for omissions such as a failure to fence in dangerous machinery, materials or animals.
5. The Codes s 290 (Qld)/s 267 (WA) impose a duty to perform specific undertakings where failure to do so may endanger health or life. This provision can apply in employment situations and in other situations where there is a contractual duty to perform a specific task. It can also apply in cases where there has been a gratuitous undertaking for which the person receives no benefit. The rationale here is the same as that which was noted in relation to s 285 (Qld)/s 262 (WA). An undertaking to provide some assistance to another person can deprive that person of the opportunity to obtain assistance elsewhere. Under s 285 (Qld)/s 262 (WA), the duty is a general one to provide necessaries of life; under s 290 (Qld)/s 267 (WA), the duty is limited to the terms of the specific undertaking.

Breach of duty

3.11 In order for criminal liability to be imposed for an omission, there must be not only a specific duty to act but also a breach of that duty. A duty to act is not a duty to do everything conceivable in order to prevent harm occurring. The duty is to do whatever would be reasonable to prevent harm occurring. This limitation is express in Codes ss 286(1)(b)–(c), 288–289 (Qld)/ ss 265–266 (WA) and is implied in the other provisions. In *R v Macdonald and Macdonald* [1904] St R Qd 151 at 170, it was said that the scope of a duty to act was to be assessed 'not according to any exaggerated opinion of supersensitive or over-refined persons, but according to the plain commonsense ideas of ordinary English people'. Undoubtedly, the test would now refer to ordinary Australians.

3.12 In *Bland* (3.22C), the House of Lords discussed the principles governing decisions by health providers to discontinue care and treatment. Lord Goff said that in cases where a patient is capable of expressing his or her wishes, the principle of self-determination should prevail over the principle of the sanctity of human life. In cases where the patient is not capable of expressing his or her wishes, the operative principle should be the principle of the patient's best interests, taking into account medical opinion.

In *Bland* itself, a declaration was issued that it would be lawful to discontinue care and treatment in a case of irreversibly severe brain damage where the patient was in a 'persistent vegetative state' and could not benefit from care. In such cases, *Bland* is authority supporting decisions to discontinue measures such as medication and artificial ventilation, and even hydration or nourishment. The decision did not, however, provide any guidance for handling less extreme cases.

3.13 Some jurisdictions have enacted statutory schemes enabling individuals to direct that life-sustaining measures be withheld or withdrawn in the event that certain specified circumstances eventuate and they lose the capacity to express their own wishes. This has been done in Queensland and Western Australia.

- Under the Powers of Attorney Act 1998 (Qld) ss 35–36, a person can make an 'advance health directive', requiring life-sustaining measures to be withheld or withdrawn in certain eventualities, including 'a terminal illness or condition that is incurable or irreversible', 'a persistent vegetative state' and 'permanent unconsciousness'. Since the Act uses the term 'requiring', a health provider who meets the Act's conditions cannot breach the duty of care owed to the patient. Section 37 of the Act insists that the scheme neither (a) authorises, justifies or excuses killing, nor (b) affects the declaration in the Code (Qld) s 284 that consent to one's own death does not affect the criminal responsibility of another person. The point of the section is to affirm that the scheme concerns only omissions to sustain life and does not change the law respecting active killings.
- In Western Australia, the Guardianship and Administration Act 1990 provides for an advance health directive by a person who has reached 18 and has full legal capacity to make decisions for the person's future treatment under Pt 9B. There are formal requirements and safeguards. A directive is invalid if it is involuntary, obtained through coercion or intimidation or a person does not understand the nature or consequences of a treatment decision. If a health professional acts in good faith in accordance with a valid treatment decision they may commence or continue palliative care or not commence or discontinue treatment even if an effect of doing so is to hasten the death of a person.

CAUSATION OF DEATH

3.14 Killing is defined in the Codes s 293 (Qld)/s 270 (WA) as directly or indirectly causing the death of another person by any means. The Codes contain a number of provisions on specific aspects of causation: Codes ss 294–298 (Qld)/ss 271–275 (WA). Nevertheless, causation remains largely a matter of common law in the code states. The common law dictates general principles of causation that must be applied. The Codes merely supplement these general principles with specific rules for some recurring issues.

3.15 Several different issues respecting causation can arise in a homicide case. First, there may be a factual question about the operative or medical cause of death. Second, there may be a question about whether the accused was causally connected with that operative cause of death in a way which the law recognises. Third, there may be a question whether the causal connection with the accused is sufficiently strong in light of any other contributing factors to justify attributing causal responsibility for the death to the accused: see *Krakouer v State of Western Australia* [2006] WASCA 81; 161 A Crim R 347 at [21]–[23] (**3.23C**), on the distinction between causal connection (*factual causation*) and causal responsibility (*legal causation*).

3.16 A causal connection is usually established through the 'but for' test: *Krakouer* at [22]; see **3.23C**. The question is asked: 'Would the death have occurred but for (that is, without) the contribution of the accused?' A negative answer establishes causal connection. It is immaterial that the deceased would soon have died in any event: Codes s 296 (Qld)/s 273 (WA). However, there are some causal connections which the law does not recognise:

1. Omissions are not legally recognised causes in the absence of breach of a duty to act: see **3.7–3.10**.
2. Deaths that are coincidental results of acts or omissions are not caused by those acts or omissions: see, for example, the discussion respecting an unconscious victim of an assault drowning from a tidal wave in *R v Hallett* [1969] SASR 141 at 150. The rationale here is that, although the death would not have occurred without the act or omission of the accused, the act or omission would not have significantly increased the likelihood of the death occurring.
3. Deaths brought about through using an innocent agent, such as a postal officer who delivers a bomb, are considered to be caused not by the agent but by the manipulator of the agent. On the doctrine of innocent agency, see *White v Ridley* (1978) 140 CLR 342; 21 ALR 661. For Commonwealth offences, see Code (Cth) s 11.3. See also the discussion on procuring at **20.11**.

3.17 Various tests have been suggested for measuring causal responsibility. That which has the most current support is the 'substantial contribution' test. It is a retrospective test which involves looking backwards from a death to ascertain whether, in light of all that happened, the contribution of the accused was a substantial one.

This test was adopted by the Western Australia Court of Appeal in *Krakouer* (**3.23C**). It has also been often used in Queensland: for example, *R v Carter* [2002] QCA 431 at [59]; [2003] 2 Qd R 402; *R v Thomas* [2002] QCA 23; 35 MVR 381 at [21].

In *Royall v R* (1991) 172 CLR 378; 100 ALR 669, the 'substantial contribution' test was endorsed by several members of the High Court; see the discussion in *Krakouer* (**3.23C**) at [30]–[31]. Moreover, in *Osland v R* (1998) 197 CLR 316; 159 ALR 170 and *Arulthilakan*

v R [2003] HCA 74; 203 ALR 259, none of the judges of the High Court expressed any disagreement with the use of this test in the directions of trial judges to juries.

3.18 The emergence of the 'substantial contribution' test has led to a clear distinction between a denial of causation and a defence of accident under the Codes s 23. A death can be 'caused' and yet also be 'an accident'. An accident must not have been foreseeable: see **4.21**, **4.25**. If a test such as 'substantial contribution' is used for causal responsibility, then the question of whether a defence of accident is available is a separate question from that of causation: see also *Jemielita v R* (1995) 81 A Crim R 409 at 432–3 per Murray J.

3.19 The courts have sometimes referred to a special doctrine whereby a causal chain can be broken by a *novus actus interveniens*. A *novus actus interveniens* is a new act performed by someone else which relieves the original actor of causal responsibility. The term has often been used loosely but the doctrine appears most useful in cases where two or more independent actors would each be causally responsible on general principles. The application of this doctrine results in the law choosing to assign responsibility to the later actor.

In *R v Pagett* (1983) 76 Cr App Rep 279 at 289, it was suggested by the English Court of Appeal that in order to constitute a *novus actus interveniens* the act would have to be 'free, deliberate and informed'. If this is right, inadvertently negligent conduct could never constitute a *novus actus interveniens*, no matter how wide the departure from the standard of reasonable conduct. It may be questioned whether this conclusion is correct as a matter of general principle. The causal chain from the first actor should surely be regarded as broken when there is gross negligence, to a degree sufficient for criminal responsibility, on the part of a subsequent actor.

In *Thomas*, the Queensland Court of Appeal appeared to assume that negligent conduct could sometimes constitute a *novus actus interveniens*. The case involved an appeal from a manslaughter conviction by the owner of a vehicle who had been present as a passenger when a young unlicensed driver crashed the vehicle and died as a result. The basis for the conviction was that he had been criminally negligent in allowing her to drive the vehicle. Immediately prior to the crash, however, the steering wheel had been grabbed and pulled by another passenger. The Court of Appeal quashed the conviction on the ground that the trial judge had not instructed the jury that it could conclude that the cause of the driver's death was the negligence of the other passenger. See also the special provision dealing with cases of negligent medical treatment in the Codes s 298 (Qld)/s 275 (WA): discussed at **3.20**.

3.20 There are some problems relating to causal responsibility which can be handled by reference to provisions of the Codes rather than by reliance on general principles. The terms of these provisions are all confined to the causation of death.

1. The Codes s 295 (Qld)/s 272 (WA) provide that one person kills another if threats, intimidation or deceit cause the other person to do, or fail to do, something which results in her or his own death. Thus, the response of the other person is not a *novus actus interveniens* when it is caused by threats, intimidation or deceit. This leaves unanswered, however, the question which test is to be used for determining whether threats, intimidation or deceit actually caused the response: see **3.17** for a discussion of general principles relating to causal responsibility.

   The High Court in *Royall* was faced with a case at common law where the victim's death may have resulted from her jumping from a window in order to escape her assailant. The court unanimously held that the accused had not been disadvantaged

by a direction to the jury that he would have caused the death if the victim 'had a well-founded and reasonable apprehension that if she remained in the bathroom she would be subjected to such further violence as would endanger her life'. Different judges gave different reasons, based on the particular sets of general principles of causal responsibility which they had espoused.

2. The Codes s 297 (Qld)/s 274 (WA) make it immaterial to causal responsibility that death from some injury might have been prevented by taking precautions to prevent the injury occurring, or by care or treatment of the injury. Thus, in cases where doctors have omitted to provide proper treatment, the original assailant causes the resulting death as long as the injury itself provides the operative cause of death. It is immaterial that the doctors might otherwise meet the general criteria for causal responsibility. Moreover, a victim is under no duty to save her or his own life: *R v Blaue* [1975] 3 All ER 446, where a Jehovah's Witness who had been stabbed died after refusing a blood transfusion. Her assailant was held to have caused the death. The result would have been the same under s 297 (Qld)/s 274 (WA).
3. The Codes s 298 (Qld)/s 275 (WA) provide that when one person inflicts grievous bodily harm (see the definition of 'grievous bodily harm' in the Codes s 1) upon another, but the victim dies directly from medical treatment rather than the injury, the original assailant causes the death. To fall within this provision, however, the medical treatment must have been 'reasonably proper under the circumstances'. Presumably, therefore, improper or negligent treatment can break the causal chain. This provision appears to make improper or negligent treatment a *novus actus interveniens*. A literal reading might suggest that any degree of negligence has this effect but it would seem more sensible to insist on gross negligence, to a degree sufficient for criminal responsibility. See 4.32–4.33 on criminal negligence. See also the discussion of general principles at 3.19.

See also the Codes s 294 (Qld)/s 271 (WA) on the issue of injuries inflicted before birth which cause death after birth: discussed at 3.2 and in *Iby* at 3.21C, below.

3.21C **R v Iby**

[2005] NSWCCA 178; (2005) 63 NSWLR 278
New South Wales Court of Criminal Appeal

Spigelman CJ:

1 On 4 April 2002, the Appellant was driving a stolen vehicle in Fairfield, Sydney, at excessive speed and in an erratic manner. After colliding with a car travelling in the same direction the Appellant's vehicle crossed the double white lines and collided head-on with a car driven by Mrs My Nghi Vongratsavai, who was 38 weeks pregnant. Following her arrival at Liverpool Hospital, an emergency caesarean was performed on Mrs Vongratsavai and a male infant in poor condition was delivered, subsequently named Mathew Joseph Vongratsavai. The delivery occurred at 11.48 am. Mathew was pronounced dead exactly two hours later at 13.48 pm.

2 The Appellant was charged with a number of offences including, manslaughter and an alternative count of driving in a manner dangerous causing death, both in the aggravated and non-aggravated form. He pleaded not guilty to these charges. He elected for a trial by judge

alone, pursuant to s 132 of the Criminal Procedure Act 1986. Ellis DCJ found the Appellant guilty of manslaughter.

3 Where an offence involving killing or death of a newly born child arises as an element of a criminal offence, there is a long-established common law rule that the element cannot be established unless the baby was 'born alive'. The issue that arises in this case is what is meant by the words 'born alive'?

4 It was the Crown case, both at first instance and in this Court, that Mathew was fully issued forth from his mother and lived independently of her for two hours before he died, albeit supported by mechanical respiration. The baby was, it was submitted, a person within the law.

5 The Appellant's case was that the baby was not born alive and did not live independently. The primary basis of the submission was the lack of, or paucity of, evidence that the baby breathed independently. The Appellant submitted that the presence of a heartbeat, which did exist, was not enough for the baby to have been born alive for purposes of the common law rule. Alternatively, in this Court, the Appellant relied on the absence of or paucity of evidence of the baby's brain function. Accordingly, it was submitted, the Appellant did not cause the death of another person.

…

9 The crucial factual finding of Ellis DCJ, on the basis of the medical evidence, was as follows:

> I find that Mathew did breathe, albeit with the assistance of a respirator, and that his lungs functioned in that they oxygenated his blood. I find that Mathew had a heartbeat for almost two hours after delivery.

10 On the basis of this finding the issue in the case is a legal one: that is, for purposes of the 'born alive' rule is it necessary that an infant must live independently in a sense other than that which his Honour held to be sufficient?

…

Submissions on Appeal

20 The primary thrust of the Appellant's written submissions was to repeat the submissions made to Ellis DCJ to the effect that beating of the heart was insufficient and that unassisted breathing was also required to be present. The Appellant challenged his Honour's test, which accepted that any sign of life was sufficient and submitted that his Honour misdirected himself or, alternatively, that the verdict is unreasonable and cannot be supported. I will deal with these submissions below under the heading 'The Born Alive Rule'.

21 In oral submissions, the Appellant placed primary emphasis on the proposition that a person cannot, in the eyes of the law, be both 'alive' and 'dead' at the same time and relied on the statutory definition of death in s 33 of the Human Tissue Act 1983, which provides:

> 33 For the purposes of the law of New South Wales, a person has died when there has occurred:
> (a) irreversible cessation of all function of the person's brain; or
> (b) irreversible cessation of circulation of blood in the person's body.

…

23 Although there was some evidence of brain function after birth, it was not of so definitive a character as to overcome the possibility that a miscarriage of justice has occurred. If brain activity had to be established, which I do not believe to be the case, the outcome of this appeal could have been different.

24 The Appellant submits that the definition of death in the Human Tissue Act should be adapted to the born alive rule with the result that evidence of brain functioning is an essential part of the Crown case. I will deal with these submissions below under the heading 'The Proposed Brain Death Rule'.

The Born Alive Rule

…

56 Authority is clearly in favour of a conclusion that the common law 'born alive' rule is satisfied by any indicia of independent life. There is no single test of what constitutes 'life'…

62 This review of the authorities indicates that his Honour was correct to hold that the evidence of heartbeat was sufficient to satisfy the common law born alive rule. His Honour was also correct to reject the Appellant's submission that a person cannot be born alive unless the person had manifested an ability to breathe without assistance.

…

64 The context in which the rule arises for present consideration is a context in which the Appellant wishes to avoid criminal responsibility for manslaughter of a baby which was injured as a late term foetus, indeed was fully developed in perfect condition and within a week or two of actual birth. In the current state of medical technology and with the extremely low rate of stillbirths in the Australian community, the born alive rule, if it is to survive at all, should continue to be applied, as Ellis DCJ did, so that any sign of life after birth is sufficient. This happens to be consistent with the authorities.

65 It is also the approach which conforms best with contemporary conditions. It is now virtually certain that a newborn baby which shows any sign of life would have lived but for the conduct, said to constitute manslaughter or dangerous driving, inflicted on the baby late in the mother's pregnancy. The viability of a foetus can now be both established and ensured in a manner which was beyond the realms of contemplation when the born alive rule was adopted. That rule should now be applied consistently with contemporary conditions by affirming that any sign of life after delivery is sufficient.

…

The Proposed Brain Death Rule

68 The Appellant's submissions appear to rely on two alternative arguments with respect to the implications of s 33 of the Human Tissues Act 1983, set out above. First, it was suggested that the Act operated of its own force to change the common law by reason of the fact that it introduced a definition of death 'for the purposes of the law of New South Wales'. The second argument appears to be that the common law should be adapted, so that the definition of life coincides with the new statutory definition of death.

…

70 The thrust of the Appellant's submissions was that it would be anomalous if a person could be classified as 'dead' for virtually all purposes of the law of New South Wales, but also

be classified as 'alive' for some of those purposes, specifically with respect to the application of the common law born alive rule to criminal offences. I cannot myself identify any relevant anomaly, other than perhaps a semantic one, which should not be determinative.

71 It is important in this, as in so many contexts, to bear in mind Fullagar J's warning in *Attorney General (NSW) v Perpetual Trustee Co Limited* (1951–1952) 85 CLR 237 at 285 to resist '… the temptation, which is so apt to assail us, to import a meretricious symmetry into the law'. Although a similar argument has succeeded in the United States (see *State of Wisconsin v Cornelius* 152 WIS 2d 272 (1989)), I would not adopt it here.

72 The scope and purpose of the Human Tissue Act, to which I will further refer below, providing as it does a definition of death of general application, does not indicate any legislative intention to alter the concept of 'life' for purposes of the law, specifically the born alive rule. There is no purpose of the legislative scheme that would be served by extending its application in this manner, on the basis of a semantic analogy of the character relied upon by the Appellant.

73 The Act finds its origins in the consideration of brain death by the Australian Law Reform Commission Report, Human Tissue Transplants, No 7 (Canberra, AGPS, 1977). The purpose of the rule proposed by the Commission, and eventually adopted, is indicated in the following observation:

> [118] … In practice the determination of death involves a judgment that the patient's progress to a state of nonliving or non-existence is sufficiently far advanced to be diagnosed with certainty as *irreversible*.
>
> [Emphasis added]

74 The report went on to note that irreversible cessation of all brain function is referred to as brain death. It recommended a definition of death which included reference to brain death. The definition is applicable to the case of a person who had been alive, where the issue is to determine the time of death. The born alive rule is concerned with the identification of life at a time after the baby has been completely separated from his or her mother's body. This is not the reciprocal of 'death', as now defined, because it adopts an artificial and non-scientific standard of when life begins, ie, after delivery.

75 As indicated above, the second way in which the proposition appeared to be put by the Appellant was that the common law should be adapted so that the born alive rule is consistent with the definition of death. There is only a single common law of Australia (see *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503).

76 The Human Tissue Act is part of a scheme which is in large measure a national scheme. The Australian Law Reform Commission recommendation of a definition has now been adopted in all States and Territories, other than Western Australia. (See s 45 Transplantation and Anatomy Act 1978 (ACT); s 27A Human Tissue Act 1985 (Tas); s 23 Human Tissues Transplant Act 1979 (NT); s 2 Death (Definition) Act 1983 (SA); s 41 Human Tissues Act 1982 (Vic); s 45 Transplantation and Anatomy Act 1979 (Qld).) There is one difference: the definition in Queensland is only 'for the purposes of this Act'. Other States adopt the New South Wales formula of 'for the purposes of the law of …' the relevant jurisdiction.

77 There are considerable difficulties in developing the common law by analogy with statute. See the discussion in *Esso Australia Resources Australia Limited v Federal Commissioner of Taxation* (1999) 201 CLR 49 esp at [23], [64], [91] and [144]. Here there is a much closer approximation to a national uniform regime than that considered by the High Court in *Esso*. Only Western Australia wholly fails to adopt the definition and only Queensland limits its application to the particular purposes of the Transplantation and Anatomy Act 1979 (Qld). Nevertheless, there is no uniformity.

78 More significant, however, for present purposes is the above analysis with respect to the application of the statutory definition of death to the common law born alive rule. The Courts should also resist the temptation to introduce a meretricious symmetry between the common law and statute law. The definition of death does not, other than in the context of semantic symmetry, require a corresponding definition of life. This is particularly so for the purposes of a common law rule which, as I have indicated above, is itself anachronistic and which adopts an artificial and non-scientific concept of when life begins. Other than in semantic terms, this test for the born alive rule is not the reciprocal of death as now defined by statute.

Conclusion

79 In my opinion the appeal should be dismissed.

[**Grove** and **Bell JJ** agreed.]

3.22C Airedale National Health Service Trust v Bland

[1993] AC 789; [1993] 1 All ER 821
House of Lords

Lord Goff of Chieveley: My Lords, the facts of the present case are not in dispute … I propose simply to adopt the sympathetic and economical summary of the Master of the Rolls …

> Mr Anthony David Bland, then aged 17½, went to the Hillsborough Ground on 15 April 1989 to support the Liverpool Football Club. In the course of the disaster which occurred on that day, his lungs were crushed and punctured and the supply of oxygen to his brain was interrupted. As a result, he suffered catastrophic and irreversible damage to the higher centres of the brain. The condition from which he suffers, and has suffered since April 1989, is known as a persistent vegetative state (PVS). PVS is a recognised medical condition quite distinct from other conditions sometimes known as 'irreversible coma', 'the Guillain-Barré syndrome', 'the locked-in syndrome' and 'brain death'. Its distinguishing characteristics are that the brain stem remains alive and functioning while the cortex of the brain loses its function and activity. Thus the PVS patient continues to breathe unaided and his digestion continues to function. But although his eyes are open, he cannot see. He cannot hear. Although capable of reflex movement, particularly in response to painful stimuli, the patient is incapable of voluntary movement and can feel no pain. He cannot taste or smell. He cannot speak or communicate in any way. He has no cognitive function and can thus feel no emotion, whether pleasure or distress. The absence of cerebral function is not a matter of surmise; it can be scientifically demonstrated. The space which the brain should occupy is full of watery fluid. The medical witnesses in this case include some of the outstanding authorities in the country on this condition. All are

agreed on the diagnosis. All are agreed on the prognosis also: there is no hope of any improvement or recovery. One witness of great experience described Mr Bland as the worst PVS case he had ever seen.

Mr Bland lies in bed in the Airedale General Hospital, his eyes open, his mind vacant, his limbs crooked and taut. He cannot swallow, and so cannot be spoon-fed without a high risk that food will be inhaled into the lung. He is fed by means of a tube, threaded through the nose and down into the stomach, through which liquefied food is mechanically pumped. His bowels are evacuated by enema. His bladder is drained by catheter. He has been subject to repeated bouts of infection affecting his urinary tract and chest, which have been treated with antibiotics. Drugs have also been administered to reduce salivation, to reduce muscle tone and severe sweating and to encourage gastric emptying. A tracheotomy tube has been inserted and removed. Genito-urinary problems have required surgical intervention. A patient in this condition requires very skilled nursing and close medical attention if he is to survive. The Airedale National Health Service Trust have, it is agreed, provided both to Mr Bland. Introduction of the nasogastric tube is itself a task of some delicacy even in an insensate patient. Thereafter it must be monitored to ensure it has not become dislodged and to control inflammation, irritation and infection to which it may give rise. The catheter must be monitored: it may cause infection (and has repeatedly done so); it has had to be resited, in an operation performed without anaesthetic. The mouth and other parts of the body must be constantly tended. The patient must be repeatedly moved to avoid pressure sores. Without skilled nursing and close medical attention a PVS patient will quickly succumb to infection. With such care, a young and otherwise healthy patient may live for many years.

At no time before the disaster did Mr Bland give any indication of his wishes should he find himself in such a condition. It is not a topic most adolescents address. After careful thought his family agreed that the feeding tube should be removed and felt that this was what Mr Bland would have wanted. His father said of his son in evidence: 'He certainly wouldn't want to be left like that.' He could see no advantage at all in continuation of the current treatment. He was not cross-examined. It was accordingly with the concurrence of Mr Bland's family, as well as the consultant in charge of his case and the support of two independent doctors, that the Airedale NHS Trust as plaintiff in this action applied to the Family Division of the High Court for declarations that they might '(1) … lawfully discontinue all life-sustaining treatment and medical support measures designed to keep [Mr Bland] alive in his existing persistent vegetative state including the termination of ventilation nutrition and hydration by artificial means; and (2) … lawfully discontinue and thereafter need not furnish medical treatment to [Mr Bland] except for the sole purpose of enabling [Mr Bland] to end his life and die peacefully with the greatest dignity and the least of pain suffering and distress'. After a hearing in which he was assisted by an amicus curiae instructed by the Attorney-General, the President of the Family Division made these declarations (subject to a minor change of wording) on 19 November 1992. He declined to make further declarations which were also sought.

The Official Solicitor, acting on behalf of Anthony Bland, appealed against that decision to the Court of Appeal, who dismissed the appeal. Now, with the leave of the Court of Appeal, the Official Solicitor has appealed to your Lordships' House …

The central issue in the present case has been aptly stated by Sir Thomas Bingham MR to be whether artificial feeding and antibiotic drugs may lawfully be withheld from an insensate patient with no hope of recovery when it is known that if that is done the patient will shortly thereafter die …

I start with the simple fact that, in law, Anthony is still alive. It is true that his condition is such that it can be described as a living death: but he is nevertheless still alive. This is because, as a result of developments in modern medical technology, doctors no longer associate death exclusively with breathing and heart beat, and it has come to be accepted that death occurs when the brain, and in particular the brain stem, has been destroyed: see Professor Ian Kennedy's paper entitled 'Switching off Life Support Machines: The Legal Implications', reprinted in *Treat Me Right, Essays in Medical Law and Ethics*, 1988, especially at pp 351–2, and the material there cited. There has been no dispute on this point in the present case, and it is unnecessary for me to consider it further. The evidence is that Anthony's brain stem is still alive and functioning and it follows that, in the present state of medical science, he is still alive and should be so regarded as a matter of law.

It is on this basis that I turn to the applicable principles of law. Here, the fundamental principle is the principle of the sanctity of human life … a principle long recognised not only in our own society but also in most, if not all, civilised societies throughout the modern world, as is indeed evidenced by its recognition both in Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1953 (Cmd 8969), and in Article 6 of the International Covenant of Civil and Political Rights 1966.

But this principle, fundamental though it is, is not absolute. Indeed there are circumstances in which it is lawful to take another man's life, for example by a lawful act of self-defence, or (in the days when capital punishment was acceptable in our society) by lawful execution. We are not however concerned with cases such as these. We are concerned with circumstances in which it may be lawful to withhold from a patient medical treatment or care by means of which his life may be prolonged. But here too there is no absolute rule that the patient's life must be prolonged by such treatment or care, if available, regardless of the circumstances.

First, it is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so: see *Schloendorff v Society of New York Hospital* (1914) 105 NE 92, per Cardozo J; *S v McC (orse S)* and *M (DS Intervener)*; *W v W* [1972] AC 24 at 43 per Lord Reid; and *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 at 882, per Lord Scarman. To this extent, the principle of the sanctity of human life must yield to the principle of self-determination (see *ante*, at 351H–352A, per Hoffmann LJ), and, for present purposes perhaps more important, the doctor's duty to act in the best interests of his patient must likewise be qualified.

But in many cases not only may the patient be in no condition to be able to say whether or not he consents to the relevant treatment or care, but also he may have given no prior indication of his wishes with regard to it. In the case of a child who is a ward of court, the court itself will decide whether medical treatment should be provided in the child's best interests, taking into account medical opinion. But the court cannot give its consent on behalf of an adult patient who is incapable of himself deciding whether or not to consent to treatment. I am of the opinion that there is nevertheless no absolute obligation upon the doctor who has the patient in his care to prolong his life, regardless of the circumstances. Indeed, it would be most startling, and could lead to the most adverse and cruel effects upon the patient, if any such absolute rule were held to exist. It is scarcely consistent with

the primacy given to the principle of self-determination in those cases in which the patient of sound mind has declined to give his consent, that the law should provide no means of enabling treatment to be withheld in appropriate circumstances where the patient is in no condition to indicate, if that was his wish, that he did not consent to it …

…

I must however stress, at this point, that the law draws a crucial distinction between cases in which a doctor decides not to provide, or to continue to provide, for his patient treatment or care which could or might prolong his life, and those in which he decides, for example by administering a lethal drug, actively to bring his patient's life to an end …

At the heart of this distinction lies a theoretical question. Why is it that the doctor who gives his patient a lethal injection which kills him commits an unlawful act and indeed is guilty of murder, whereas a doctor who, by discontinuing life support, allows his patient to die, may not act unlawfully — and will not do so, if he commits no breach of duty to his patient? Professor Glanville Williams has suggested (see his *Textbook of Criminal Law*, 2nd ed, 1983, p 282) that the reason is that what the doctor does when he switches off a life support machine 'is in substance not an act but an omission to struggle', and that 'the omission is not a breach of duty by the doctor, because he is not obliged to continue in a hopeless case'.

I agree that the doctor's conduct in discontinuing life support can properly be categorised as an omission. It is true that it may be difficult to describe what the doctor actually does as an omission, for example where he takes some positive step to bring the life support to an end. But discontinuation of life support is, for present purposes, no different from not initiating life support in the first place. In each case, the doctor is simply allowing his patient to die in the sense that he is desisting from taking a step which might, in certain circumstances, prevent his patient from dying as a result of his pre-existing condition; and as a matter of general principle an omission such as this will not be unlawful unless it constitutes a breach of duty to the patient. I also agree that the doctor's conduct is to be differentiated from that of, for example, an interloper who maliciously switches off a life support machine because, although the interloper may perform exactly the same act as the doctor who discontinues life support, his doing so constitutes interference with the life-prolonging treatment then being administered by the doctor. Accordingly, whereas the doctor, in discontinuing life support, is simply allowing his patient to die of his pre-existing condition, the interloper is actively intervening to stop the doctor from prolonging the patient's life, and such conduct cannot possibly be categorised as an omission.

The distinction appears, therefore, to be useful in the present context in that it can be invoked to explain how discontinuance of life support can be differentiated from ending a patient's life by a lethal injection. But in the end the reason for that difference is that, whereas the law considers that discontinuance of life support may be consistent with the doctor's duty to care for his patient, it does not, for reasons of policy, consider that it forms any part of his duty to give his patient a lethal injection to put him out of his agony.

I return to the patient who, because for example he is of unsound mind or has been rendered unconscious by accident or by illness, is incapable of stating whether or not he consents to treatment or care. In such circumstances, it is now established that a doctor may lawfully treat such a patient if he acts in his best interests, and indeed that, if the patient is already in his care, he is under a duty so to treat him: see *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, in which the legal principles governing treatment in such circumstances were stated by this House. For my part I can see no reason why, as a matter of principle, a decision by a doctor whether or not to initiate, or to continue to provide, treatment or care which could

or might have the effect of prolonging such a patient's life, should not be governed by the same fundamental principle. Of course, in the great majority of cases, the best interests of the patient are likely to require that treatment of this kind, if available, should be given to a patient. But this may not always be so. To take a simple example given by Thomas J in *Re JHL* (unreported), 13 August 1992, at 35, to whose judgment in that case I wish to pay tribute, it cannot be right that a doctor, who has under his care a patient suffering painfully from terminal cancer, should be under an absolute obligation to perform upon him major surgery to abate another condition which, if unabated, would or might shorten his life still further. The doctor who is caring for such a patient cannot, in my opinion, be under an absolute obligation to prolong his life by any means available to him, regardless of the quality of the patient's life. Common humanity requires otherwise, as do medical ethics and good medical practice accepted in this country and overseas. As I see it, the doctor's decision whether or not to take any such step must (subject to his patient's ability to give or withhold his consent) be made in the best interests of the patient. It is this principle which, in my opinion, underlies the established rule that a doctor may, when caring for a patient who is, for example, dying of cancer, lawfully administer painkilling drugs despite the fact that he knows that an incidental effect of that application will be to abbreviate the patient's life. Such a decision may properly be made as part of the care of the living patient, in his best interests; and, on this basis, the treatment will be lawful. Moreover, where the doctor's treatment of his patient is lawful, the patient's death will be regarded in law as exclusively caused by the injury or disease to which his condition is attributable.

It is of course the development of modern medical technology, and in particular the development of life support systems, which has rendered cases such as the present so much more relevant than in the past. Even so, where (for example) a patient is brought into hospital in such a condition that, without the benefit of a life support system, he will not continue to live, the decision has to be made whether or not to give him that benefit, if available. That decision can only be made in the best interests of the patient. No doubt, his best interests will ordinarily require that he should be placed on a life support system as soon as necessary, if only to make an accurate assessment of his condition and a prognosis for the future. But if he neither recovers sufficiently to be taken off it nor dies, the question will ultimately arise whether he should be kept on it indefinitely. As I see it, that question (assuming the continued availability of the system) can only be answered by reference to the best interests of the patient himself, having regard to established medical practice. Indeed, if the justification for treating a patient who lacks the capacity to consent lies in the fact that the treatment is provided in his best interests, it must follow that the treatment may, and indeed ultimately should, be discontinued where it is no longer in his best interests to provide it. The question which lies at the heart of the present case is, as I see it, whether on that principle the doctors responsible for the treatment and care of Anthony Bland can justifiably discontinue the process of artificial feeding upon which the prolongation of his life depends.

It is crucial for the understanding of this question that the question itself should be correctly formulated. The question is not whether the doctor should take a course which will kill his patient, or even take a course which has the effect of accelerating his death … The question is whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care …

[A] distinction may be drawn between (1) cases in which, having regard to all the circumstances (including, for example, the intrusive nature of the treatment, the hazards involved in it, and the very poor quality of the life which may be prolonged for the patient if

the treatment is successful), it may be judged not to be in the best interests of the patient to initiate or continue life-prolonging treatment, and (2) cases such as the present in which, so far as the living patient is concerned, the treatment is of no benefit to him because he is totally unconscious and there is no prospect of any improvement in his condition. In both classes of case, the decision whether or not to withhold treatment must be made in the best interests of the patient. In the first class, however, the decision has to be made by weighing the relevant considerations …

With this class of case, however, your Lordships are not directly concerned in the present case; and though I do not wish to be understood to be casting any doubt upon any of the reported cases on the subject, nevertheless I must record that argument was not directed specifically towards these cases, and for that reason I do not intend to express any opinion about the precise principles applicable in relation to them.

By contrast, in the latter class of case, of which the present case provides an example, there is in reality no weighing operation to be performed. Here the condition of the patient, who is totally unconscious and in whose condition there is no prospect of any improvement, is such that life-prolonging treatment is properly regarded as being, in medical terms, useless. As Sir Thomas Bingham MR pointed out, *ante*, at 335G–H, in the present case, medical treatment or care may be provided for a number of different purposes. It may be provided, for example, as an aid to diagnosis; for the treatment of physical or mental injury or illness; to alleviate pain or distress; or to make the patient's condition more tolerable. Such purposes may include prolonging the patient's life, for example to enable him to survive during diagnosis and treatment. But for my part I cannot see that medical treatment is appropriate or requisite simply to prolong a patient's life, when such treatment has no therapeutic purpose of any kind, as where it is futile because the patient is unconscious and there is no prospect of any improvement in his condition. It is reasonable also that account should be taken of the invasiveness of the treatment and of the indignity to which, as the present case shows, a person has to be subjected if his life is prolonged by artificial means, which must cause considerable distress to his family — a distress which reflects not only their own feelings but their perception of the situation of their relative who is being kept alive. But in the end, in a case such as the present, it is the futility of the treatment which justifies its termination. I do not consider that, in circumstances such as these, a doctor is required to initiate or to continue life-prolonging treatment or care in the best interests of his patient. It follows that no such duty rests upon the respondents, or upon Dr Howe, in the case of Anthony Bland, whose condition is in reality no more than a living death, and for whom such treatment or care would, in medical terms, be futile.

In the present case, it is proposed that the doctors should be entitled to discontinue both the artificial feeding of Anthony, and the use of antibiotics. It is plain from the evidence that Anthony, in his present condition, is very prone to infection and that, over some necessarily uncertain but not very long period of time, he will succumb to infection which, if unchecked, will spread and cause his death. But the effect of discontinuing the artificial feeding will be that he will inevitably die within one or two weeks.

Objection can be made to the latter course of action on the ground that Anthony will thereby be starved to death, and that this would constitute a breach of the duty to feed him which must form an essential part of the duty which every person owes to another in his care. But here again it is necessary to analyse precisely what this means in the case of Anthony. Anthony is not merely incapable of feeding himself. He is incapable of swallowing, and therefore of eating or drinking in the normal sense of those words. There is overwhelming

evidence that, in the medical profession, artificial feeding is regarded as a form of medical treatment; and even if it is not strictly medical treatment, it must form part of the medical care of the patient. Indeed, the function of artificial feeding in the case of Anthony, by means of a nasogastric tube, is to provide a form of life support analogous to that provided by a ventilator which artificially breathes air in and out of the lungs of a patient incapable of breathing normally, thereby enabling oxygen to reach the bloodstream. The same principles must apply in either case when the question is asked whether the doctor in charge may lawfully discontinue the life-sustaining treatment or care; and if in either case the treatment is futile in the sense I have described, it can properly be concluded that it is no longer in the best interests of the patient to continue it. It is true that, in the case of discontinuance of artificial feeding, it can be said that the patient will as a result starve to death; and this may bring before our eyes the vision of an ordinary person slowly dying of hunger, and suffering all the pain and distress associated with such a death. But here it is clear from the evidence that no such pain or distress will be suffered by Anthony, who can feel nothing at all. Furthermore, we are told that the outward symptoms of dying in such a way, which might otherwise cause distress to the nurses who care for him or to members of his family who visit him, can be suppressed by means of sedatives. In these circumstances, I can see no ground in the present case for refusing the declarations applied for simply because the course of action proposed involves the discontinuance of artificial feeding …

[After agreeing, somewhat reluctantly, that the opinion of the court should be sought in all cases such as the present, his Lordship dismissed the appeal. **Lords Browne-Wilkinson**, **Keith of Kinkel**, **Lowry** and **Mustill** delivered separate judgments, agreeing that the appeal should be dismissed.]

3.23C Krakouer v State of Western Australia

[2006] WASCA 81; (2006) 161 A Crim R 347
Western Australia Court of Appeal

Steytler P:

1 This is an application for an extension of time within which to appeal against the applicant's conviction for murder.

The critical issues

2 The applicant was one of four persons charged with the wilful murder of a man on 8 March 2003. Two of the four were acquitted entirely, but the applicant and a man by the name of Scott Colbung were convicted of murder.

3 The evidence at the trial, while not entirely consistent, was sufficient to establish at least the following. The applicant and the deceased had got into a fight. Neither of them made use of any weapon. During the course of the fight, Colbung decided to get involved. He hit the deceased on the base of his chin with a mallet, so severely as to inflict a mortal wound. The deceased fell to the ground. While he lay there, the applicant ran into nearby bushland, grabbed a marker post, returned to where the deceased was lying and struck him with it on the back of his head. The blow was so powerfully struck as to fracture the deceased's skull. The deceased was taken to hospital, where he died as a consequence of his injuries.

4 The prosecutor presented his case, at the trial, upon the basis that the applicant and Colbung were principal offenders, so far as the murder of the deceased was concerned. He placed no reliance, in the case against either, on s 7(b), (c) or (d) of the *Criminal Code* (WA) ('Code') (dealing with aiding or procuring the commission of an offence) or s 8 thereof (dealing with offences committed in the prosecution of a common purpose). The jury was similarly directed by the trial Judge, who told them (transcript 1406) that each of the applicant and Colbung was charged upon the basis that he had actually done the act constituting the offence: s 7(a) of the Code. The trial Judge directed the jury in terms of s 7(b) and (c) and s 8 of the Code only as regards the two men who were subsequently acquitted.

5 The critical issues, so far as the appeal is concerned, are whether the element of causation could be proved against the applicant, given that the deceased had already been mortally wounded at the time at which he was struck by the applicant and whether the trial Judge correctly directed the jury as regards this issue.

6 Before turning to the grounds of appeal, it is necessary for me to set out the medical evidence, which was central to the issue of causation, and the relevant directions given by the trial Judge in respect of that issue.

The evidence of Dr Margolius

7 The medical evidence concerning the issue of causation was given by Dr Karin Margolius, a forensic pathologist. She said (transcript 952) that there were two major injuries, being that struck at the base of the deceased's chin with the mallet and that which had been struck at the back of his head with the marker post.

8 Dr Margolius said that the blow to the base of the chin pushed the deceased's jaw, causing his teeth to go into the skin, and impelled him over. She said that, as that happened, a 'diffuse axonal injury' began to occur in the brain (transcript 965, 966 and 967). She explained that neurons in the brain transmit messages along arms or pathways known as axons and, when the head is struck with sufficient force to swing the brain around, the movement can damage the axons (transcript 963). In this case, there had been diffuse shearing of the axons, itself sufficient to result in death (transcript 969 and 972). She also said that, when the back of the deceased's head hit the ground, it was possible that this brought about a 'hinge fracture' which she had found at the base of his skull. That fracture, which involved the left and right middle cranial fossae, went right across the base of the deceased's skull and opened it up 'like a hinge' (transcript 959).

9 Dr Margolius also suggested that, if, as she had assumed, the back of the deceased's head hit the ground, this would have caused the brain to spring back, hit the back of the head, and spring forward again, hitting the front of the head inside the cranial cavity and causing what is known as a 'contre-coup injury' (transcript 960). She had found a very significant subdural haematoma, involving 100 grams of blood, over the right side of the falx and the subdural space. She said that this was double what was required in order to become life-threatening (transcript 961). She said that the blood pushes the brain down to the foramen magnum, where the spinal cord goes, impacting the respiratory centre and causing death (transcript 961). She said that there would also be cerebral swelling which caused the brain to flatten and then suffer contusional damage.

10 In the course of cross-examination, Dr Margolius accepted that, after he had been struck by the mallet, the deceased might not have fallen 'straight backwards' and that, if he had

fallen in a different way, this could explain why his diffuse axonal injury was so severe. I should mention that the great majority of the witnesses to the infliction of the blows sustained by the deceased had said that he had fallen on his front. While there was some suggestion that he had fallen on his side, no witness said that he had fallen on his back.

11 As to the second of the major injuries mentioned by Dr Margolius, being that to the back of the deceased's head, she expressed the opinion (which accorded with the overwhelming weight of the eyewitness evidence at the trial), that this was struck while the deceased man was lying on the ground. She said that she would 'go for [this] as the last thing' that had happened (transcript 964). She had found, in this respect, a seven centimetre wound over the left parietal region (transcript 949). Underneath it was a depressed fracture of the skull which, she said, was 'sufficient for it to break the bony plates and go down onto the brain' (transcript 959–960). She said (transcript 960) that no fragments of bone were impelled into the brain, although she also said, as I understand her evidence (transcript 966), that the fracture resulted in 'more contusions'. Dr Margolius said that the injury, of itself, could have caused death (transcript 967–968).

12 Dr Margolius was uncertain when the hinge fracture occurred. She said that it could have been caused when the deceased's head first hit the ground (transcript 966 and 995) or by the blow struck at the back of his head (transcript 966 and 995) although, as I understood her evidence, she regarded the former blow as having been potentially fatal even if it had not caused the hinge fracture. Alternatively, she said (transcript 967), the hinge fracture 'could've occurred first and the second … [blow] made it worse'. She accepted, as a possibility, a third scenario that was put to her to the effect that the blow with the mallet, of itself, might have caused the hinge fracture when the deceased man was impelled backwards (transcript 967 and 995). The following exchange then took place (transcript 967–968):

> Now, in terms of that sequence of events, how seriously injured would he have been following the blow below the chin that is impelling him backwards? — That's a potentially fatal injury; it's serious.
> So that alone could have led to his death? — Yes.
> And his hitting the ground? — Yes.
> Would have aggravated that? — Well, it's part of — the diffuse axonal injury, the movement could've done it; the hitting to the floor is the same — the same event, but yes, it's potentially fatal. And lastly, the blow to the back of the head in isolation, could that have caused his death? — Yes.
> Taking the assumption for the moment that either the impelling blow to the chin and/or the striking of the head to the ground on its own without treatment would have led to his death, would the blow to the back of the head have had an aggravating effect, a neutral effect, what? — Well, he was already dying. By itself, it would've added to his problems.
> But he was already dying at that stage? — He was already dying but ignoring anything else, that is a potentially fatal one, so one by itself, both, they would've added together, he's going to die.
> In your opinion, at what stage would you say that he began to die? — Well, he was unconscious while on the ground so he wasn't he was not dead even in hospital.

13 Later in her evidence (transcript 969), Dr Margolius was asked about bruising to, and laceration of, the deceased's right ear which, she said, could have been caused by a blow struck

by the same weapon as had caused the seven centimetre laceration and underlying fracture. She was asked whether this blow had fractured the skull. She responded (transcript 969):

> It would be the same as I would say with the back one. It's an additional factor in him dying.

The reference to 'the back one' is plainly a reference to the blow struck to the back of the deceased's head.

The closing submissions and the trial Judge's directions on the issue of causation

14 In his closing submissions, the then counsel for the applicant did not suggest that it was not the applicant who had struck the deceased with the marker post. Rather, he focused on the issue of whether or not the applicant had struck one or two blows (there had been some divergence in the evidence in this respect) and on that of what had been the applicant's intention when he struck what was said, on his behalf, to have been the only blow struck by him. The then counsel for the applicant submitted (transcript 1385) that the 'proper verdict' in respect of the applicant was that he was guilty of manslaughter.

15 The trial Judge told the jury (transcript 1435), in the course of his charge to them, that defence counsel had said that, although the applicant had unlawfully killed the deceased and was therefore guilty of manslaughter, he had not been proved to have had the intention which was necessary for a murder conviction. When he came to explain the issue of causation to the jury, the trial Judge said (transcript 1403–1404):

> The law is that a person who causes the death of another person directly or indirectly, by any means whatsoever, is deemed to have killed that other person. There is an issue in this case of what was the particular injury or what were the injuries which caused … [the deceased's] death and by which of the accused it was by whom they were inflicted.
>
> It is a matter for you to decide whether the evidence generally, and especially that of Dr Margolius, satisfies you there was one cause of death resulting from one particular injury or whether there were multiple causes of death resulting from one injury or a number of different injuries, but the question whether what a particular accused did caused … [the deceased's] death is one which is to be answered in a commonsense way having regard to all of the evidence of all of the circumstances and in particular, as I say, the evidence of Dr Margolius.
>
> It need not be the direct cause of death, it need not be the sole, that is, the only, cause of death. It will be sufficient if the injury inflicted by a particular accused contributed to the death, that is was one of the causes even if it was not the major cause, nor indeed the immediately operative cause. So you have heard evidence in this case from Dr Margolius that there were several injuries any one of which she said would have caused death or was causing death.
>
> In that situation if you were to find that an accused caused one of those injuries described by her as a death causing injury from which death would have resulted, then that, if you accept it, would be sufficient. It does not have to be the direct cause. It does not have to be the most immediately operative cause and you can see why the law takes it in that commonsense way. So if you have a situation in which a person suffers a number of injuries any one of which would cause death, each of those injuries may be taken in that commonsense way as having caused a person's death.

16 A little later, when he came to deal with the prosecutor's contention that each of the applicant and Colbung had directly participated in the commission of the offence, the trial Judge said (transcript 1407):

> If you were to find that each of them struck … [the deceased] a blow in the way described and that that blow resulted each in an injury which was causing death, which would itself have killed … [the deceased], and that each of them when he hit that blow, when he struck it, intended to kill … [the deceased], each would be guilty of wilful murder.

17 Then, after summarising the prosecutor's submission concerning the intention which, he said, the applicant must have had when striking the blow or blows to the deceased's head, the trial Judge said (transcript 1435–1436):

> The medical evidence of Dr Margolius obviously has a bearing on this. It bears on it first of all certainly in relation to whether or not either or both of those blows, depending upon your findings, caused … [the deceased's] death but, as I say, … [counsel for the applicant] I think does not really contest that the blow or blows were death-causing blows in that sense, but nonetheless that's a matter for you to determine and you need to have regard to Dr Margolius's evidence in that respect, but if you find, as I indicated earlier, that either or both of those blows caused an injury or injuries from which … [the deceased] would have died or was dying, then that would be sufficient for you to find that he caused … [the deceased's] death even though there may have been other injuries caused by someone else which also contributed to or were causing death.
>
> So, as I think … [counsel for the applicant] puts it to you, the really critical issue in relation to … [the applicant] is the question of intent and whether you're satisfied beyond reasonable doubt about that.

18 The trial Judge repeated, a little later in his charge (transcript 1439), that the 'real question', in relation to the applicant, was that of intent. He went on to say:

> [T]here appears to be no real dispute about whether … [the applicant] struck … [the deceased] with the post at least once so the question is whether you're satisfied there were two blows and the further question then is whether you're satisfied there was any specific intent to kill or cause grievous bodily harm.

19 That brings me to the grounds of appeal. There are four of them, a fifth having been abandoned. They read as follows:

> … 2. The verdict was unsafe and unsatisfactory in that, a jury properly instructed could not be satisfied, beyond reasonable doubt, that any act of the accused (Appellant) caused an injury, which caused death…

Ground 2

21 When dealing with causation, a distinction has often been drawn between 'factual' and 'legal' causation.

22 Factual causation involves an enquiry whether there is in fact a connection between a person's conduct and the event alleged to constitute the offence (see Professor Eric Colvin, 'Causation in Criminal Law' (1989) 1 Bond LR 253 at 254 and Kenneth Arenson, 'Causation in the Criminal Law: A Search for Doctrinal Consistency' (1996) 20 Crim LJ 189 at 189–190).

Usually, that question is simply answered by applying the 'but for' test, that is to say, by asking whether the event would have occurred but for the conduct in question. Ordinarily, satisfaction of that test will be essential to a finding of criminal responsibility. However, that is not necessarily the case. In *March v E and M H Stramare Pty Ltd* (1991) 171 CLR 506 at 516–517, Mason CJ pointed out (in a civil context) that:

> The 'but for' test gives rise to a well-known difficulty in cases where there are two or more acts or events which would each be sufficient to bring about the plaintiff's injury. The application of the test 'gives the result, contrary to common sense, that neither is a cause': *Winfield and Jolowicz on Tort*, 13th ed. (1989), p. 134. In truth, the application of the test proves to be either inadequate or troublesome in various situations in which there are multiple acts or events leading to the plaintiff's injury … The cases demonstrate the lesson of experience, namely, that the test, applied as an exclusive criterion of causation, yields unacceptable results and that the results which it yields must be tempered by the making of value judgments and the infusion of policy considerations. That in itself is something of an irony because the proponents of the 'but for' test have seen it as a criterion which would exclude the making of value judgments and evaluative considerations from causation analysis: see Weinrib, 'A Step Forward in Factual Causation', *Modern Law Review*, vol 38 (1975) 518, at p 530.

23 Legal causation raises more difficult questions of criminal responsibility — whether the factual connection between the conduct in question and the event is sufficient to justify the attribution of moral culpability and, hence, legal responsibility. The approach to be adopted in this respect was discussed by the High Court in *Royall v The Queen* (1991) 172 CLR 378. The principal issue of causation in that case arose against a background in which the scenario was posited that the death of the victim had not been caused directly by the conduct of the accused but by an act done by the victim (jumping out of a window) in response to conduct of the accused (threatening behaviour). The judgments accordingly focused on the issue of causation in that context. However, there is some discussion of wider principle that is relevant to the issues in this case.

24 The judgment of Mason CJ essentially dealt only with the issue before the Court. However, he said (at 387) that he agreed with the statement made by Burt CJ in *Campbell v The Queen* [1981] WAR 286 at 290, that it is 'enough if juries [are] told that the question of cause for them to decide is not a philosophical or a 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'.

25 In his judgment, Brennan J said (at 398) that the basic proposition relating to causation in homicide is that an accused's conduct must contribute significantly to the death of the victim although it need not be the sole, direct or immediate cause of the death.

26 Deane and Dawson JJ said (at 411) that there may be no single cause of the death of the deceased, but that if the accused's conduct 'is a substantial or significant cause of death', that will be sufficient if there is also the requisite intent to sustain a conviction for murder. They said that it was for the jury to determine whether the connection between the conduct of the accused and the death of the deceased was sufficient to attribute causal responsibility to the accused. They went on to approve the passage from the judgment of Burt CJ in *Campbell*, referred to above.

27 The same passage was also approved of by Toohey and Gaudron JJ at 423. Their Honours went on to say:

> Burt CJ's comments have much to commend them. In particular, there is little to be gained, but there is a risk of confusion, if the members of a jury are introduced to the sophisticated notions of causation that tend to bedevil the law of torts. Nevertheless the jury must be told that they need to reach a conclusion as to what caused the deceased's death. That does not mean that the jury must be able to isolate a single cause of death; there may be more than one such cause: *Reg v Butcher* [1986] VR 43, at pp 55–56; *Reg v McKinnon* [1980] 2 NZLR 31, at p 36. In that event it is inevitable that the jury will concentrate their attention on whether an act of the accused substantially contributed to the death.

…

31 There was some analysis of what amounts to a substantial or significant cause. Deane and Dawson JJ (at 412) said only that the causal connection must be 'sufficiently substantial to enable responsibility for the crime to be attributed to the accused'. McHugh J … said that the word 'substantial' meant 'not de minimis' (see also *Campbell*, above, at 290; *R v Cato* [1976] 1 WLR 110 at 117; and *Smithers v The Queen* [1978] 1 SCR 506 at 519–520; and *cf Moffatt*, above, at 213 per Wood CJ at CL).

…

38 The issue of combined causes was discussed in the United States in *People v Lewis* 57 P 470 (Cal 1899). In that case, the appellant had been convicted of manslaughter. He had shot the deceased in the abdomen. The deceased had then cut his own throat with a knife. The appellant contended that the deceased had committed suicide. The Court held that because the deceased had died from the combined effect of the two wounds, the appellant was guilty of homicide. The case is discussed by Colvin, above, at 255–256, where he suggests that, in a case in which the effects of two wounds cannot be isolated, for example where two fatal stab wounds were inflicted, the accepted view is that both actors can be held to have caused the death and can be convicted of a homicide offence. A similar conclusion appears to have been arrived at by Coldrey J in *R v McLachlan* [2000] VSC 516, a case in which a pathologist had been unable to say which of a head injury and a liver injury had caused death but had given evidence to the effect that each had contributed to the death. In *R v Franklin* (2001) 3 VR 9 at 28–29, Brooking JA said that, in a case in which injuries are inflicted by two or more assailants, acting independently and at substantially the same time, and if there is no complicating factor which may be put forward as breaking the chain of causation, it is enough for the jury to enquire whether the attack of the accused made a substantial contribution to the death.

39 In the end, it seems to me that, on the present state of authority, it is enough to satisfy the requirement of causation for the purpose of attributing criminal responsibility if the act of the accused makes a significant contribution to the death of the victim, whether by accelerating the victim's death or otherwise, and that it is for the jury to decide whether or not the connection is sufficiently substantial.

40 In my opinion, there was, in this case, more than enough in the medical evidence to entitle a jury to find that there was a sufficiently substantial connection between the blow struck by

the applicant and the death of the deceased. While the jury was obliged to accept, on the evidence of Dr Margolius, that the deceased was already dying when he was struck by the applicant, he was then still alive, and her evidence quite plainly established that this very powerful blow made a significant contribution to his death.

41 I have said that Dr Margolius described the blow as being itself potentially fatal. That was hardly surprising, given that it had been struck with sufficient force to break the bony plates of the skull, making them go down onto the brain and cause contusions. As I read the evidence of Dr Margolius (and as I believe any reasonable jury would have understood it), the injuries so caused, acting on an already severely injured man who was suffering from bleeding inside the skull, must inevitably have contributed, in a not insignificant way, to the death of the deceased. That is what I understand her to have meant when she said, variously, that the blow to the back of the head had 'added to … [the deceased's] problems'; that, when the injuries were 'added together', the deceased was 'going to die'; and that the blow struck by the applicant was 'an additional factor in … [the deceased] dying'. This was undoubtedly sufficient to entitle a reasonable jury to find that the applicant was causally responsible for the death of the deceased. Indeed, I do not see how any reasonable jury could have found otherwise, given the damage inflicted by the blow and the evidence of Dr Margolius to which I have referred. Accordingly, the verdict of the jury was not unsafe or unsatisfactory: *M v The Queen* (1994) 181 CLR 487 at 493.

42 Ground 2 has consequently not been made out.

[**Steytler P** went on to rule that the trial judge had not given sufficient directions to the jury on the issue of causation but that this deficiency has caused no substantial miscarriage of justice. He therefore dismissed the appeal. **Wheeler JA** agreed. **McClure JA** gave separate reasons for reaching the same conclusion that the appeal should be dismissed.]

Murder and Manslaughter

CHAPTER 4

THE HOMICIDE OFFENCES

4.1 Ever since their first enactment, the Criminal Codes of Queensland and Western Australia have provided that an unlawful killing of a person may constitute murder or manslaughter: Codes s 300 (Qld)/s 277 (WA).

- The offence of murder attracts a mandatory sentence of life imprisonment: Code (Qld) s 305. The maximum penalty for manslaughter is life imprisonment: s 310.
- In Western Australia, an adult person who commits murder must be sentenced to life imprisonment unless this would be unjust and the person is unlikely to be a threat to the safety of the community when released, in which eventualities there is liability to imprisonment for 20 years: Code (WA) s 279(4). The maximum penalty for manslaughter is 20 years: Code (WA) s 280.

4.2 Despite the provision for murder and manslaughter, several additional homicide offences of a lesser character have been created in the Codes.

- In Queensland, there is an offence of dangerous driving causing death: Code (Qld) s 328A(4).
- In Western Australia, there are offences of: assault causing death (Code (WA) s 281); culpable driving (other than a motor vehicle) causing death (Code (WA) s 284); and dangerous driving causing death (Road Traffic Act 1974 (WA) s 59).

4.3 On a charge of an offence of murder, it is possible for a jury to return an alternative verdict of manslaughter whenever the jury is satisfied that there was an unlawful killing but is not satisfied beyond reasonable doubt that the killing constituted murder: Codes (Qld) s 576/ ss 10B, 279 (WA). On alternative verdicts generally, see Chapter 29.

FORMS OF MURDER

4.4 An unlawful killing becomes murder when the killing is accompanied by any of the special fault elements prescribed in the Codes.

Essentially, there are three forms of murder under the Codes:

- unlawful killing with intent to cause death: Codes s 302(1)(a) (Qld)/s 279(1)(a) (WA);
- unlawful killing with intent to cause some form of serious injury — grievous bodily harm in Queensland (Code s 302(1)(b) (Qld)); an injury endangering or likely to endanger life in Western Australia (Code s 279(1)(b) (WA));
- unlawful killing by means of a dangerous act performed in the prosecution of an unlawful purpose: Codes s 302(1)(c) (Qld)/s 279(1)(c) (WA).

The Queensland Code specifies additional circumstances or intentions that amount to murder but these are redundant in practice: see **4.8**.

4.5 Where the intent specified is not to kill, there is a slight difference between the Codes as to the precise intent required.

- In Queensland, a killing becomes murder when it is accompanied by an intent to cause grievous bodily harm: Code (Qld) s 302(1)(a). The term 'grievous bodily harm' is defined in the Code (Qld) s 1 as including 'any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health'. The definition also extends to 'serious disfigurement' and to 'the loss of a distinct part or organ of a body'. In any of its forms, the injury constitutes grievous bodily harm 'whether or not treatment is or could have been available'.
- In Western Australia, a killing becomes murder when it is accompanied by an intent to cause a bodily injury of such a nature as to endanger, or be likely to endanger, life: Code (WA) s 279(1)(b). Parliament accepted a recommendation of the Law Reform Commission that the intention to cause permanent injury to health should not constitute an element of murder when amendments to the Code were introduced in 2008.

4.6 An intent to cause death or injury to some person can satisfy the terms of the Code s 302(1)(a) (Qld)/s 279(1)(a)–(b) (WA) even though another person is actually killed. For example, if A shoots at B with intent to kill B, but misses and kills C, A will still be guilty of murdering C. This is expressly confirmed by s 302(2) (Qld)/s 279(2) (WA) which provide that it is immaterial that the person 'did not intend to hurt the particular person who is killed'. For a discussion of the problem of the accidental victim in relation to offences other than murder, see **5.16**.

4.7 The Codes s 302(1)(b) (Qld)/s 279(1)(c) (WA) deem an unlawful killing to be murder when 'death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life'. Unlike the other forms of murder, the special fault element under s 302(1)(b) (Qld)/s 279(1)(b) (WA) is not an intent to cause some form of injury. Indeed, s 302(3) (Qld)/s 279(3) (WA) expressly provides that it is immaterial that the defendant did not intend to hurt anyone. Instead, the special fault element is the association of a dangerous act with the pursuit of some further criminal objective such as a robbery. This form of murder is sometimes (though not in the Codes) called 'constructive murder' or 'felony murder', in order to emphasise that its fault elements do not pertain to the intentional infliction of injury upon the deceased.

4.8 There are other forms of murder specified in the Queensland Code, but they are of no practical significance:

1. The Code s 302(1)(c) (Qld) is clearly redundant. It requires an intent to cause grievous bodily harm together with an *additional* purpose relating to either the commission of an offence of a serious kind (one for which there can be an arrest without warrant: see 25.17–25.22) or the effecting of a subsequent escape. By itself, however, the intent to cause grievous bodily harm would be sufficient to make the killing murder under s 302(1)(a) (Qld).
2. The Code s 302(1)(d)–(e) (Qld) are also arguably redundant provisions. They provide that a person is guilty of murder when the death is caused by 'administering any stupefying or any overpowering thing' or by 'wilfully stopping the breath' for the purpose either of committing a serious offence (one for which there can be an arrest without warrant: see 25.17–25.22) or the effecting of a subsequent escape. It is likely that any killing which falls under either of these provisions would also fall under s 302(1)(b) (Qld). Either the commission of the offence or the escape would be an 'unlawful purpose' within the meaning of the former provision. Moreover, the other requirement for an act likely to endanger life would usually be satisfied in cases where stupefying or overpowering things were administered or a person's breath was stopped.

MURDER AND INTENTION

4.9 Intention is a state of mind and is a fact, capable of being proved like any other fact.

The concept of intention is not defined in the Criminal Codes of Queensland and Western Australia although it is in the Commonwealth Criminal Code. Moreover, it is generally not defined for juries unless they specifically request assistance: see, for example, the remarks in *R v Glebow* [2002] QCA 442. The model direction in the Queensland Supreme and District Court Benchbook merely offers:

> 'Intent' and 'intention' are familiar words. In this legal context, they carry their ordinary meaning.

This kind of direction, however, has been described as 'unhelpful' by the House of Lords: see *R v Woollin* [1999] 1 AC 82; [1998] 4 All ER 103 at 4.44C.

4.10 It is well established that intention does not require premeditation. An intention may be formed and executed within a moment.

Moreover, intention is not the same as motive. The prosecution does not have to prove motive (Codes s 23(3) (Qld)/s 23(2) (WA)), though the existence of a motive is a fact that a jury may use to determine if a killing took place with a specific intent.

4.11 Two somewhat different forms of intention have been identified in the cases, the link between them being that in both cases the offender chooses to inflict death or injury.

1. A person is said to intend a result when the prospect of achieving it provides the purpose or reason for acting. In *Peters v R* (1998) 192 CLR 493; 151 ALR 51 (19.40C), McHugh J said: 'No doubt, when a person intends to do something, ordinarily he or she acts in order to bring about the occurrence of that thing.' For example, someone who shoots at another person in order to kill that person may be said to intend to cause death.

This form of intention is sometimes called direct intention or purpose intention. It was analysed by Connolly J in *R v Willmot (No 2)* [1985] 2 Qd R 413 (4.43C) where he referred to 'having a purpose or design'.

2. A person is said to intend a result when it is known or foreseen that it will be a certain or virtually certain consequence of some action, even though the action may have a different purpose. In *Peters* (19.40C), above, McHugh J said: 'If a person does something that is virtually certain to result in another event occurring and knows that that event is certain or virtually certain to occur, for legal purposes at least he or she intends it to occur.' For example, a person who sets fire to a house in order to collect insurance money, knowing that people are inside and will inevitably be killed, may be said to intend to cause death. See also the similar views of the House of Lords in *Woollin* (4.44C) and the Supreme Court of Canada in *Chartrand v R* [1994] 2 SCR 864.

   This form of intention is sometimes called oblique intention or knowledge intention. Compare the discussion of the concepts of virtual or practical certainty in relation to the burden of proof in 2.3. It is not sufficient that the outcome was foreseen as a possible or even a probable risk. The latter states of mind are usually described as recklessness rather than intention: see 9.8, 9.10 on the distinction between these concepts. See also the mistakes in the jury directions in *Willmot (No 2)* (4.43C), above, and *Woollin* (4.44C).

For Commonwealth offences, statutory versions of the two forms of intention are found in the Criminal Code (Cth) s 5.2(3), which provides: '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': see 9.8.

4.12 Some Queensland judges have taken a narrow view of intention, describing the concept in terms which refer to purpose but not to knowledge. In *Willmot (No 2)* (4.43C), Connolly J said: 'Relevant definitions in the *Shorter Oxford English Dictionary* show that what is involved is the directing of the mind, having a purpose or design.' In *R v Ping* [2005] QCA 472 at [29]; [2006] 2 Qd R 69, Chesterman J spoke with the concurrence of the other judges when he said:

> 'Intention' has no specific legal definition. It is to be given its ordinary, everyday, meaning. 'Intention' is the act of 'determining mentally upon some result'. It is a 'purpose or design'. (See the Macquarie Dictionary.)

Chesterman J repeated these comments in *R v Reid* [2006] QCA 202; [2007] 1 Qd R 64 at [90]: see 5.32C. Moreover, the remarks of Connolly J from *Willmot (No 2)* were endorsed in *Glebow*, above, by Jerrard JA (at [31]) and in *Reid*, above, by both Keane JA (at [68]) and Chesterman J (at [92]). *Ping* and *Reid* were cases on non-fatal offences against the person. Nevertheless, the remarks of the judges in these cases were clearly meant to apply generally to the concept of intention.

The endorsements of the remarks of Connolly J from *Willmot (No 2)* should be treated cautiously. The wealth of contrary authority elsewhere in the common law world was not considered and the distinction between the two forms of intention was not directly in issue in the cases. Moreover, excluding the knowledge form of intention would drastically reduce the scope of the offence of stealing. Stealing requires an intention to deprive the owner of the property, but in almost all cases this can be proved only in the form of knowledge intention:

see 7.12. It is, therefore, difficult to see how the restrictive interpretation of intention could withstand serious challenge.

4.13 Recognition of knowledge or foresight as a form of intention is potentially significant for 'mercy killings' of persons who are terminally ill or in extreme pain. The intent to cause death can be present even where the purpose is to relieve pain and suffering. Moreover, no defence is available on the ground that the person consented to death (Codes s 284 (Qld)/s 261 (WA)) or on the ground that the person would soon have died in any event: s 296 (Qld)/s 273 (WA). A mercy killer can therefore commit the offence of murder.

4.14 In both Queensland and Western Australia, special exculpatory defences are available for some cases where death is caused in the course of administering palliative care.

- In Queensland a potential defence has been introduced for cases where 'palliative care' incidentally hastens death: Code (Qld) s 282A. 'Palliative care' is defined as an act or omission 'directed at maintaining or improving the comfort of a person who is, or would otherwise be, subject to pain and suffering': s 282A(5). There is no criminal responsibility for a death which is an incidental effect as long as (a) the care is performed in good faith and with reasonable care and skill, (b) its provision is reasonable in all the circumstances, and (c) it is provided or ordered by a doctor: s 282A(1). The reasonableness of the palliative care is to be determined by 'good medical practice', which is to be determined having regard to medical ethics, standards, practices and procedures in Australia: s 282A(4)–(5).

  Curiously the Code (Qld) s 282A does not authorise, justify or excuse 'an act done or omission made *with intent to* kill another person': s 282A(3)(a). Presumably the word 'intent' is used here in the restrictive sense, meaning 'purpose', favoured by some Queensland judges. If that is what was meant, the section would have been clearer if the reference had been to 'an act done or omission made *for the purpose* of killing another person'.
- In Western Australia, the provisions of the Guardianship and Administration Act Pt 9 ss 110ZK, 110ZL operate to relieve responsibility for a health professional who provides palliative care following an advance health directive even if the actions hasten death. Palliative care means a medical, surgical or nursing procedure directed at relieving a person's pain, discomfort or distress, but does not include a life sustaining procedure.

4.15 As intention is ultimately a question of fact, it can be proved by logical inferences from a person's words and conduct together with the surrounding circumstances.

Intention can sometimes be proved through a confession or some other admission by the accused. It can also be proved by circumstantial evidence, through inferences from what happened: for example, *R v Winner* (1995) 79 A Crim R 528 at 4.45C. The circumstances of the killing may be such that it is reasonable to conclude the accused's purpose must have been to kill or cause grievous bodily harm, or alternatively that the accused must have known that death or grievous bodily harm would result.

The chain of reasoning here is first to analyse objectively what would be in the mind of an ordinary person who did what the accused did and then ask whether there is any reason why the accused's state of mind might have been different. An objective test is used to analyse the accused's state of mind. However, the ultimate issue is always the accused's own state of mind and this may not be the same as that suggested by the objective test. Compare *Winner*, above, with *Cutter v R* (1997) 143 ALR 498, a case of stabbing where the trial judge (sitting without a jury) had convicted the accused of attempted murder. Attempted murder requires an intention

to kill, not merely to injure: see 19.12. The judge's reasoning was that, given the nature of the stabbing, the only reasonable inference which could be drawn about intent was that there was an intention to kill. A majority of the High Court quashed the conviction on the ground that there were special factors, including the accused's anger and intoxication, which meant that it might be wrong to draw that inference. See also the decision in *Turner v R* [2004] WASCA 127, where the offence was a now-abolished special form of murder, 'wilful murder', which also required intent to kill.

4.16 Although the process of drawing inferences can be illuminated by separating the objective and subjective elements, the Queensland Court of Appeal has disapproved of instructing juries in these terms: *R v Glebow* [2002] QCA 442. The concern appears to be that instructing juries first to consider the objective question might divert them from their task of ascertaining the accused's own state of mind. It is safer to simply ask whether circumstances of the case prove the requisite intent.

MURDER AND THE PROSECUTION OF AN UNLAWFUL PURPOSE

4.17 In addition to the requirement of unlawful killing, the definition of murder under the Codes s 302(1)(b) (Qld)/s 279(1)(c) (WA) has two other elements: the prosecution of an unlawful purpose, and an act likely to endanger life. It is immaterial that the accused did not intend to hurt anyone: s 302(3) (Qld)/s 279(3) (WA). Examples of this kind of murder involve armed robberies where someone is killed by a shot that may have been fired unintentionally or as a warning. The rationale for the existence of constructive or felony murder is that there is an additional unlawful purpose which magnifies the wrongfulness of the killing.

4.18 It has been held that the unlawful purpose must lie beyond the dangerous act: see *R v Gould and Barnes* [1960] Qd R 283 at 4.46C. The dangerous act must be the means to achieve some further unlawful end. This condition would be met in a case where robbery is the purpose and shooting is the act. The condition does not apply when a person was struck or stabbed simply in order to cause injury: the dangerous act of inflicting injury and the unlawful purpose of injuring correspond. This limitation on the operation of the Codes s 302(1)(b) (Qld)/s 279(1)(c) (WA) is necessary in order to preserve the separate identities of the other forms of murder. Unless the limitation is imposed, s 302(1)(b) (Qld)/s 279(1)(c) (WA) could be used to evade the requirements to prove intention to cause death or injury under s 302(1)(a) (Qld)/s 279(1)(a)–(b) (WA).

4.19 Death must be caused by an act of such a nature as to be 'likely' to endanger life. It is not sufficient that the conduct 'would tend to' endanger life: see *Gould and Barnes* (4.45C), above.

There is authority for the proposition that 'likely' does not mean more probable than not; it means 'a substantial — a "real and not remote" — chance regardless of whether it is less or more than 50 per cent': see *Hind and Harwood v R* (1995) 80 A Crim R 105 at 141–2.

The formulation from *Hind and Harwood* was applied in some subsequent cases to the word 'probable' in the common purpose rule in the Codes s 8. However, this interpretation of 'probable' in s 8 was eventually rejected by the High Court in *Darkan v R* [2006] HCA 34; 227 CLR 373; 228 ALR 334 at 20.25C. The High Court preferred the higher standard of an outcome that 'could well have happened': see [81]. It was acknowledged, however, that the word 'likely' might suggest a test that would be easier to satisfy: see [51].

FORMS OF MANSLAUGHTER

4.20 Manslaughter occurs when an unlawful killing does not amount to murder.

Manslaughter is committed when an unlawful killing occurs under 'such circumstances as not to constitute murder': Codes s 303 (Qld)/s 280 (WA). It is unlawful to kill any person unless such killing is 'authorised or justified or excused by law': Codes s 291 (Qld)/s 268 (WA). In *Roberts v State of Western Australia* [2007] WASCA 48; 34 WAR 1 at [118], it was said that the provisions of the Codes 'constitute a comprehensive and complete statutory structure for the determination of what homicides are unlawful and whether they constitute wilful murder, murder or manslaughter or do not attract criminal responsibility at all'. Reference to the common law is therefore unnecessary.

In Queensland, cases that would otherwise be murder may be reduced to manslaughter if certain special circumstances are present. These special circumstances are provocation (s 304), diminished responsibility (s 304A) and killing for preservation in an abusive domestic relationship (s 304B). The roles of these partial defences to murder are examined in Chapters 14, 15 and 17. They will not be discussed in this chapter.

4.21 The provisions of the Codes necessitate a division between two classes of manslaughter for those cases where the additional elements for murder are absent:

1. There are cases in which someone causes the death of another person through some unlawful intentional act such as an assault but without any of the specific intents required for murder. For example, someone may intentionally strike another person with a weapon, and unintentionally use a lethal degree of force. Similarly, someone may intentionally damage or destroy property in a way which happens to cause the death of a person. Such cases will constitute unlawful killing unless there is an authorisation, justification or excuse for the killing: Codes s 291 (Qld)/s 268 (WA). The most commonly raised excuse is the defence of accident under s 23(1)(b) (Qld)/s 23B(2) (WA). The standard definition for an accident is an outcome that was neither foreseen nor foreseeable: see 4.25. This means that, unless there is some other special defence, manslaughter by intentional violence is committed when the killing is either foreseen or foreseeable: see *R v Taiters* [1997] 1 Qd R 333 at 4.47C.
2. There are cases in which someone causes the death of another person simply through negligence, without any intentional violence being involved. For example, a motorist may fail to notice a pedestrian and hit her or him. Such cases will constitute unlawful killing if two conditions are met. First, there must be a breach of one of the duty-imposing provisions in the Codes: ss 285–290 (Qld)/ss 262–267 (WA); see 4.29–4.31. In addition, there must have been negligence to the special degree which constitutes 'criminal negligence': see 4.32. If there is no negligence, or any negligence is less than criminal in degree, there will be an 'excuse' for the killing and it will not be unlawful under s 291 (Qld)/s 268 (WA).

4.22 The division between the two classes of manslaughter cases is made manifest by the opening words of the Codes s 23(1) (Qld)/s 23 (WA). Section 23(1) (Qld)/s 23B (WA) is one of the key provisions on criminal responsibility in the Codes. Importantly, it creates the defence of accident. However, it begins with a qualification respecting negligent acts and omissions.

- Section 23(1) (Qld) begins with the words: 'Subject to the express provisions of this Code relating to negligent acts or omissions …' These words have been interpreted as establishing

a special category of cases for which criminal responsibility is to be determined by reference to provisions expressly dealing with negligence and not by reference to the general provisions of s 23. The duty-imposing provisions in ss 285–290 (Qld) have been characterised as express provisions relating to negligence, even though the word 'negligence' itself is not used in these provisions.

- Section 23B(1) (WA) specifically provides: 'This section is subject to the provisions in Chapter XXVII and section 444A relating to negligent acts and omissions.' Chapter XXVII incorporates the duties of care respecting persons specified in ss 262–267. Section 444A imposes a duty of care respecting property upon persons in charge or control of fires or sources of ignition.

4.23 In *Jackson and Hodgetts v R* (1989) 44 A Crim R 320 (**4.47C**), Thomas J said: 'In a broad way, one would ask whether the case is essentially based on negligence or upon direct violence.' The use of the term 'direct' is, however, inappropriate in this content: 'intentional' would have been a better choice. Assault can be committed through the direct or indirect application of force: Codes s 245 (Qld)/s 222 (WA). How it is done is immaterial to responsibility. What is material to responsibility is whether the application of force was intentional or inadvertently negligent. In the former case, there is prima facie an unlawful assault. In the latter, the conduct is unlawful only if there is a breach of a duty of care involving a criminal degree of negligence.

4.24 Different tests are therefore applied in order to determine criminal responsibility for the two types of manslaughter.

1. For manslaughter by intentional violence, the accused is prima facie liable if the killing was either foreseen or foreseeable, so that the defence of accident under the Codes s 23(1)(b) (Qld)/s 23B(2) (WA) is excluded: see **4.25**. A foreseeable death is one which would have been foreseen and avoided by a reasonably careful person. In effect, therefore, the defence of accident is excluded where any negligence is involved in the killing. The combination of intentional violence with negligence respecting the resulting death is considered sufficient fault to constitute the offence of manslaughter.
2. In contrast, under the Codes ss 285–290 (Qld)/ss 262–267, 444A (WA), when there has been no intentional violence, the negligence must be of the special degree that constitutes 'criminal negligence': see **4.34**. In such cases, an accused never needs recourse to a defence of accident, because issues of foresight and foreseeability can be addressed on more favourable terms in the determination whether any negligence has been criminal in degree. See *Agnew v R* [2003] WASCA 188 at [65]–[71], where it was held that an accused could not have been disadvantaged when the trial judge focused on criminal negligence and gave inadequate directions to the jury on the defence of accident.

ACCIDENT AND MANSLAUGHTER BY INTENTIONAL VIOLENCE

4.25 For many years, both the Queensland and the Western Australian Codes provided that a person is not criminally responsible for an event that occurs 'by accident'. In *Kaporonovski v R* (1973) 133 CLR 209 at 231–2; 1 ALR 296, Gibbs J said that an accident is an event 'which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person'.

- In Queensland, the Code s 23(1)(b) was amended in 2011 to delete the word 'accident' and substitute the words of the test from *Kaporonovski*. The provision now reads that a person is not criminally responsible for an event that '(i) the person does not intend or foresee as a possible consequence; and (ii) an ordinary person would not reasonably foresee as a possible consequence'. This change in wording does not affect the substantive conditions for the defence of accident.
- In Western Australia, the Code s 23B(2) still provides that a person is not criminally responsible for an event that occurs 'by accident'.

This means that under the Codes s 23(1)(b) (Qld)/s 23B(2) (WA), liability for events which are foreseen or foreseeable is not excused. The event need only be foreseen or foreseeable as a *possible* outcome, but excluding possibilities 'that are no more than remote and speculative': see *Taiters* (**4.47C**), above. Moreover, foreseeability is assessed in light of the pressures of the situation faced by the accused. In *Taiters*, the question was said to be 'what would be in the mind of an ordinary person acting in the circumstances with the usual limited time for assessing probabilities'.

Events which are subjectively foreseen are usually objectively foreseeable. Objective foreseeability therefore constitutes the general threshold of criminal responsibility for an event.

4.26 The original intention behind the statement in *Kaporonovski*, above, was to deny any suggestion that a defence of accident could be available merely because the event was not subjectively foreseen by the accused. Gibbs J insisted upon the additional requirement that the event not be objectively foreseeable. There was no express statement in *Kaporonovski* that the test was unqualified so that all unforeseen and unforeseeable events are to be classified as accidents. Subsequently, there was some controversy about 'eggshell skull' cases. These are cases in which the victim suffered from some unusual condition which contributed to the death. The death was unforeseeable, not because some complex chain of events brought it about, but simply because the pre-existing condition of the victim could not have been anticipated. Examples from the cases include enlarged spleens and weak blood vessels in the head as well as thin skulls.

4.27 Pre-existing conditions of the victim have generally been excluded from calculations of foreseeability, on the ground that the accused must take the victim as found. This 'eggshell skull' rule has been traditionally favoured by the courts of Queensland and Western Australia, and also by the High Court in some appeals from Papua New Guinea: see, especially, *R v Martyr* [1962] Qd R 398; *Mamote-Kulang v R* (1964) 111 CLR 62; ALR 1046; *Ward v R* [1972] WAR 36; *Hubert v R* (1993) 67 A Crim R 181.

Various attempts have been made to derive the 'eggshell skull' rule from the meaning of the words 'event' and 'accident' in the Codes s 23. None of these attempts has much current support. The phraseology of s 23 is vague and interpretation requires that the underlying issues of social policy be considered. The 'eggshell skull' rule is best regarded simply as a policy-based exception to the general principle that there is no criminal responsibility for an unforeseen and unforeseeable event.

4.28 The 'eggshell skull' rule has now been given statutory formulation in both Queensland and Western Australia.

- Section 23(1A) (Qld) provides that a person is not excused from criminal responsibility for death or grievous bodily harm resulting from 'a defect, weakness or abnormality' of the victim.

- Section 23B(3)–(4) (WA) applies to cases where death or grievous bodily harm is directly caused by the deliberate use of force. These subsections provide that the person is not excused from criminal responsibility even though the harm would not have been caused but for an 'abnormality, defect or weakness' of the victim, even though the death or grievous bodily harm was neither intended, nor foreseen nor foreseeable.

Traditionally the 'eggshell skull' exception has been confined to the pre-existing conditions of intended victims, so that the physical weaknesses of unintended victims are subject to the standard test of foresight or foreseeability: see *Timbu Kolian v R* (1968) 119 CLR 47; [1969] ALR 143. Yet, the terms of s 23(1A) (Qld) and s 23B(3)–(4) (WA) might appear to apply the 'eggshell skull' rule to such cases.

4.29 Western Australia has amended its Code as a response to so-called 'one punch' cases where a single blow to the deceased, not of itself perhaps particularly violent, causes the victim to fall and strike their head on the ground, starting a chain of events that lead to death. The Code (WA) s 281 establishes the lesser offence of assault causing death. A feature of this offence is that the provisions of s 23B relating to accident are specifically excluded. Section 281(2) provides that there is criminal responsibility 'even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable'.

The assault which leads to death must be unlawful. For example, a provoked assault is not unlawful: Code (WA) s 223. An involuntary act may be excused under s 23A.

MANSLAUGHTER AND CRIMINAL NEGLIGENCE

4.30 Where a case of manslaughter is based entirely on negligence, with no intentional violence involved, there must have been a breach of one of the duty-imposing provisions in the Codes ss 285–290 (Qld)/ss 262–267 (WA): see *Jackson and Hodgetts* at **4.48C**. These provisions serve two different functions:

1. They create a foundation for general criminal liability for omissions: see **3.8–3.9**.
2. They create a foundation for liability for offences against a person, including manslaughter, in cases where negligence is the sole fault element. Under the Codes ss 288–289 (Qld)/ss 265–266 (WA), this form of criminal liability can be based on positive acts as well as omissions.

4.31 One of the duty-imposing sections only applies to certain dangerous acts: Codes s 288 (Qld)/s 265 (WA). This section governs the special circumstance of an act, dangerous to human life or health, done in pursuance of an undertaking, such as an undertaking to administer surgical or medical treatment. Except in a case of necessity, the person must have reasonable skill and use reasonable care in doing the act. In the case of surgical or medical treatment, reasonable skill and care is required in the decision to perform the treatment as well as in its performance: *R v Patel; ex parte A-G (Qld)* [2011] QCA 81 at [53]. Thus, an inappropriate decision to perform treatment can constitute a breach of the duty even though the treatment was then performed competently.

4.32 The Codes s 289 (Qld)/s 266 (WA) are the most commonly invoked of the duty-imposing provisions in manslaughter cases. The section establishes a duty on persons

in charge of or in control of dangerous things to use reasonable care and to take reasonable precautions in their use or management. More precisely, the duty applies to anything which may endanger the life, safety and health of any person in the absence of care and precaution in its use or management.

Most cases involve motor vehicles, but the section applies to 'anything, whether living or inanimate, and whether moving or stationary'. In *Pacino v R* (1998) 105 A Crim R 309, the dangerousness of some dogs was in issue.

There have been competing opinions on whether or not the 'thing' must be ordinarily dangerous. In *R v Dabelstein* [1966] Qd R 411, the majority held that the section applies whenever a thing is dangerous in the particular use to which it is put, regardless of how innocuous it may ordinarily be. In *Dabelstein*, the appellant caused the death of a woman when he thrust a sharpened pencil into her vagina. The pencil penetrated the vaginal wall and the woman haemorrhaged to death.

4.33 An unresolved question is whether a person's own body, or part or fluids thereof, can be a dangerous 'thing' for the purposes of the Codes s 289 (Qld)/s 266 (WA). Suppose, for example, that someone waves their arms in the air and strikes another person, causing that person to fall backwards down some steps and suffer death or injury. Different opinions have been expressed as to whether or not Codes s 289 (Qld)/s 266 (WA) could apply. In *Houghton v R* (5.31C), a case on unlawfully causing grievous bodily harm, a majority took the view that the section could apply to seminal fluid: see [122]–[126]. Murray J, however, disagreed on this point: at [51]. His view was supported by McPherson J of the Queensland Court of Appeal in *Reid* [2006] QCA 202 at [19]; [2007] 1 Qd R 64: 'Section 289 has hitherto been regarded as applying to "dangerous things" as objects external to the human body, such as knives and guns.' If this restrictive view were to prevail there would be a curious gap in the scope of criminal liability.

4.34 In order to attract criminal liability, the negligence must be of such a degree as to meet the common law standard of 'criminal negligence': see *Callaghan v R* (1952) 8 CLR 115; [1952] ALR 941 at 4.49C. In the civil law of torts, a simple departure from the standard of behaviour of a reasonable person would be sufficient to attract liability. In criminal law, however, the departure must be great enough to justify the kind of sanctions and stigma that follow on conviction. See the comments on the differences between liability in tort and in criminal law in *R v BBD* (5.30C).

Criminal negligence is sometimes equated with 'gross' negligence: see Sir James Fitzjames Stephen's *A History of the Criminal Law of England* Vol 3, quoted in *Callaghan*, above. Various expressions have been used to convey this idea to jurors. A common direction is taken from *R v Bateman* (1925) 19 Cr App Rep 8 at 13, where it was said that a jury must be satisfied that the negligence 'went beyond a mere matter of compensation and showed such a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment'. Other expressions that have been used include 'a marked departure', 'a substantial departure' and 'a serious deviation' from the standard of conduct of the reasonable person. See also the definition of negligence in the Criminal Code (Cth) s 5.5 (discussed at 9.11) which refers to 'a great falling short' of the standard of care of a reasonable person.

4.35 The Queensland Supreme and District Courts Benchbook recommends a jury direction in the following form:

> To convict, you must be satisfied beyond reasonable doubt that his conduct … so far departed from the standard of care incumbent upon him to use reasonable care to avoid a danger to life, health and safety, as to amount to conduct deserving of punishment.
>
> The notion of criminal negligence involves a large or serious departure from reasonable standards of conduct, by which is meant the standard of conduct that a reasonable member of the community would use in the same circumstances. It must go substantially beyond a case where payment of compensation is adequate punishment. It must be in a category of behavior where the only adequate punishment is for his lack of care to be branded as criminal and for him to be punished by the State for it.
>
> Before you can convict on the basis of criminal negligence, you must be satisfied that there has been a very serious departure from reasonable standards of care. Because it involves an assessment of what standard of care a reasonable member of the community would use in similar circumstances and the seriousness of the degree of departure from it by the accused, it is for you, as representatives of the community in this trial, to make up your minds whether you are satisfied beyond reasonable doubt that his conduct was criminally negligent or whether it falls short of the degree of deviation from proper standards necessary to prove criminal negligence.

4.36 It is difficult to see any textual basis for implying the common law standard of criminal negligence into the duty-imposing provisions of the Codes: see the arguments of Philp J (dissenting) in *R v Scarth* [1945] St R Qd 38. The majority in *Scarth* made some attempt to argue that the provisions are ambiguous. In *Callaghan* (**4.49C**), however, the High Court justified importing the standard of criminal negligence merely on the ground that this would be appropriate for criminal liability. Such a liberal use of common law doctrine does not sit easily with orthodox views regarding the proper approach to interpreting the Codes: see **1.19–1.21**.

4.37 In *Pacino*, above, a conviction of manslaughter was quashed by the Western Australia Court of Criminal Appeal because the trial judge had failed to instruct the jury that criminal negligence would be negatived by an honest and reasonable, albeit mistaken, belief that dogs were not dangerous. This was viewed as a case where consideration should have been given to a defence of honest and reasonable mistake of fact under the Codes s 24: see **Chapter 12**. However, the court may have made an error in referring to the special defence under s 24. An honest and reasonable belief that the dogs were not dangerous would, by itself, mean that there was no criminal negligence. There was no need to invoke s 24 in aid of this conclusion. The reference to s 24 was not only unnecessary but also potentially confusing because s 24 does not incorporate the distinctive standard of criminal negligence.

ORDINARY AND REASONABLE PERSONS

4.38 Under the objective tests for accident and criminal negligence, the culpability of an accused is assessed by reference to what other persons might have thought or done. An accident is an event which was neither foreseen by the accused nor foreseeable to an ordinary person in the position of the accused: see **4.25**. Criminal negligence is conduct falling well short of the standard that would be observed by the reasonable person: see **4.34**.

4.39 The 'reasonable person' suggests a higher standard than that of the 'ordinary person'. Despite the difference, it can still be hard to prove criminal negligence because of the requirement for conduct to fall well below the standard.

It has been held that the difference between the two standards is not obscured for the defence of accident by a direction to the jury to consider what an ordinary person 'would reasonably' have realised could happen: *R v Seminara* [2002] QCA 131; 128 A Crim R 567 at [13]–[14]. It was also held in *Seminara* that it is acceptable for a judge to refer to 'an ordinary person like you or me': at [15].

4.40 A controversial question has been whether, in working with such objective tests, a uniform standard should be imposed or whether concessions should be made for any immaturity or impairment of the accused. It may be thought unfair to measure an accused against an objective test that was particularly difficult for the accused to meet for reasons such as youth or mental impairment. It should be possible to construct flexible objective tests which refer to ordinary or reasonable persons of the age or mental capacity of the accused. Australian courts have traditionally been reluctant to endorse this approach. See, for example, *Stingel v R* (1990) 171 CLR 312; 97 ALR 1 (**15.35C**), where, although an age-specific objective test for the defence of provocation was endorsed, it was remarked that the test for criminal negligence has taken 'no account of the age of an accused'. It may be questioned whether such a rigid approach is likely to be maintained in the future. The Queensland and Western Australia Courts of Appeal have both abandoned it for the defence of reasonable mistake of fact under the Codes s 24: see *R v Mrzljak* [2004] QCA 420; [2005] 1 Qd R 308 (**6.30C**); *Aubertin v State of Western Australia* at **6.31C**. See further **6.21–6.25**, **14.14–14.15**, **14.38**, **15.15–15.18**, **16.26**.

DANGEROUS DRIVING CAUSING DEATH

4.41 Careless driving is an offence under the Transport Operations (Road Use Management) Act 1995 (Qld) s 83 and the Road Traffic Act 1974 (WA) (Road Traffic Act (WA)) s 62. In addition, the Codes and the Road Traffic Act (WA) establish more serious offences relating to dangerous driving. A person convicted under these provisions is liable to increased penalties if the dangerous driving causes death or grievous bodily harm: Code (Qld) s 328A(4); Road Traffic Act (WA) s 59. See also Code (WA) s 284 in relation to causing death or grievous bodily harm by dangerously driving conveyances other than motor vehicles.

The relationship between dangerous driving causing death and manslaughter by criminal negligence is unclear. The practical scope of the offences may well be the same, but the courts have been reluctant to acknowledge this.

A further complication arises in Western Australia. If a person is guilty of dangerous driving causing death when using a stolen motor vehicle, under the provisions of the Road Traffic Act (WA) s 59(3) the maximum penalty becomes one of 20 years' imprisonment, the same maximum penalty as for manslaughter.

4.42 In *Callaghan* (**4.48C**), it was held that a now repealed offence of dangerous driving under the Code (WA) required proof of criminal negligence. There was a statutory definition of the offence in terms similar to those used for the duty of care respecting dangerous things in the Codes s 289 (Qld)/s 266 (WA). Subsequent decisions relating to offences of dangerous driving which lacked statutory definitions in this form have made the meaning of dangerous driving less rather than more clear.

In *McBride v R* (1966) 115 CLR 44 at 50, it was said that dangerous driving is 'in sharp contrast to the concept of negligence' and 'requires some serious breach of the proper conduct

of a vehicle'. Similarly, in *Jiminez v R* (1992) 173 CLR 572 at 597; 106 ALR 162 at 167, it was held that dangerous driving must subject the public to some risk over and above that associated with driving without due care and attention. Although these statements suggest that there must be criminal negligence, the latter term was not used. Moreover, in *Smith v R* [1976] WAR 97 at 105, it was held that driving can be dangerous without amounting to criminal negligence. The offence in issue in that case was under the provisions of the Road Traffic Act 1974 (WA) and not the Code (WA). On the basis of this distinction, it was held that *Callaghan* was not an applicable authority. See also *Kaighin v R* (1990) 1 WAR 390.

In *R v Wilson* [2008] QCA 349; (2009) 1 Qd R 476; 51 MVR 344 (12.19C), the Queensland Court of Appeal held at [15] that dangerous driving is driving that is objectively dangerous and that fault is not an element of the offence. It was acknowledged at [10] that trial judges had been directing juries for many years that fault was an element of the offence. However, the view of the Court of Appeal was that lack of fault could only be raised by way of special defences such as mistake of fact under Code (Qld) s 24 or emergency under s 25. The authority of *Callaghan* was not discussed.

In the result, the relationship between careless driving, dangerous driving and criminal negligence in the operation of a motor vehicle may need further clarification.

4.43C **Willmot (No 2)**

[1985] 2 Qd R 413

Queensland Court of Criminal Appeal

Campbell J:

It is unfortunate that this trial should have miscarried as the facts spoke largely for themselves and the only issue was intent.

The appellant was convicted after a four-day trial of the murder of Jennifer Rachel Everson on 5 June last year. He has appealed against his conviction on the ground that the learned trial judge misdirected the jury in relation to intention as an element of murder under s 302(1) of the Criminal Code Act 1899 (Qld). …

At about 9.30 am on Wednesday, 6 June, Constable Cahill of the Nundah Police Station found the deceased lying face down on a bed in the main bedroom of a unit which she occupied in a block of units at 129 Milton Road. Both her hands and one leg were tied to the bed supports and she had a gag in her mouth made up of a T-shirt secured by a length of pantyhose. A cord was knotted around her neck. There were abrasions on the bony rim of the pelvis and on the right side of the hip. In addition to injuries to her neck, she had injuries to her forehead and face. The upper part of her body was bare and the lower part was covered by a bedspread. Constable Cahill had gone to the unit as a result of a phone call from the deceased's sister, Deborah Willmot, who is the wife of the appellant, Bruce Henry Willmot. A post mortem established that the deceased had died from asphyxia caused by the mouth gag and ligature.

Sergeant Burton of Yangan Police Station was called to the scene of an accident on the Cunningham Highway, Gladfield, at 2.20 am on 6 June; his wife's sister is married to the appellant's brother. The accident involved a Mitsubishi Colt sedan driven by the appellant and a semi-trailer. It came to Sergeant Burton's knowledge that the car the appellant was driving was owned by Jennifer Rachel Everson. About the time the deceased's body was discovered in her unit, he questioned the appellant at the Warwick Base Hospital as to how it had come about that he was driving her car.

The appellant made admissions implicating himself in his sister-in-law's death in a record of interview taken by Detective Senior Constable Mair at the Warwick Police Station the following day. In the course of questioning he had this to say:

> I went there with the intention of having sex with her. She let me in and we had a cup of coffee and I asked her if her mother had got away all right and she said as far as she knew she had. We talked about how I was going with my car. I asked her if she would like to go to bed with me. She asked, 'Why?', and I said, 'Because I'd like to'. She said, 'No', because I was married to her sister and that she knew that I loved her. I think she said, 'You'd better go'. We got up and we started to walk down the hall and I thought I'd try one more time. I tried to kiss her and she started to struggle and I just did my block.
>
> She kept struggling and I grabbed her by the throat. We somehow ended up on the floor. She screamed and I just absolutely panicked. I hit her and I hit her head against the floor. She became semi-conscious and I then pulled her into her bedroom. She started to struggle again and tried to cry out and I think I shoved a pair of knickers in her mouth and somehow tied them there. She was still struggling and I put my hand around her neck and choked her. She stopped struggling. I tied her down and I was tempted to have her even then but there was no way. She came to again. She tried to get off the bed. There was some sort of white belt lying on the floor and I grabbed it and choked her with it.
>
> For some reason I cleaned up the blood in the hall, grabbed her car keys from the bedroom, grabbed some money out of her piggy bank and fled. At that stage I don't know whether she was still breathing or not.

His version of the events given in evidence during the trial was not materially different except on one point. That was on the point as to whether he was tempted to have sexual relations with her after he tied her down. The evidence he gave as to that was as follows:

> Why did you take her into the bedroom. — At that time I still entertained the thought of having sex with her, but after I got her in there and looked at what I had done I just couldn't bring myself to …
> Was it at that stage that you completely gave up the idea? — Completely.
> And then you put the gag in her mouth? — Yes.
> And then you did something with your hands around her there? — Yes.
> And then you tied a belt around her neck? — Yes.

He was then asked by his counsel about his intention.

The passage reads:

> When you were doing those things what were you trying to do? — I don't know really what I was trying to do.
> Were you trying to kill her? — No, I wasn't — consciously, no.
> Do you accept that you did cause her death? — I have accepted that.

When cross-examined, he maintained that things just 'snowballed' and he baldly asserted that he neither wanted to kill the deceased nor intended to kill her.

Before the addresses began counsel for the accused, relying on a passage in the speech of Lord Hailsham LC in *Hyam v DPP* [1975] AC 55 at 74, argued that there was a distinction which should be pointed out to the jury in the summing up between desiring a result and foreseeing it as likely to happen. Counsel submitted that it was only where a person desired

the stated result to ensue that he could be held to come within s 302(1). Having rightly ruled that the end need not be positively desired to bring the subsection into operation, the trial judge intimated that the question he would ask the jury to address themselves to was whether the accused realised that what he was doing was likely to endanger her life or cause permanent injury to her health. The direction he subsequently gave then was to that effect. It appears that the jury discussed the meaning of the word 'intent' during their retirement. After being out overnight their foreman asked the judge for clarification of the actual meaning of the word. His Honour is reported as directing them that they were concerned with the existence of a state of mind on the part of the accused:

> … in which he realises that what he is doing 'may' be likely to lead to the death of the person to whom he is doing it or, if not to her death, then to her suffering grievous bodily harm.

He is reported as saying next:

> Now, the point on which you must concentrate then is determining as best you can whether or not at the time the accused did these things and, in particular, at the time at which he stuffed the pants down her mouth and tied them into her face, the accused realised that what he was doing 'might' or was likely to endanger her life or cause grievous bodily harm being done to her.

The jury retired again and returned in 40 minutes' time with a verdict of guilty of murder.

Even if it were expedient to explain intent for the benefit of the jury as involving an awareness of consequences, the directions given in this case read as a whole, were confusing and contradictory. Conceivably, some members of the jury could have acted under the impression that all they had to be satisfied of was that the appellant foresaw the outcome of his conduct as a possibility. … I am of the opinion that the appeal should be allowed and the conviction quashed and a new trial ordered.

Connolly J:

… The mental element which must be proved when a case of murder goes to the jury under s 302(1) is intention to cause death or to do grievous bodily harm. The ordinary and natural meaning of the word 'intends' is 'to mean, to have in mind'. Relevant definitions in the *Shorter Oxford English Dictionary* show that what is involved is the directing of the mind, having a purpose or design. The notion of desire is not involved as the learned judge rightly held. A person may do something, fully intending to do it, although he does not in the least desire to do it.

Now there is, in my judgment, no ambiguity about the expression as used in s 302(1) and it is not only unnecessary but undesirable, in charging a jury, to set about explaining an ordinary and well understood word in the English language. It is a truism that it is the Code itself which speaks and that it is, with respect, wrong in principle to gloss it. …

In charging the jury elaboration or paraphrase of what is meant by intent should be avoided: *Moloney* [1985] 2 WLR 648 at 664. The jury should of course be told in appropriate cases that intention is not the same as motive or desire. They should also be told that they are to decide whether the intention is established on the whole of the evidence. Thus, in this case, the appellant denied having formed any intention to kill. But it was clearly open to the jury to conclude that the cruel death which this young woman suffered must have been and in fact was intended by him.

Should there be direct evidence of the accused's awareness that death or grievous bodily harm was a probable result of his act, they may properly be directed that if they accept that evidence, it is open to them to infer from it that he intended to kill or do grievous bodily harm as the case may be …

[**Connolly J** agreed with the order of **Campbell J. Moynihan J** concurred with the other judges.]

4.44C

Woollin

[1999] 1 AC 82; [1998] 4 All ER 103
House of Lords

Lord Steyn:
By an order made on 25 June 1998 your Lordships' House allowed this appeal; quashed the conviction of murder and substituted a conviction of manslaughter; and remitted the matter to the Court of Appeal to pass sentence. I now give my reasons for assenting to that course.

The case in a nutshell
The appellant lost his temper and threw his three-month-old son on to a hard surface. His son sustained a fractured skull and died. The appellant was charged with murder. The Crown did not contend that the appellant desired to kill his son or to cause him serious injury. The issue was whether the appellant nevertheless had the intention to cause serious harm. The appellant denied that he had any such intention. Subject to one qualification, the Recorder of Leeds summed up in accordance with the guidance given by Lord Lane CJ in *Nedrick* [1986] 1 WLR 1025. The guidance of Lord Lane had been as follows (at 1028F):

> Where the charge is murder and in the rare cases where the simple direction [that it is for the jury simply to decide whether the defendant intended to kill or to do serious bodily harm (p 1027)] is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case. (Words in brackets added.)

But towards the end of his summing up the judge directed the jury that if they were satisfied that the appellant 'must have realised and appreciated when he threw that child that there was a substantial risk that he would cause serious injury to it, then it would be open to you to find that he intended to cause injury to the child and you should convict him of murder'. The jury found that the appellant had the necessary intention; they rejected a defence of provocation; and they convicted the appellant of murder. On appeal to the Court of Appeal (Criminal Division) the appellant's principal ground of appeal was that by directing the jury in terms of substantial risk the judge unacceptably enlarged the mental element of murder. The Court of Appeal rejected this ground of appeal and dismissed the appeal: [1997] 1 Crim App R 97. Giving the judgment of the Court of Appeal Roch LJ observed about *Nedrick* (107F) that:

> … although the use of the phrase 'a virtual certainty' may be desirable and may be necessary, it is only necessary where the evidence of intent is limited to the admitted

actions of the accused and the consequences of those actions. It is not obligatory to use that phrase or one that means the same thing in cases such as the present where there is other evidence for the jury to consider.

The Court of Appeal certified the following questions as of general importance:

1. In murder, where there is no direct evidence that the purpose of a defendant was to kill or to inflict serious injury on the victim, is it necessary to direct the jury that they may only infer an intent to do serious injury, if they are satisfied (a) that serious bodily harm was a virtually certain consequence of the defendant's voluntary act and (b) that the defendant appreciated that fact?
2. If the answer to question 1 is 'yes', is such a direction necessary in all cases or is it only necessary in cases where the sole evidence of the defendant's intention is to be found in his actions and their consequence to the victim?

On appeal to your Lordships' House the terrain of the debate covered the correctness in law of the direction recommended by Lord Lane CJ in *Nedrick* and, if that direction is sound, whether it should be used only in the limited category of cases envisaged by the Court of Appeal. And counsel for the appellant renewed his submission that by directing the jury in terms of substantial risk the judge illegitimately widened the mental element of murder.

The directions of the judge on the mental element

... The judge reminded the jury that the Crown did not allege an intention to kill. He accordingly concentrated on intention to do really serious bodily harm. He further reminded the jury that the Crown accepted that the defendant did not want to cause the child serious injuries. The judge then directed the jury as follows:

> In looking at this, you should ask yourselves two questions and I am going to suggest that you write them down. First of all, how probable was the consequence which resulted from his throw, the consequence being, as you know, serious injury? How probable was the consequence of serious injury which resulted from his throw? Secondly, did he foresee that consequence in the second before or at the time of throwing?
>
> The second question is of particular importance, members of the jury, because he could not have intended serious harm could he, if he did not foresee the consequence and did not appreciate at the time that serious harm might result from his throw? If he thought, or may have thought, that in throwing the child he was exposing him to only the slight risk of being injured, then you would probably readily conclude that he did not intend to cause serious injury, because it was outside his contemplation that he would be seriously injured. But the defence say here that he never thought about the consequence at all when he threw the child. He did not give it a moment's thought. Again, if that is right, or may be right, you may readily conclude that he did not appreciate that serious harm would result. It follows from that, if that is how you find, that you cannot infer that he intended to do Karl really serious harm unless you are sure that serious harm was a virtual certainty from what he was doing and he appreciated that that was the case.
>
> So, members of the jury, that is how you should approach this question — and it is a vital question in the case — 'Are we sure that the prosecution have established that the defendant intended to cause Karl serious harm at the time that he threw him?' (My emphasis added.)

The first two questions identified by the judge appear in Lord Lane's guidance in *Nedrick*: at p 1028B–D. The underlined passage is a classic direction in accordance with *Nedrick*: at p 1028F.

After an overnight adjournment the judge continued his summing up. He returned to the mental element which had to be established in order to find the appellant guilty of murder. On this occasion the judge did not use the *Nedrick* direction. Instead the judge directed the jury as follows:

> If you think that he had not given any thought to the consequences of what he was doing before he did it, then the Crown would have failed to prove the necessary intent, the intent to cause really serious harm, for murder and you should acquit him of murder and convict him of manslaughter.
>
> If, on the other hand, you reject that interpretation and are quite satisfied that he was aware of what he was doing and must have realised and appreciated when he threw that child that there was a substantial risk that he would cause serious injury to it, then it would be open to you to find that he intended to cause injury to the child and you should convict him of murder.

It is plain, and the Crown accepts, that a direction posing an issue as to appreciation of a 'substantial risk' of causing serious injury is wider than a direction framed in terms of appreciation of a 'virtual certainty (barring some unforeseen intervention)'. If Lord Lane correctly stated the law in *Nedrick*, the judge's direction in terms of substantial risk was wrong. But the Crown argued, as I have indicated, that *Nedrick* was wrongly decided or, alternatively, that the principle as enunciated by Lord Lane does not apply to the present case.

The premises of the appeal

The first premise of any examination of the issues raised by this appeal is that it is at present settled law that a defendant may be convicted of murder if it is established (1) that he had an intent to kill or (2) that he had an intent to cause really serious bodily injury…

The context of the decision in Nedrick

My Lords, since the early sixties the House has on a number of occasions considered the mens rea required to establish murder. It would be right to acknowledge that none of these decisions satisfactorily settled the law… In *Reg v Hyam* [1975] AC 55 the House of Lords had an opportunity to consider what state of mind, apart from the case where a defendant acts with the purpose of killing or causing serious injury, may be sufficient to constitute the necessary intention. The defendant had burnt down the house of her rival in love, thereby killing her children. The judge directed the jury to convict the defendant of murder if she knew that it was highly probable that her act would cause death or serious bodily harm. The jury convicted her of murder. The House upheld the conviction by a majority of three to two. But the Law Lords constituting the majority gave different reasons: one adopted the 'highly probable' test; another thought a test of probability was sufficient; and a third thought it was sufficient if the defendant realised there was 'a serious risk'. The law of murder was in a state of disarray. The decision in *Hyam* was not only criticised by academic writers but was badly received in the profession. The next opportunity for the House of Lords to examine the mental element of murder came in *Reg v Moloney* [1985] AC 905. The clear effect of *Moloney* was to narrow down the broad approach to mens rea adopted in *Hyam*. In the leading judgment Lord Bridge of Harwich observed in *Moloney* with the approval of all the Law Lords (at 925H):

> But looking on their facts at the decided cases where a crime of specific intent was under consideration, including *Reg v Hyam* [1975] AC 55 itself, they suggest to me that the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice *to establish* the necessary intent. (My emphasis added.)

Lord Bridge paraphrased this idea in terms of 'moral certainty' (at 926F). In the result the House adopted a narrower test of what may constitute intention which is similar to the 'virtual certainty' test in *Nedrick*: see also the answer to the certified question in *Moloney*, pp 908D and 929H. It is true that Lord Bridge said that in the 'rare cases' in which it might be necessary to direct a jury by reference to foresight of consequences it would be sufficient to place the following two questions before the jury (at 929G):

> First, was death or really serious injury in a murder case (or whatever relevant consequence must be proved to have been intended in any other case) a natural consequence of the defendant's voluntary act? Secondly, did the defendant foresee that consequence as being a natural consequence of his act? The jury should then be told that if they answer yes to both questions it is a proper inference for them to draw that he intended that consequence.

It seems clear that Lord Bridge used 'natural consequence' as implicitly conveying the concept of a high probability. But the guidance did not make that clear. The suggested direction soon caused practical difficulties. The problems caused by the guidance arose a year later in acute form in *Reg v Hancock and Shankland* [1986] AC 455. Two miners on strike had pushed a concrete block from a bridge onto a three-lane highway on which a miner was being taken to work by taxi. The concrete block hit the taxi and killed the driver. The defendants were charged with murder. The defendants said that they merely intended to block the road and to frighten the non-striking miner. Following the guidance in *Moloney* the judge directed the jury to ask themselves: 'Was death or serious injury a natural consequence of what was done? Did a defendant foresee that consequence as a natural consequence?' The jury convicted the defendants of murder. The Court of Appeal held that the *Moloney* guidelines, and the judge's direction in terms of those guidelines, were defective and potentially misleading. The conviction of murder was quashed. There was an appeal to the House of Lords. In the only speech Lord Scarman accepted that the *Moloney* guidelines were misleading since they omitted any reference to probability. Lord Scarman observed (at 473F):

> They also require an explanation that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that that consequence was also intended. But juries also require to be reminded that the decision is theirs to be reached upon a consideration of all the evidence.

…

The problem facing the Court of Appeal in Nedrick

In *Hancock* … Lord Scarman merely said that model directions were generally undesirable. Moreover, Lord Scarman thought that where explanation is required the jury should be directed as to the relevance of probability without expressly stating the matter in terms of any particular level of probability. The manner in which trial judges were to direct juries was left unclear.

Moreover, in practice juries sometimes ask probing questions which cannot easily be ignored by trial judges. For example, imagine that in a case such as *Hancock* the jury sent a note to the judge to the following effect:

> We are satisfied that the defendant, though he did not want to cause serious harm, knew that it was probable that his act would cause serious bodily harm. We are not sure whether a probability is enough for murder. Please explain.

One may alter the question by substituting 'highly probable' for 'probable'. Or one may imagine the jury asking whether a foresight of a 'substantial risk' that the defendant's act would cause serious injury was enough. What is the judge to say to the jury? *Hancock* does not rule out an answer by the judge but it certainly does not explain how such questions are to be answered. It is well known that judges were sometimes advised to deflect such questions by the statement that 'intention' is an ordinary word in the English language. That is surely an unhelpful response to what may be a sensible question. In these circumstances it is not altogether surprising that in *Nedrick* the Court of Appeal felt compelled to provide a model direction for the assistance of trial judges.

In *Nedrick* the appellant poured paraffin through the front door of a house and set it alight. In the fire a child died. The facts were remarkably similar to those in *Hyam*. The trial judge in *Nedrick* framed his direction in terms of foresight of a high probability that the act would result in serious bodily injury. Lord Lane observed (at 1028C–F):

> When determining whether the defendant had the necessary intent, it may therefore by helpful for a jury to ask themselves two questions. (1) How probable was the consequence which resulted from the defendant's voluntary act? (2) Did he foresee that consequence?
>
> If he did not appreciate that death or serious harm was likely to result from his act, he cannot have intended to bring it about. If he did, but thought that the risk to which he was exposing the person killed was only slight, then it may be easy for the jury to conclude that he did not intend to bring about that result. On the other hand, if the jury are satisfied that at the material time the defendant recognised that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result. …
>
> Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.
>
> Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen. The decision is one for the jury to be reached upon a consideration of all the evidence. (My emphasis added)

… the underlined passage contains the critical direction. The effect of the critical direction is that a result foreseen as virtually certain is an intended result …

The Crown did not argue that as a matter of policy foresight of a virtual certainty is too narrow a test in murder. Subject to minor qualifications, the decision in *Nedrick* was widely welcomed by distinguished academic writers: see J C Smith (1986) Crim LR 742–744;

Glanville Williams, *The Mens Rea for Murder: Leave It Alone*, 105 (1989) LQR 387; J R Spencer, [1986] CLJ 366–367; Andrew Ashworth, *Principles of Criminal Law*, 2nd ed (1995), p 172. It is also of interest that it is very similar to the threshold of being aware 'that it *will* occur in the ordinary course of events' in the Law Commission's draft Criminal Code: compare also J C Smith, *A Note on Intention* (1990) Crim LR 85, at 86. Moreover, over a period of twelve years since *Nedrick* the test of foresight of virtual certainty has apparently caused no practical difficulties. It is simple and clear. It is true that it may exclude a conviction of murder in the often cited terrorist example where a member of the bomb disposal team is killed. In such a case it may realistically be said that the terrorist did not foresee the killing of a member of the bomb disposal team as a virtual certainty. That may be a consequence of not framing the principle in terms of risk taking. Such cases ought to cause no substantial difficulty since immediately below murder there is available a verdict of manslaughter which may attract in the discretion of the court a life sentence. In any event, as Lord Lane eloquently argued in a debate in the House of Lords, to frame a principle for particular difficulties regarding terrorism 'would produce corresponding injustices which would be very hard to eradicate': Hansard (HL Debates), 6 November 1989, col 480. I am satisfied that the *Nedrick* test, which was squarely based on the decision of the House in *Moloney*, is pitched at the right level of foresight.

…

The disposal of the present appeal

It follows that the judge should not have departed from the *Nedrick* direction. By using the phrase 'substantial risk' the judge blurred the line between intention and recklessness, and hence between murder and manslaughter. The misdirection enlarged the scope of the mental element required for murder. It was a material misdirection. At one stage it was argued that the earlier correct direction 'cured' the subsequent incorrect direction. A misdirection cannot by any means always be cured by the fact that the judge at an earlier or later stage gave a correct direction. After all, how is a jury to choose between a correct and an incorrect direction on a point of law? If a misdirection is to be corrected, it must be done in the plainest terms: Archbold, *Criminal Pleading, Evidence and Practice*, 1998, para 4–374.

That is, however, not the end of the matter. For my part, I have given anxious consideration to the observation of the Court of Appeal that, if the judge had used the phrase 'a virtual certainty', the verdict would have been the same. In this case there was no suggestion of any other ill-treatment of the child. It would also be putting matters too high to say that on the evidence before the jury it was an open-and-shut case of murder rather than manslaughter. In my view the conviction of murder is unsafe. The conviction of murder must be quashed. …

[In a separate judgment, **Lord Hope** agreed with **Lord Steyn**. **Lords Brown-Wilkinson**, **Nolan** and **Hoffman** agreed with **Lords Steyn** and **Hope**.]

4.45C Winner

(1995) 79 A Crim R 528
New South Wales Court of Criminal Appeal

Kirby ACJ:

On 3 November 1993, Mr David Winner (the appellant) was convicted by Ireland J upon two counts of an indictment charging him with murder and with stealing a motor vehicle.

The trial of the appellant took place before Ireland J, sitting without a jury, pursuant to an election by the appellant under the Criminal Procedure Act 1986, s 32(1) to which the Crown consented.

When arraigned, the appellant pleaded not guilty to the charge of murder but guilty to manslaughter. He also pleaded guilty to the charge of car stealing. The Crown declined to accept the plea of guilty to manslaughter in discharge of the indictment …

The appellant has appealed to this court both against his conviction of murder and against the sentence imposed. As to the conviction of murder, the appellant contends that it was vitiated by legal errors and was unsafe and unsatisfactory …

The facts of the case were in large part undisputed. On 3 April 1992 the appellant and his brother consumed a large quantity of alcohol at the Oasis Hotel, Lansvale. They were unable to find transport home. They decided to steal a Holden motor vehicle parked not far from the hotel. On the way home, the appellant was observed at traffic lights at the intersection of Cabramatta Road and the Hume Highway when he brought the vehicle to a screeching halt. This manoeuvre drew the attention of passengers in a vehicle in the adjacent lane to the appellant. He was proceeding in the near side lane of a road which had three lanes. When the lights at the intersection turned green, the appellant drove off at high speed.

Meanwhile, Mr Benjamin Cox was riding his bicycle in the gutter of the Hume Highway not far from the intersection where the appellant had stopped temporarily at the lights. Mr Cox's cycle was closely followed by one ridden by Mr Justin Ross. The boys had spent an evening at a friend's place listening to music. After midnight they set out to return to their homes which were not far away. They were proceeding in single file about a metre and a half apart. They had crossed the main road, Mr Ross keeping his eye on the wheel of the cycle being ridden by his friend, Mr Cox. They were then proceeding in the same direction as the appellant along the Hume Highway. But as the appellant took off from the traffic lights, the vehicle in which he was travelling suddenly veered at approximately 45 degrees across the road to the left. It passed close to Mr Ross but did not strike him. However, it then struck Mr Cox at a point adjacent to the front left headlight of the appellant's vehicle …

Mrs Schlammerl said that at no time did she see brake lights come on at the rear of the appellant's vehicle. She observed that one of the vehicle's tail lights was not functioning; but she could not remember which one. Her description of the manoeuvre of the vehicle which the appellant was driving was that of a sharp swerve.

Mrs Schlammerl's evidence was confirmed by a number of other eye-witnesses. Although there were various disputes at the trial, in this court there was no contest that the vehicle driven by the appellant took off from the lights and suddenly turned across two lanes of traffic at about 45 degrees, coming close to Mr Ross and striking Mr Cox.

As a result of the collision and of his injuries, Mr Cox was killed …

The appellant drove his brother home and later moved the stolen car to a nearby street where he abandoned it. As a result of police discussions with the driver and passengers in the vehicle which had stopped at the lights adjacent to the appellant, immediately prior to the collision, an Identikit photograph was prepared by police and circulated. As a result of information received, the appellant was interviewed on 15 April 1992. He denied any involvement in the incident. He was again interviewed on 30 June 1992. Initially, he denied involvement. But later he admitted to police:

> OK it was me. I'll tell you what happened. I was going to give myself up before … It was an accident. I didn't mean to hit him, I didn't mean to kill him. I had a lot to drink. I was very drunk.

The following answers were contained in the police record of interview which was recorded on video tape:

> Q86. When did you first become aware that they [the boys on bicycles] were in front of you on the roadway? A: When I was right on top of them.
>
> Q87. Are you saying that you veered across the road and hit the boys? A: No, what I am saying is that I was in the middle lane and the car was — I sort of drifted and I was trying to keep it straight on the middle lane. Then I noticed the two boys, they were side by side, they were sort of like drifting too with the bikes, or they were racing each other sort of thing and then my car was here and they were there and I thought, 'Oh shit, I'm a bit close' and I was trying to keep it in the lanes and then it hit him …

…

[His Honour noted other Crown evidence: an unsworn statement of the appellant and in particular, evidence of Mr Burt, a long-term acquaintance of the appellant, who gave evidence of how he and the appellant had previously engaged in baulking. (This involved driving up close to pedestrians and trying to scare them.) Upon dismissing the first two grounds of appeal, his Honour proceeded to deal with the third ground.]

Safety of the conviction

The appellant then argued that it was not open to Ireland J to be satisfied beyond reasonable doubt that the appellant was guilty of murder. It was suggested that the conviction which his Honour entered was unsafe and unsatisfactory and should be set aside by this court.

Presented with this familiar argument, the court's duty is clear. It must ask itself whether 'it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'. See *M* (1994) 181 CLR 487; 78 A Crim R 213. By analogy, in this appeal, it is the duty of this court, in reviewing the whole of the evidence, to judge whether it was open to Ireland J to find as he did …

In this case, it was urged for the appellant that such a significant possibility was established. True, he had acted in a very wrong way. True also his reckless driving had caused the death of Benjamin Cox. But he was not a murderer for he had not intended Mr Cox's death or to occasion grievous bodily harm. He was guilty of manslaughter, not murder.

In the attack on the safety of the verdict, many of the arguments which have been recounted above were repeated for the appellant. Many of them rested upon the suggestion (contrary to the appellant's case at the trial) that the true interpretation of what had occurred was that the appellant had endeavoured to 'baulk' the cyclists, but his endeavour had gone tragically wrong.

…

Because it is impossible for any court, judge or jury, to actually enter the mind of an accused person and search for his or her intent at the critical time, it is inescapable that the forensic process by which intent is judged (when it is denied) will address the objective facts from which an inference of intention may be derived. This is why it is often said that a person's acts may provide the most convincing evidence of intention. In *Richard III*, Shakespeare suggested that it is by acts that the observer straightway shall know the heart. So it is by acts that a court straightway may know the solution to the riddle of intention required by the criminal law. If it were otherwise intention, absent acknowledgment or reliable confession, could scarcely ever be proved.

…

The mind hesitates to accept a conclusion that a person driving a powerful and fast-moving motor vehicle would deliberately swerve across a lane of traffic, strike a cyclist with fatal or certainly grievous consequences, although he was a total stranger, and then depart without applying the brakes or even pausing for a moment. Such conduct is so callous that it seems unacceptable in humanity. Yet in this case there is objective evidence that the appellant did swing his vehicle, without reason across more than one lane of traffic, struck the deceased and took off without ever apparently applying his brakes. The absence of brake signals confirms the last statement. This too was affirmed by the objective witnesses whom Ireland J believed.

The case of the appellant at trial relied on a mechanical defect in the vehicle combined with alcohol consumption. The mechanical defect argument was rejected and is not pressed in this court. The effect of the alcohol consumption was found to have been exaggerated. It was not urged in this court that alcohol alone deprived the appellant of the capacity to form the requisite intent. These conclusions drove the appellant to the suggested exculpation of 'baulking' which he had expressly denied at the trial. For the reasons already given, I do not find the analogy persuasive. The sudden sharp movement of the appellant's car had all the hallmarks of a deliberate act. Combined with the absence of any braking or slowing of the vehicle when the impact occurred, I consider that Ireland J was entitled, on the objective evidence alone, to infer the requisite intent. What confused state of anger, rage or excitement caused the appellant to do such an act to a total stranger cannot be fathomed. But it happened. And the objective evidence supports and warrants the conclusion, beyond reasonable doubt, that it happened as an intentional act on the part of the appellant who had control of the motor vehicle which was the instrument of the act …

[His Honour dismissed the appeal against the conviction. **Newman** and **Barr JJ** agreed with his reasons.]

4.46C Gould & Barnes

[1960] Qd R 283
Queensland Court of Criminal Appeal

Philp J: The appellants were convicted of the murder of a pregnant woman who admittedly died as the result of an attempt by the appellants to abort her.

The appellants intending an abortion, by means of a douche introduced into the victim's vagina and uterus of a liquid produced by boiling a mixture of glycerine, Dettol (a well-known antiseptic) and Surf (a washing powder containing irritant substances). The liquid caused a necrosis of the uterine wall and so entered the victim's bloodstream and caused her death …

Under s 302(2) [now 302(1)(b)] no intent or knowledge is involved. The Crown must prove only —

1. An unlawful killing.
2. That the act causing death was one in fact likely to endanger human life, and
3. That the act was done in the prosecution of an unlawful purpose.

Section 302 specifically provides that under this head of murder 'it is immaterial that the offender did not intend to hurt any person' …

[I]t was argued that the act done by the appellants constituted their unlawful purpose so that they could not be guilty of murder under s 302(2). *Hughes v R* ([1951] 84 CLR 170) was relied on. In that case the appellant had killed a woman by repeatedly assaulting her. The trial judge directed the jury on s 302(1) and there certainly was clear evidence of an intent to do grievous bodily harm; but he also directed that the killing could be murder under s 302(2). The High Court held that s 302(2) applied only when the dangerous act did not itself constitute the unlawful purpose; otherwise of course s 302(2) would make a man guilty of murder if, without any intent to do grievous bodily harm, he killed by an unlawful act which, in fact, was likely to endanger human life. As appears from the report in ([1951] St R Qd 237) the point was raised in the Court of Criminal Appeal but counsel did not pursue it.

But in the instant case there was a supervening unlawful purpose apart from the act which killed — the purpose being the unlawful attempt to abort and s 302(2) applies to such a case. …

_ There emerges from none of the matters with which I have dealt any ground for interfering with the verdict but there is a matter of misdirection which amounts to a substantial miscarriage of justice although it arises from an error of the judge which apparently went unnoticed at the trial. Certainly his Honour's attention was not called to his error.

A Doctor Davison swore that in his opinion the act of the appellants was likely to endanger human life but the evidence of Doctor Hayes — the Government Medical Officer — was as follows:

> Assuming that the fluid that you saw removed from the girl's uterus consisted of a mixture of Dettol, glycerine and a soap powder such as Surf, can you express an opinion as to whether the introduction of such a mixture into the uterus of a pregnant girl would be an act likely to endanger human life?
>
> Yes. It would not be normal medical procedure. I think it would tend to endanger life.

Evidently his Honour understood this evidence to mean that Doctor Hayes was of opinion that the appellants' act was likely to endanger human life and he told the jury that Doctor Davison was of opinion that the act was so likely and said 'You have in addition the evidence of Doctor Hayes who is of the same opinion'.

I think that Doctor Hayes, who is an experienced witness as well as an experienced medical man, was speaking by the card when he gave his answer and that he was not prepared to say that the act was likely to endanger human life but that it would only tend so to do. In any event the appellants were entitled to have exactly put to the jury Doctor Hayes' evidence on this vital matter.

Indeed I think it highly probable that the jury would have had a reasonable doubt as to murder if their attention had been called to the fact that Doctor Hayes would not go so far as to say that the act was likely to endanger human life. For this reason I would substitute a verdict of manslaughter for the verdict of murder. Upon the evidence the jury must have found manslaughter to which there was no available defence and in respect of which there was no available misdirection.

4.47C

Taiters

[1997] 1 Qd R 333
Queensland Court of Appeal

The court: This is a reference by the Attorney-General under s 669A(2) of the Criminal Code (Qld) (the Code). Two points of law are referred for this Court's consideration and opinion:

1. Whether when a person is charged with manslaughter it is necessary for the Crown to prove beyond reasonable doubt that an ordinary person in the position of the accused could have foreseen that death was a probable or likely consequence of his or her actions?

2. Whether when a person is charged with manslaughter it is a correct direction of law that an accused is not responsible for a death which follows from his or her actions if death was such an unlikely consequence of his or her actions that an ordinary person could not reasonably have foreseen it?

The circumstances in which these questions have arisen from the trial of the accused Taiters may be briefly stated.

On 24 December 1993 a fight occurred in the street between Taiters and a man called Cooper. Cooper suffered certain injuries and died in consequence on 3 January 1994. In the course of the fight Taiters had struck Cooper causing him to fall heavily and strike his head on the cement footpath. Cooper was taken to hospital but did not initially remain an inmate and was allowed to leave. Certain symptoms persisted and he was readmitted when it was discovered that he had a fractured skull. Contusions and swelling of the brain became apparent and notwithstanding treatment that was administered, Cooper's death followed. The present matter falls to be dealt with on the basis that Taiters caused the death. We are not concerned with the physical mechanisms that played a part following the initial injury caused.

Taiters faced trial on a manslaughter charge. The Crown led its evidence and after hearing argument the trial judge ruled that he would direct the jury that the accused should be acquitted on the basis that it was not open to the jury to be satisfied beyond reasonable doubt that the accused was guilty of the offence charged. That course being indicated by the judge, the Crown prosecutor sought the return of the indictment and entered a *nolle prosequi* …

In the argument put to us on the reference it was suggested that trial judges continue to experience difficulty in giving correct and clear directions to juries when cases arise involving the application of s 23 of the Code. We are particularly concerned with the following part of that section:

> Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of [the person's] will, or for an event which occurs by accident.

Leaving on one side the reference there made to 'omission' it is seen that attention is directed both to acts which occur independently of the exercise of the will and, separately, to events which occur by accident. A number of earlier debates upon the operation of this section have been settled by the decision of the High Court in *Kaporonovski* (1973) 133 CLR 209 and in particular the judgment delivered in that case by Gibbs J agreed in by Stephen J. The reasons there delivered by Gibbs J have acquired additional weight as a result of the pronouncement of the majority of the High Court in *Van den Bemd* (1994) 179 CLR 137; 70 A Crim R 494. There the High Court refused special leave to appeal from a judgment of this court. In refusing special leave the majority appeared content to accept the correctness of the interpretation placed upon s 23 by this court in *Van Den Bemd* [1995] 1 Qd R 401; 70 A Crim R 489

supported as it was by comments made by members of the High Court in *Kaporonovski*, particularly Gibbs J.

It is clear, then, that certain statements of principle of this court in *Van Den Bemd* will be acted upon by trial judges when, in the future, they sum up to juries. What was said in *Van Den Bemd* is of considerable importance. It should now be taken that in the construction of s 23 the reference to 'act' is to 'some physical action apart from its consequences' and the reference to 'event' in the context of occurring by accident is a reference to 'the consequences of the act'. Even if, as has been said, there can on occasion be some difficulty, in an exceptional case, in distinguishing the border line between act and event so viewed, this theoretical distinction is clear. Taking an example from *Kaporonovski* itself, the thrusting of the glass by the accused was the act and the injury to the victim's eye which constituted the grievous bodily harm was the event. A number of occurrences can as a result of the operation of one or more chains of causation follow upon the doing of an act. However, s 23 is concerned to excuse from criminal liability so the relevant event for the purpose of the section should be taken to be the one which, apart from the operation of the section, would constitute some factual element of an offence which might be charged. In cases when grievous bodily harm is charged the state of bodily harm will be the relevant event and when unlawful killing is charged, the death will be the relevant event …

The principle now established in respect of the second part of the rule appearing in the quoted words of s 23 may be taken as stated by Gibbs J [in *Kaporonovski*] at 231:

> It must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person.

In terms of what the Crown must prove to exclude the operation of the defence of accident under s 23 it has been noted that double negatives can sometimes appear in the words in which trial judges sum up and it has been suggested that they may be troublesome for juries. Such phrasing has been subject to adverse comment, see eg the observations of Stanley J in *Knutsen* [1963] Qd R 157 at 178 and the observations of this court in *Whiting; Ex parte A-G* [1995] 2 Qd R 199 at 201. In the latter case the court said:

> It is desirable in directing a jury to avoid where possible the use of a double negative, which is a form of speech favoured by lawyers rather than by ordinary members of the public.

The court then continued:

> It would no doubt be legitimate for a judge in summing up to reformulate the critical question in affirmative terms without doing injustice to the accused.

However, it was not found necessary in *Whiting* to suggest an appropriate positive form of direction such as would be consistent with the words of the statute as they now stand authoritatively interpreted.

It is possible that one observation made by this court in *Van Den Bemd* may subsequently have been misconstrued and so become the source of some of the difficulties. At 405 it was said:

> The test thus appears to be one of foreseeability of the happening of the consequence as a matter of probability or 'likelihood'.

… One question is whether the first statement quoted from page 405; 493 of *Van Den Bemd* was intended to introduce some departure from or modification of the test or was, on the contrary, meant to be no more than a neutral statement of it. It is to be noted that the Code itself contains no definition of 'accident'. In turning to provide an exact meaning of the s 23 phrase, Gibbs J did not directly and in positive form state what the Crown has to prove. Since, as has been indicated, the onus lies on the Crown, it will be called upon to exclude the excuse raised by s 23 when the evidence in particular proceedings requires the issue to be dealt with. Any judge choosing to cast the Gibbs J test in positive form will not be obliged to adhere to a particular formula, but this being said he will, of course, be obliged to put the substance of the matter correctly. It seems that the time has come for this court to attempt to state the formula in an acceptable positive form.

It is important to continue to bear in mind that under the Code we are concerned with something that is there described by the term 'accident' It is also clear that within the Code concept there is an objective element, something beyond what might have been subjectively contemplated by the perpetrator of the act in question. If it is to be an accident in the Code sense it must be not intended or foreseen by the one acting. This is one essential requirement. What is involved in the concept of subjectively 'foreseen' can be put to one side for the moment while attention is given to the further objective element.

To be accidental in the relevant sense there is the additional requirement that the event must be one which 'would not reasonably have been foreseen by an ordinary person'. Looking again at the first quoted statement by this court on the nature of the test at 405; 493 in *Van Den Bemd* the question is whether it was there intended to expound at all upon the degree of likelihood or extent of probability involved. The alternative view is that the court did not mean to make any precise statement upon necessary degrees of likelihood and probability and was intending to do no more than draw general attention to the fact that matters of likelihood and probability are involved in the notion of 'foreseeable' …

…

In undertaking the necessary analysis, it has to be said first that an event cannot qualify as an accident within the meaning of s 23 simply because a reasonable person, although regarding the consequence as being a likely outcome, would have thought it more probable that it would not happen than that it would. To conclude differently on this point would, it is suggested, involve a rejection of the concept as expounded in *Kaporonovski*. The discussion may be carried further and instances at either end of the spectrum looked at. If the outcome of some action is regarded as certain or even just more probable than not, it cannot legitimately be called accidental. Even if there is a substantial likelihood although something less than a preponderance of probability that a particular outcome will occur and the risk of the outcome is voluntarily accepted by the one acting, it should not, if it results, be called accidental. On the other hand, something which a reasonable man might think of as no more than a remote possibility which does not call to be taken into account and guarded against can, when it happens, be fairly described as accidental.

The references which have been made in the cases to 'reasonably' and 'ordinary person' in the context under discussion give an emphasis to the fact that the relevant test calls for a practical approach and is not concerned with theoretical remote possibilities. It directs inquiry to what would be present in the mind of an ordinary person acting in the circumstances with the usual limited time for assessing probabilities, this being a factor which is applicable to a great deal of human activity. However, it should not be accepted that some real risk of an outcome which an ordinary person in the circumstances would have been conscious of, can

be disregarded by the doer of an action, yet still, if it eventuates, be called accidental within the meaning of the section. In the subjective part of the expression being considered under s 23 ('an event which occurs by accident'), ie when it is necessary to consider 'foreseen' by the accused, the same degrees of likelihood will be regarded as those discussed in connection with the objective test.

By way of summary and looking at the matter from the point of view of the prosecution, it can be said that if the circumstances of the case call for the s 23 defence of accident, ie that based on the words 'an event which occurs by accident', to be excluded, the applicable onus will be sufficiently stated if the jury is told that:

> The Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome.

This casts the matter in an acceptable positive form. If this direction is given it will be desirable for the trial judge to add that in considering the possibility of an outcome the jury should exclude possibilities that are no more than remote and speculative.

Although the questions posed for the court's answer do not direct attention to all of the critical details which have been discussed, they should now be responded to:

Question No 1: No.

Question No 2: Yes.

4.48C Jackson & Hodgetts

(1989) 44 A Crim R 320

Queensland Court of Criminal Appeal

Thomas J: On 17 April 1989 Hodgetts, Jackson and Hehlen were convicted of the manslaughter of one Kennedy. The conduct relied on by the Crown could be described as amounting to a cruel or at least an ill-conceived prank played by the appellants upon a local vagrant. These are appeals by Hodgetts and Jackson against conviction.

The appeals raise questions whether the learned trial judge erred in failing to direct the jury on the question of criminal negligence or under s 23 of the Criminal Code (Qld). The only issue which his Honour left to the jury was whether the appellants' acts caused Kennedy's death. If they answered that question 'yes' they were told they should convict the respective appellants of manslaughter.

The appellants were butchers at the Cleveland shopping centre. Kennedy was a vagrant given to rummaging in rubbish bins in the area. The appellants thought it would be amusing to add some meat preservative to a partially filled can of Coca-Cola and leave it near a rubbish bin where Kennedy might consume it. The appellants had themselves been the victims of pranks in which foul tasting meat preservative had been administered to them. Hodgetts' belief was that victims of such pranks always spat it out because of the foul taste, that it left a bad taste in the mouth, and 'if you get enough of it, it gives you the shits'. He had not seen anyone become ill after drinking it. He had the idea of 'trying to give him diarrhoea so that he'd stop hanging around'. Jackson, who had had some of it forced down his throat when he was an apprentice, found that it made him cough, burnt his nose and made him feel like vomiting. He said he drank a lot of water after the event and he had felt sick for a few days.

Hodgetts and Jackson poured a quantity of the meat preservative (which contained sodium metabisulphite) into a half full can of Coca-Cola. Hodgetts said that they put about an egg cup full of preservative into it. Other evidence suggests that more than this might have been added, but at all events, a significant quantity of preservative was added. There was however no warning label on the preservative container suggesting that it was dangerous for human consumption. Indeed the substance was supplied so that it could be added (in controlled quantities) to meat and sausage with a view to human consumption. It was freely available to and used by butchers throughout the community in 4-and-a-half litre cans.

The appellants and Hehlen considered it likely that if the can were placed near the bin Kennedy would start to drink it in the course of his scavenging. They expected him to get a bad taste and spit it out, and thought that this might discourage him from such activity in the future. They also thought they might get a good laugh out of it. Hehlen placed the can, with a straw in it, on the side of the bin.

They were correct in believing that Kennedy would drink it. However, he did not spit it out. He consumed the contents of the can. They still did not think it was particularly dangerous although they respectively knew that it could produce some physical consequences such as diarrhoea or a feeling of nausea. Kennedy went away and died three hours later.

Unbeknown to the appellants, Kennedy was in a particularly vulnerable condition. He was in an advanced state of coronary artery disease and he suffered from emphysema. The evidence of Dr Ansford was that the ingestion of the chemical substance caused the death. He could not 'absolutely' exclude the possibility of death from a spontaneous heart attack, but gave a number of reasons for concluding that death was due to ingestion of sodium metabisulphite. It is perhaps surprising that no evidence was called contrary to Dr Ansford's opinion. However, it was left uncontradicted …

In a case like the present it is erroneous to look at ss 291 and 293 in isolation from Ch 27 of the Code. If one applies these sections in isolation to the evidence capable of showing that the appellants 'caused the death of another', s 293 would 'deem' the appellants to have killed Kennedy. This indeed was the basis on which the trial was conducted. However, for reasons which will emerge, it is not appropriate to deal with the question of causation separately from the question of criminal liability under ss 289 and 291. The ratio of *Evgeniou's* case is that 'in a case to which s 289 applies, that is to say in a case where what is alleged is death resulting from failure on the part of a person in charge of or in control of a thing that, carelessly used, may endanger life to use reasonable care or take reasonable precautions as required by s 289, liability has to be determined by reference to ss 289 and 291 and without resort to s 23': per McTiernan and Menzies JJ (at 510, col II); per Taylor J (at 511, col I); per Owen J (at 513, col II). Further, unless he is in breach of his duty under s 289, '*he is not to be deemed to have killed* … and no authority, justification or excuse by law as provided by s 291 [is] needed' (at 510) (my emphasis). This is premised in part on the view that 'unless the appellant omitted to use reasonable care or take reasonable precautions to avoid such danger, he did not fail to observe or perform the duty imposed upon him by s 289 which, in the circumstances of the case, was the only relevant duty' (at 509). These conclusions followed their Honours' analysis of Ch 27 of the Code and the perception that in this area it is only the breach of a duty imposed by such sections that is to be regarded as giving rise to criminal responsibility. Such a view is amply supported by *Callaghan* at 119.

The view that in such a case one starts simply with ss 291 and 293, determines if the accused 'killed' the victim, and then, without any consideration of the question of negligence concludes that the accused is guilty of manslaughter unless 'excused' by s 23, is not open …

…

It is clear that in cases falling under s 289 (which embraces most but not all conceivable cases depending upon proof of criminal negligence), a separate set of sections and considerations apply, virtually in a different stream from those which apply to other cases involving death or harm through personal violence …

The principles may be summarised:

1. In cases to which s 289 applies:

(a) The jury may not convict unless satisfied that criminal negligence has been proved: *Callaghan*; *Evgeniou* and *Scarth*.

(b) Appropriate directions upon the nature of proof of criminal negligence are not well-established: *Bateman* (1925) 28 Cox CC 33; 19 Cr App R 8; *Callaghan*; *Evgeniou* and *Miller* [1962] Qd R 594 at 599. They require, *inter alia*, recklessness involving grave moral guilt.

(c) No defence is open under s 23: *Evgeniou*; *Callaghan*; cf *Young* [1969] Qd R 417. The gist of the available 'defence' will be that any breach of duty falls short of the high standard of negligence necessary to constitute a 'crime against the state' deserving of punishment. The available submissions on this issue are in no way inferior to or less effective than those which could be made if s 23 were available. For instance, in a case in which s 23 was available, the jury might be told that the accused would not be criminally responsible if 'the event' was a consequence not in fact foreseen by the accused and would not have been foreseen by a reasonable person: per Gibbs J in *Kaporonovski* at 231. It is impossible to see how a jury could convict a person on the basis of criminal negligence if it saw the facts in that way. The questions entrusted to the jury in a case based on criminal negligence are classical jury questions involving ultimately the application of community standards.

(d) The law as stated in *Evgeniou*'s case is not limited to motor car cases. It applies to all cases to which s 289 applies, irrespective of the nature of the 'thing' used, and irrespective of the offence charged: *Hansen* [1964] Qd R 404; *Dabelstein* [1966] Qd R 411. The most familiar examples where convictions may result on the footing of criminal negligence will be manslaughter, grievous bodily harm, bodily harm, and wounding.

(e) Unless a failure to perform the duty specified in the section is established (that is, unless criminal negligence is proved to the jury's satisfaction) he is not held to have caused the consequences (that is, the death).

In that event the requirements of s 291 are not met, and it is unnecessary to seek justification or excuse for causing the death.

2. To what cases does s 289 apply?

The characterisation of a case as one to which the section applies may not always be easy. There is no difficulty in identifying it as applicable to the motor car cases or indeed to any case in which the accused has caused the injury as a result of his use of a means of a vehicle or form of conveyance. Equally there is no difficulty in recognising the section as inapplicable in cases involving direct personal violence by blows to the body such as in *Martyr*. The problem area emerges when weapons are involved. It is difficult to find room for its application if the victim is the target. Where the victim is not the target (such as a case involving the unintentional but negligent discharge of a firearm, or a case where it is open to take the view that the accused fired to frighten and aimed to miss, but injured) it would seem to be plain enough that s 289

is raised. In cases where different views are open on the evidence, alternative directions are necessary to cover the factual alternatives. There is nothing new in this.

There is nothing in the Code which suggests that the sections dealing with negligent acts have no application if the acts are done deliberately or wilfully with a full appreciation of the risk but an intention to avoid it. If it were otherwise a person could successfully plead when charged with bodily harm, grievous bodily harm or manslaughter arising by criminal negligence that he was not guilty of criminal negligence because although he knew of the danger and deliberately took the risk he intended to avoid the consequences.

…

The starting point of course is the words of s 289 itself. There has to be a dangerous thing. One also has to consider whether the essential case is that it was the absence of care or precaution in its use or management that did the damage. In a broad way, one would ask whether the case is essentially based on negligence or upon direct violence. Sometimes it may be useful to consider whether the contact between the dangerous thing and the victim was willed, but this cannot be the decisive test. Skylarking with motor cars may well involve some intention by a driver to damage the victim, although not as badly as happens in the event. In such a case the criminal responsibility of the accused may still be measured in terms of criminal negligence although from case to case it will be the trial judge's duty to decide whether it may reasonably be characterised in this way. If the essential Crown case is based on intention to cause harm, it will militate against the identification of the criminal acts as ones that proceeded from absence of care or precaution. When the case is not based on s 289, the accused must find his defence, if he can, in s 23.

The problem will frequently be solved by the Crown indicating or particularising that its case is or is not based on criminal negligence. This however will not prevent the ultimate presentation of alternatives to the jury if the evidence fairly leaves open alternative routes to conviction: compare *O'Halloran*, per Mack J.

In the present case the relevant 'thing' was the meat preservative. The evidence was capable of showing that it was a substance or thing of such a nature that in the absence of care or precaution in its use the life or health of someone might be endangered. It is difficult to see how it could be said that the section did not apply, or that the relevant duty was not raised in the present case. The fact that they intended a small portion to be consumed hardly removes it from the field of absence of care in the use or management of a dangerous thing. The Crown has a *prima facie* case based on criminal negligence. Other features of the case, including the belief of the appellants that Kennedy would spit it out, that he would swallow only a small quantity of it, that the substance was not dangerous, the absence of any warning of danger from the manufacturer, their belief (based on personal experience) that only mild consequences would ensue from its consumption, and many other factors all indicate that there was a highly arguable case that their conduct, although reprehensible, did not involve recklessness involving grave moral guilt, and that it did not amount to criminal negligence …

This is really a classical example of a case based on criminal negligence … Unless it could prove criminal negligence, the Crown had no case to go to a jury.

In these circumstances the accused persons simply have not had a trial on the true issue …

The convictions should be set aside and retrials ordered.

[**Ambrose** and **Derrington JJ** wrote separate judgments also allowing the appeals and ordering retrials.]

4.49C

Callaghan

(1952) 87 CLR 115, ALR 941
High Court of Australia

The court: … The question for our decision is whether, to warrant a conviction under s 291A of The Criminal Code 1913–1945 (WA), no greater degree of negligence need have been exhibited by the accused than would suffice to make him civilly liable in respect of any damage caused thereby.

The accused in the present case was charged upon indictment with manslaughter but convicted under s 291A of the crime of failure to use reasonable care and take reasonable precautions thereby causing death.

Section 291A was introduced into The Criminal Code by the Criminal Code Amendment Act 1945 (No 40 of 1945). It provides:

> (1) Any person who has in his charge or under his control any vehicle and fails to use reasonable care and take reasonable precautions in the use and management of such vehicle whereby death is caused to another person is guilty of a crime and liable to imprisonment with hard labour for five years. (2) This section shall not relieve a person of criminal responsibility for the unlawful killing of another person …

[The court discussed the trial judge's direction to the jury which in effect was that if they found a lack of care but not a gross lack of care then their verdict would be dangerous driving causing death. If, however, they thought it was gross negligence then their verdict would be one of manslaughter. This direction was at least partially based upon the differing punishments affixed to the two crimes. The court then continued:]

It certainly would appear strange that a subsequent enactment should take so closely the elements by which the Code constitutes manslaughter through negligence and turn it into a new crime of less magnitude. But much the same thing has been done in other jurisdictions and the explanation is to be found in practical rather than logical or juristic considerations …

But the question then arises what is the standard of negligence required by s 266 and s 291A? The words 'use reasonable care and take reasonable precautions' smack very much of the civil standard of negligence; yet, particularly of late, defaults involving no moral blame at all are treated as exposing the party to civil liability for negligence in respect of any damage which results. It is out of keeping with the conceptions of the purpose of The Criminal Code to regard such defaults as making the person guilty of manslaughter or the lesser crime created by s 291A. In Queensland in *R v Scarth* (1945) QSR 38, a majority of the Supreme Court, Macrossan SPJ and Stanley J, on the corresponding provisions of The Criminal Code 1899–1943 (Qld) decided that the expressions 'reasonable care' and 'reasonable precautions' should be given a well-established meaning which, in their Honours' view, they possessed in criminal law and that the distinction between criminal and civil negligence should be maintained. Philp J dissented on the ground that 'reasonable care' had been used for many years as defining the duty the breach of which supports a civil action for negligence, whereas the corresponding breach of duty required to support at common law a charge of manslaughter has been described by such epithets as 'culpable', 'gross', 'criminal'. In the Supreme Court of New Zealand the same interpretation as that adopted by Philp J had already been placed upon the provisions of the Code with reference to manslaughter by negligence: *R v Dawe* (1911) 30 NZLR 673; *R v Storey* (1931) NZLR 417.

The question obviously is one of difficulty but in the end it appears to depend upon a choice between two courses. One is to treat the omission to perform the duty to use reasonable care and take reasonable precautions as a description of negligent conduct to be applied according to a single and unvarying standard no matter what the purpose for which the description is employed. The other is to recognise that it may have different applications when it is a description of fault so blameworthy as to be punishable as a crime and when it is used to describe a basis of civil responsibility for harm that is occasioned by the omission …

In his judicial capacity Sir James Fitzjames Stephen in summing up to a jury explained as follows the neglect which may make a man guilty of manslaughter. 'Manslaughter by negligence occurs when a person is doing anything dangerous in itself, or has charge of anything dangerous in itself and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence and ought to be punished. As to what act of negligence is culpable, you, gentlemen, have a discretion, and you ought to exercise it as well as you can': *R v Doherty* (1887) 16 Cox 306 at 309.

In *Andrews v Director of Public Prosecutions* [1937] AC 576 at 583 Lord Atkin deals with the common law felony of manslaughter a little differently: 'Simple lack of care such as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied "reckless" most nearly covers the case …'

…

In Sir James Fitzjames Stephen's *History of Criminal Law*, vol 3, pp 9–11, there is a treatment of the common law in relation to killing by omission. … The author says: 'By the law of this country killing by omission is in no case criminal unless the thing omitted is one which it is a legal duty to do. Hence, in order to ascertain what kinds of killing by omission are criminal, it is necessary in the first place to ascertain the duties which tend to the preservation of life.' He proceeds to enumerate these duties. In his enumeration, he includes a duty to do dangerous acts in a careful manner, and a duty to take proper precautions in dealing with dangerous things. He deals with the question of the degree of want of care in the following passage: 'To cause death by the omission of any such duty is homicide, but there is a distinction of a somewhat indefinite kind as to the case in which it is and is not unlawful in the sense of being criminal. In order that homicide by omission may be criminal, the omission must amount to what is sometimes called gross, and sometimes culpable negligence. There must be more; but no one can say how much more negligence than is required in order to create a civil liability. For instance, many railway accidents are caused by a momentary forgetfulness or want of presence of mind, which are sufficient to involve the railway in civil liability, but are not sufficient to make the railway servant guilty of manslaughter if death is caused. No rule exists in such cases. It is a matter of degree determined by the view the jury happen to take in each particular case.' It will be seen that here as in his charge in *R v Doherty* (1887) 16 Cox 306 the author makes the word 'culpable' perform the duty which the majority of the Supreme Court of Queensland felt must be done by the words 'reasonable care and precaution' in The Criminal Code (Qld).

…

The conclusion we have formed is that the expression 'omission to perform the duty to use reasonable care and take reasonable precautions' which in effect is that of s 266 and s 291A must be regarded from the point of view of the context where it occurs. It is in a criminal code dealing with major crimes involving grave moral guilt. Without in any way

denying the difficulties created by the text of The Criminal Code, we think it would be wrong to suppose that it was intended by the Code to make the degree of negligence punishable as manslaughter as low as the standard of fault sufficient to give rise to civil liability. The standard set both by s 266 and by s 291A should, in our opinion, be regarded as that set by the common law in cases where negligence amounts to manslaughter. We, therefore, are of opinion that the direction given is wrong and that a conviction under s 291A is not warranted by a degree of negligence which is no greater than would suffice to make the accused civilly liable in respect of any damage caused by his fault.

The application for special leave should be granted. It should be treated as an appeal and the appeal should be allowed. The conviction should be set aside …

In all the circumstances we think that we ought not to order a new trial, but we ought simply to quash the conviction.

Assaults and Injuries

CHAPTER 5

THE STRUCTURE OF OFFENCES AGAINST THE PERSON

5.1 This chapter is concerned with non-fatal offences against the person. Excluded from its scope are certain offences with special characteristics such as offences of sexual violence and robbery: see Chapters 6 and 7.

5.2 The major offences fall into two broad groups. One group comprises assault and its compound offences, such as assault occasioning bodily harm. Assault and its compound offences take as their initial focus the intentional use or threat of force by one person against another. In the other group of offences, the focus is on the causation of injury, whether intentional or unintentional, by one person to another.

There can be cases in which force was intentionally used by the accused but no injury was inflicted. Conversely, there can be cases in which injury was inflicted unintentionally but by means involving criminal negligence. However, the offences often overlap in their application, with offences from both groups being potentially applicable to particular cases.

5.3 Within each group, there are hierarchies of offences, with penalties increasing as the circumstances or consequences of the violence become more serious. The lesser offences which are possible alternative verdicts when a more serious offence has been charged but not proved are listed in the Code (Qld)) ss 575–589 and Code (WA)) ss 10A–10I. See Chapter 29 on alternative verdicts, generally.

5.4 Assault is defined in the Codes s 245 (Qld)/s 222 (WA): see 5.6–5.10. Section 246 (Qld)/s 223 (WA) then provides that an assault is unlawful 'unless it is authorised or justified or excused by law'. Circumstances of justification include self-defence (see Chapter 14) and circumstances of excuse include accident (see 4.25–4.28) and provocation: see Chapter 15.

Some forms of assault must be prosecuted by indictment, others must be prosecuted summarily and yet others are dual offences that may be prosecuted either way. Maximum terms of imprisonment for some of the most common offences involving assault are listed in Table 5.1.

Table 5.1: Maximum Terms of Imprisonment for Assault and its Compound Offences

Offence	On Indictment		On Summary Conviction	
	Qld	WA	Qld	WA
Common assault	3 years s 335		3 years ss 552A, 552H	3 years if there are circum-stances of aggravation or racial aggravation, otherwise 18 months s 313
Assault occasioning bodily harm	7 years s 339	7 years if there are circumstances of aggravation, otherwise 5 years s 317	3 years ss 552B, 552H	3 years if there are circum-stances of aggravation, otherwise 2 years s 317
Serious assault (including assault on a police officer and other public officials and, in Queensland, on a person aged 60 or more)	7 years s 340	10 years, with automatic imprisonment for 9 or 6 months if the person is a police or prison officer who suffers bodily harm. s 318	3 years ss 552A, 552H	3 years s 318
Indecent assault (WA)/sexual assault (Qld)	10 years s 352	5 years s 323	3 years ss 552B, 552H (only for a guilty plea relating to a complainant aged 14 or more)	2 years s 323

5.5 In the second group of offences, the focus is on the injury caused by one person to another. The principal offences include:

- Unlawfully wounding or doing grievous bodily harm with intent to maim, disfigure, disable or do grievous bodily harm, or with intent to resist or prevent a lawful arrest or detention: punishable by up to life imprisonment under the Code (Qld) s 317 and up to 20 years under the Code (WA) s 294;
- unlawfully doing grievous bodily harm: punishable by up to 14 years' imprisonment under the Code (Qld) s 320 and up to 10 years (14 years under some circumstances) under the Code (WA) s 297;

- unlawfully wounding: punishable by up to 7 years' imprisonment under the Code (Qld) s 323 and up to 5 years (7 years if there are circumstances of aggravation) under the Code (WA) s 301;
- unlawfully causing bodily harm: punishable by up to 2 years' imprisonment under the Code (Qld) s 328 and up 7 years (20 years if there was intent to harm) under the Code (WA) s 304 — unless the matter is dealt with summarily, in which event the maximum term of imprisonment in Western Australia is 3 years.

THE DEFINITION OF ASSAULT

5.6 The common law traditionally distinguished between 'assault' as a threat of force and 'battery' as an application of force. The Codes, however, do not use the term 'battery' and the term has also fallen into disuse in the modern common law of crime. Under the Codes, the term 'assault' covers applied as well as threatened force.

5.7 Assault is defined in the Codes s 245 (Qld)/s 222 (WA). These sections establish the elements of a common assault under s 335 (Qld)/s 313 (WA). They also define assault for the purposes of compound offences such as assault occasioning bodily harm. The sections identify two forms of assault:

1. application of force;
2. attempt or threat by bodily act or gesture to apply force where 'the person making the attempt or threat has actually or apparently a present ability to effect [the] purpose'.

Force is defined broadly in the Codes as 'strikes, touches, or moves, or otherwise applies force': Codes s 245(1) (Qld)/s 222 (WA). The force used may be as light as a mere touch. The force may be direct or indirect, so that it may be applied by way of a third party, agent, device or instrument. The Codes s 245(2) (Qld)/s 222 (WA) indicate that the application of force may even be incorporeal; the application of 'heat, light, electrical fault, gas, odour, or any other substance or thing whatever' is an application of force if the degree is such as to cause 'injury, or personal discomfort'.

Since a bodily act or gesture is required for an assault by threat, words alone will not suffice. Nevertheless, the utterance of threatening words may be what gives a bodily movement the character of a threatening act or gesture. *Hall v Fonceca* [1983] WAR 309 (5.26C) provides an example of an assault by gesture. It was suggested in that case that a threat would have to create an actual apprehension of the use of force on the part of the victim. In other words, there could not be an assault by threat without the victim being aware that the threat was made.

Where threatening or menacing words are transmitted by telecommunication, offences may be committed under the Criminal Code (Cth) s 474.15 or s 474.17.

5.8 In *R v Secretary* (1996) 5 NTLR 96 (5.27C), it was held that the requirement for actual or apparent 'present ability' to effect a threat does not mean that the victim must apprehend immediate personal violence. The threat may be of future violence. It was held that: 'The reference in the section to "present ability" means in this context, an ability, based on the known facts as present at the time of the making of the threat, to effect a purpose at

the time the purpose is to be put into effect.' On this interpretation, 'present' refers to the time when the assessment of ability is made and not to the time when the threat is to be carried out.

It was also held in *Secretary*, above, that a person who makes a threat of future violence and then falls asleep may continue to commit the assault while asleep. The question of continuing assaults is important because of its bearing on rights of self-defence against an assault: see **Chapter 14**. The accused in *Secretary* had shot and killed her husband while he was asleep. Her defence to a charge of murder was that he had threatened to kill her and that she had shot him in self-defence against an assault. The case occurred in the Northern Territory where the definition of assault is similar to that in the Codes, except that under the Criminal Code (NT) there can be an assault by threatening words alone. The court ruled that an assault may continue to be committed by a person who falls asleep after making a threat, if the ability to put the threat into effect upon awakening is evident.

5.9 Conduct constituting an assault must occur without the consent of the victim or alternatively with consent obtained by fraud: Codes s 245(1) (Qld)/s 222 (WA). Consent and fraud, in respect of assault generally, are not themselves defined in the Codes. Problems about their meanings have mainly arisen in relation to offences of sexual violence: see **6.11–6.16**. In that specific context, s 348 (Qld)/s 319(2)(a) (WA) now expressly provides that consent means consent 'freely and voluntarily given' and excludes an expression of consent obtained by such means as force, threat or intimidation. It is to be expected that a similar interpretation of coerced expressions of consent would be adopted by courts for assault generally.

There is some uncertainty as to whether any deception or fraud will invalidate an expression of consent. See **6.12–614** and *Michael v The State of Western Australia* [2008] WASCA 66; 183 A Crim R 348 (**6.28C**) for discussion of this issue in the context of sexual assault.

5.10 Consent can be implied as well as expressed: see *Horan v Ferguson* [1994] QCA 375; [1995] 2 Qd R 490 at **5.28C**. For example, a person who plays in a game, the rules of which permit physical contact, may be taken to have consented to the application of some measure of force, even though there has been no express statement to this effect. Of course, even where there is consent to some degree of force, a greater degree of force may actually be used. The assailant is then liable for the force used just as if there had been no consent at all.

THE FAULT ELEMENT OF ASSAULT

5.11 Assault by way of attempt or threat to apply force clearly requires proof of certain states of mind. It is well established that, for the purposes of criminal law, an attempt to achieve any result requires an intention to bring about that result: see **Chapter 19**. Thus, an attempt to apply force requires an intention to do so. In *Hall v Fonceca* [1983] WAR 309 (**5.26C**) it was also suggested that speaking of a threat to apply force ordinarily conveys the idea of intentional conduct. However, the intention might be to make the victim believe that there was ability and willingness to use force rather than intention actually to use it.

5.12 There is some uncertainty about whether any state of mind must be proved for an assault by way of the actual application of force.

The general principles of criminal responsibility under the Codes do not indicate that any particular state of mind must be proved. The Codes s 23(2) (Qld)/s 23(1) (WA) state that intention is immaterial unless the intention to cause a particular result is expressly declared to be an element of the offence. In the case of assault, therefore, it might be argued that the application of force could have been inadvertent.

A different approach was taken in *Hall v Fonceca* [1983] WAR 309 at **5.26C.** The court stated that there must be an intention to apply force or to create an apprehension of its application, or possibly recklessness (that is, awareness of a risk) respecting these results. This is the position at common law (see *R v Venna* [1976] QB 421; [1975] 3 All ER 788) and the court relied heavily on the common law as authority for its position. This reasoning does not sit easily with the orthodox view of code interpretation: see **1.19–1.21**. It could be reconciled with the orthodox view if 'assault' is regarded as a technical term that the Codes adopt from the common law.

5.13 With respect to consent, a conviction of assault does not require knowledge that consent was absent or even awareness of the risk of absence of consent. A mistaken belief in consent can provide a defence, but only if the mistake was objectively a reasonable one: the Codes s 24. See **Chapter 12** on mistakes of fact.

THE COMPOUND ASSAULT OFFENCES

5.14 The Codes create separate offences for assaults that have a sexual element: Code (Qld) s 352 (sexual assault)/Code (WA) s 323 (indecent assault). These offences are examined at **6.3–6.10**. There are increased penalties for sexual or indecent assaults of a particularly serious nature such as those committed when armed with a weapon or in the company of another person: s 352(2)–(3) (Qld)/s 324 (WA).

5.15 The offence of assault occasioning bodily harm is established under the Codes s 339 (Qld)/s 317 (WA). In order to obtain a conviction, the prosecution must prove not only an assault but also that bodily harm was caused. On the principles of causation, see **3.14–3.20**. There is no need to prove intention to cause bodily harm or even foresight of the possibility. If not foreseen, however, the harm must have been foreseeable. The prosecution in other words must disprove accident under the Codes s 23(1)(b) (Qld)/s 23B (WA) if that defence is in issue: see **4.25–4.28**.

5.16 It sometimes happens that an assailant intends to strike one person but misses and strikes and perhaps injures another person. The contact that actually results is different from the contact which was intended. There are special provisions making the assailant criminally responsible for murder: see **4.6**. For assault and its compound offences, however, the issue is decided in accordance with general principles respecting the defence of accident. It will usually be immaterial that contact was made with someone other than the person intended, because the foreseeability of contact and injury will encompass contact with and injury to anyone within a certain range. Nevertheless, the scope of what was foreseeable is a matter for the jury

to determine and the defence of accident should not be withdrawn from its consideration: see *R v Tralka* [1965] Qd R 25.

5.17 There is a common law rule that no person may consent to the infliction of bodily harm unless there is some justification in public policy: *R v Brown* [1994] 1 AC 212. There is no such rule in the Codes, although there is a rule that consent is immaterial to criminal responsibility for homicide: Codes s 284 (Qld)/s 261 (WA). It has sometimes been suggested that a defence of consent to assault occasioning bodily harm might also be excluded because s 246(2) (Qld)/s 223 (WA) provide that an application of force 'may be unlawful, although it is done with the consent of that other person'. However, an alternative reading is that this provision refers only to consent obtained by fraud. In *Lergesner v Carroll* [1991] 1 Qd R 206 (**5.29C**), the court preferred the view that consent can generally be a valid defence to assault occasioning bodily harm.

5.18 There are a group of offences called serious assaults: Codes s 340 (Qld)/s 318 (WA). These offences incorporate aggravating features that increase the maximum penalties. So, too, do some assaults carried out with specific intent in Western Australia: Code (WA) s 317A.

'Serious assaults' include assaults on police officers.

- The Code (Qld) s 340(b) establishes a specific offence of assaulting a police officer who is acting in the execution of his or her duty. Other paragraphs extend the offence to cover assaults on certain persons exercising legal powers or performing legal duties.
- The Code (WA) s 318(d) is framed to cover assaults upon any public officers who are performing functions of their office or employment or on account of the performance of such functions. These include ambulance officers, health professionals, firefighters and drivers of public conveyances.

In both states, the category of serious assault also applies to assaults upon persons who are assisting officers: Codes s 340(b) (Qld)/s 318(f) (WA). Assaults on officers often arise in the context of resistance to arrest. These assaults are separately specified as serious assaults: Codes s 340(1)(a) (Qld)/s 317A (WA).

In the event of a mistake about whether a person is a police officer, the Codes s 24 may provide a defence of mistake of fact to the more serious charge and result in a conviction of common assault only. The mistake must be both honest and reasonable. Moreover, there must be a positive belief and not just a state of ignorance: see *G J Coles and Coy Ltd* (**12.15C**); see also **12.10**.

The position is more complicated for mistakes about whether a known police officer is acting in the execution of his or her duty. If the mistake is a simple one of fact, there can be a defence if the mistake was reasonable. However, a mistake about the legal duties of a police officer is a mistake of law rather than a mistake of fact. Mistakes of law are generally immaterial to criminal responsibility: Codes s 22; see **Chapter 13**.

5.19 The wilful obstruction of a police officer is an alternative form of the offence under the Code (Qld) s 340(b). Obstruction involves some active conduct which makes it more difficult for the police to execute their duties. Mere failure or refusal to co-operate is not an offence: see *Rice v Connolly* [1966] 2 QB 414; 2 All ER 649. 'Wilfully' means 'intentionally' or 'recklessly': *R v Lockwood; Ex parte Attorney-General* [1981] Qd R 209 at **7.54C**. Thus, this form of the offence under the Code (Qld) s 340(b) can only be committed by persons who are aware their actions will or may obstruct police officers.

Perhaps more appropriately, obstruction can also be prosecuted as a separate offence under the Police Powers and Responsibilities Act 2000 (Qld) s 444; Code (WA) s 172.

FORMS OF INJURY

5.20 The Codes refer to several forms of injury, some but not all of which are given statutory definitions.

1. 'Bodily harm' is defined in the Codes s 1 as any bodily injury which interferes with health or comfort. In *Lergesner v Carroll* (5.29C), above, Shepherdson J observed that the definition was broad enough to cover a black eye or a bloodied nose received in a fist fight. The Code (WA) s 1(4)(a) extends the definition to include 'a disease which interferes with health and comfort'. In *R v Scatchard* (1987) 27 A Crim R 136, the Western Australian Court of Criminal Appeal held hurt or pain without injury is not bodily harm.
2. 'Grievous bodily harm' is defined to include any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health: Codes s 1. The severity of the injury is to be assessed at the time of its infliction and without reference to any expected results of medical treatment. This rule has now been given statutory recognition in the Code (Qld) s 1 which includes the phrase 'whether or not treatment is or could have been available'. The rule was explained in *R v Lobston* [1983] 2 Qd R 720 and has been followed in Western Australia.

   - The definition in the Code (Qld) s 1 includes 'serious disfigurement' and 'the loss of a distinct part or organ of a body'. In *R v Stuart* [2005] QCA 138 at [25], it was said: 'The loss of a tooth is sufficient to constitute grievous bodily harm.' The definition does not, however, cover diseases.

   - The definition in the Code (WA) s 1(4) includes a 'serious disease'; 'serious disease' is defined in s 1(1).

   The term 'likely' has been held to mean 'a substantial — a 'real and not remote' — chance regardless of whether it is less or more than 50 per cent: see 4.19 and, also, the comments about the uncertain status of this test.
3. 'Wound' is not defined in the Codes. At common law, wounding involves breaking or penetration of the skin. For this purpose, the skin includes the covering of a cavity that is contiguous with the outer skin of the body, such as the mouth. Bruising is not sufficient; nor is a surface scratch. It must be a break of the whole skin including the underlayer. See *Jervis v R* [1993] 1 Qd R 643; *R v Da Costa* [2005] QCA 385 at [3], [33].
4. 'Maim' is also not defined in the Codes. At common law, maiming means inflicting an injury which interferes with a person's fighting capacity. Thus, the loss of a hand would constitute a maiming, but not the loss of an ear.
5. 'Serious disease' is defined as a disease of such a nature as to endanger (or be likely to endanger) life or to cause (or be likely to cause) permanent injury to health: Codes s 1. In Queensland, the definition is extended to cover causing or being likely to cause loss of a distinct part or organ of the body or serious disfigurement (thus paralleling the definition of 'grievous bodily harm', see above).

- The Queensland Code expressly states that the seriousness of the disease is to be assessed as 'if left untreated'.
- The Western Australian Code is also likely to be interpreted to mean that the seriousness of the disease is to be assessed as if left untreated, by analogy with the interpretation of the term 'grievous bodily harm'.

LIABILITY FOR INJURY

5.21 There are a number of offences (in addition to assaults occasioning bodily harm) that focus on the causation of injury rather than the use of force. The primary point of differentiation between them is the severity of the harm. There are separate offences for various degrees of injury, each with escalating penalties: see 5.5. There are intentional offences in the Codes s 317 (Qld)/s 294 (WA). Less serious are offences without specific intention: s 320 (Qld)/ s 297 (WA) (unlawfully causing grievous bodily harm); s 323 (Qld)/s 301 (WA) (unlawfully wounding); s 328 (Qld)/s 304 (WA) (unlawfully causing bodily harm).

These offences generally require proof that an injury was caused by the accused. On the principles of causation, see 3.14–3.19. Omissions as well as acts can establish the offences if there is a breach of a duty of care under the Code ss 285–290 (Qld)/ss 262–267 (WA). The same general conditions of liability for omissions apply to all offences against the person: see 3.7–3.13.

In Western Australia, the offence of unlawfully causing bodily harm extends to acts which are likely to endanger the life, health or safety of any person: s 304(1)(b) (WA). Provision is made for increased penalties if the harm or endangerment is intentional.

5.22 It has been held that 'unlawfully' in these offences simply seems 'prohibited by law' or 'not excused': *Houghton v R* [2004] WASCA 20; (2004) 28 WAR 399 (5.31C), at [121]. There are two main ways in which the causation of bodily harm can be unlawful: either by involving intentional violence or by involving criminal negligence: see 4.21–4.24 on the distinction for manslaughter. The same principles apply to non-fatal offences based on the causation of bodily harm:

- Where liability is based on intentional violence, the harm must have been foreseen or at least foreseeable in order to defeat a defence of accident: Codes s 23(1)(b) (Qld)/s 23B(2) (WA).
- Where liability is based on inadvertent negligence, the general conditions for criminal liability based on negligence must be met: Codes ss 285–290 (Qld)/ss 262–267 (WA); *R v BBD* [2006] QCA 441; [2007] 1 Qd R 478 at 5.30C.
- Divergent views have been expressed about whether a person's own body, or part or fluids thereof, can be a dangerous 'thing' for the purposes of the Codes s 289 (Qld)/s 266 (WA): see 4.33.

5.23 The offence under the Codes s 317 (Qld)/s 294 (WA) is a complex one, comprising several forms and involving different relationships between the conduct elements of the offence and elements of intention:

1. Where the offence takes a form such as doing grievous bodily harm with intent to do grievous bodily harm, the fault element matches the conduct element. The intent which has to be proved is the intent to do that which has been done.

2. Where the offence takes a form such as wounding with intent to do grievous bodily harm, or doing grievous bodily harm with intent to resist arrest, the fault element is separate from the conduct element. The intent to be proved is an intention to achieve a result that lies beyond the actual conduct required, and which need not have actually occurred. Offences involving such further intentions are sometimes called offences of ulterior intent.

On the concept of intention, see 4.9–4.12. The orthodox view is that there are two forms of intention: intention as the purpose or reason for acting and intention as knowledge or foresight of a result that is a virtually certain consequence of acting: see the discussion in 4.11. Some Queensland judges have taken a narrower view of intention, restricting the concept to the purpose or reason for acting: see 4.12. This narrower view was adopted for the Code (Qld) s 317 by a majority in *R v Reid* [2006] QCA 202; [2007] 1 Qd R 64 at 5.32C.

5.24 It is possible that the consent of a person upon whom injury is inflicted is not a defence to any of the offences which take the causation of injury as their focus, even though consent would be a defence to an offence of which assault is an element: see 5.17, and see *Lergesner v Carroll* at 5.29C. There is a common law rule to the effect that a person may not consent to the infliction of bodily harm unless there is some justification in public policy: see the discussion in *R v Brown* [1994] 1 AC 212. This rule cannot apply to offences of which assault is an element, because the definition of assault in the Codes s 245 (Qld)/s 222 (WA) expressly refers to lack of consent. Nevertheless, it could conceivably be invoked in relation to offences such as unlawfully doing bodily harm.

The performance of female genital mutilation is unlawful in most circumstances, regardless of consent: Codes s 323A (Qld)/s 306 (WA). Exceptions include procedures for proper medical purposes and gender reassignment.

5.25 The transmission of disease has become an increasingly important issue because of the potentially fatal impact of AIDS. The issue is treated somewhat differently in the two states:

- In Queensland, the complex offence in the Code (Qld) s 317 (see 5.5, 5.23) has been extended in two ways. First, the offence can be committed by the transmission of a serious disease (s 317(e)) accompanied by any of the range of intents specified in the section. 'Serious disease' is defined in s 1 to mean a disease likely to endanger life or cause permanent injury to health. The relevant intents include not only intent to transmit a serious disease (s 317(b)) but also intent to resist arrest (s 317(d)). Second, the offence can be committed when intent to transmit a serious disease accompanies commission of any of the range of harms specified in the section. These harms include not only transmission of a serious disease (s 317(e)) but also wounding (s 317(e)) or striking with anything capable of transmitting the disease (s 317(f)). The result of this dual formulation is that, if a disease is transmitted, transmission need not have been intended, whereas if there was intent to transmit a disease, transmission need not have occurred. Mere transmission of a disease, however, is not an offence under the Code (Qld), whatever the degree of any negligence involved in its transmission.

In *Reid* (5.32C), above, the majority upheld a conviction based on the intentional transmission of HIV, even though the narrow conception of intention as the purpose or reason for acting was adopted.

- In Western Australia, the definitions of 'bodily harm' and 'grievous bodily harm' have been extended in the Code (WA) s 1(4) to cover diseases as well as injuries: see 5.7.

This means that the transmission of a disease, either intentionally or with criminal negligence, can constitute unlawfully causing bodily harm or unlawfully causing grievous bodily harm, depending on the seriousness of the disease. If the disease is a serious one, the offence will be unlawfully causing grievous bodily harm under the Code (WA) s 297. 'Serious disease' is defined in s 1 to mean a disease likely to endanger life or cause permanent injury to health. In *Houghton* (5.31C), the conviction was quashed on appeal because the issues had not been properly put to the jury.

There was a division of opinion in *Houghton* over the scope of the duty of care respecting dangerous things under the Code (WA) s 266. Steyler and Wheeler JJ at [122]–[126] saw no difficulty in the idea of the duty attaching to seminal fluid contaminated by HIV; Murray J, however, characterised the virus itself as the relevant 'thing' and thought that it could not fall within the scope of s 266.

In addition to potential liability under the Code (WA) s 297, the complex offence under s 294 can be committed by the doing of 'an act that is likely to result in a person having a serious disease' (s 294(8)) with any of the intents specified in the section, whether or not the victim is actually infected. The intents specified in s 294 include intent to cause grievous bodily harm which, by virtue of s 1(4), includes intent to transmit a disease likely to endanger life or cause permanent injury to health. The relevant intents also include intent to resist arrest.

5.26C **Hall v Fonceca**
[1983] WAR 309
Supreme Court of Western Australia (Full Court)

Wallace J: This appeal arises out of the dismissal by the learned trial judge of the appellant's claim for damages arising out of an assault committed upon him by the respondent at the Mount Lawley Harlequin Hockey Club on 5 July 1979. As a result of the assault and the subsequent fall to the floor the appellant suffered grievous head injury. By his defence the respondent admitted the assault but contended that it was committed in necessary self-defence using no more force than was reasonably necessary in the circumstances. Particulars provided in that regard are as follows:

(a) the plaintiff first assaulted the defendant by raising both hands in a threatening manner so as to cause the defendant to fear an imminent attack;
(b) prior to the actual assault the plaintiff was behaving in an aggressive and highly provocative manner towards the defendant.

The learned trial judge after hearing evidence from both parties and their supporting witnesses upheld the respondent's defence.

The short facts are that both the appellant and respondent were members of the Harlequin Hockey Club and after training on the night of 5 July 1979 had a few drinks together. A discussion arose over the finances of the club in the course of which it clearly developed that the appellant adopted an abusive and aggressive attitude towards the respondent. In his Honour's words it then followed that:

> The defendant [respondent] rose from his chair and warned the plaintiff [appellant], telling him to 'watch it'. The defendant at the same time shook his finger at the plaintiff

> who was then turned away from him. The plaintiff turned towards the defendant and the defendant poked his right finger into the plaintiff's left shoulder. The plaintiff raised his left arm and pushed the defendant on the right shoulder at the same time telling him to 'get away'. The plaintiff's right hand was then behind his back. The plaintiff shook his left hand in front of the defendant's face. The defendant saw that the plaintiff was about to raise his right hand. The defendant apprehended that the plaintiff was about to strike him with his right hand. He swung a blow in the general direction of the plaintiff's head with his right fist. The blow struck the plaintiff somewhere on the left side of his face. To some degree the plaintiff walked into the blow but it was in any case a fairly hard blow. The plaintiff fell to the floor. It was a concrete floor covered only by a thin carpet. The plaintiff hit the back of his head on the floor and suffered the unfortunate consequence of a subdural haemorrhage in the left temporal region of the brain.

His Honour accepted the evidence of the respondent as opposed to that of the appellant. He did however not accept the respondent's evidence that the blow which struck the appellant's head was delivered in order to parry an expected blow from the appellant. Rather was he of the opinion that the respondent's blow was wildly delivered on the spur of the moment and that he did not aim the blow, but directed it intentionally to the region of the appellant's head. Again he did not accept the respondent's evidence that he did not poke the appellant in the shoulder intentionally, but did accept that the appellant turned into the respondent's poking finger.

Importantly, his Honour found that the respondent was justified in remonstrating with the appellant in the manner he described and in poking his finger: s 247 of the Criminal Code. He further found that the appellant assaulted the respondent unlawfully when he pushed him on the shoulder. His Honour went on to say:

> It is, however not this assault which the defendant [respondent] alleges is the assault against which he used self-defence. The defendant's case in court was that the plaintiff assaulted him by threatening him, and thereby causing him to apprehend immediate and unlawful violence, by making the movement which the defendant took to be preparation for a blow by the plaintiff with his right hand to the defendant.
>
> There are two issues here — the fact of threat by the plaintiff and the fact of apprehension by the defendant.

His Honour found the decision which he had to make difficult, identified the test as an objective one and went on to say:

> As to the former I conclude that although the plaintiff did not in fact intend to punch the defendant with his right hand he did move it, and that the plaintiff was by a combination of actions and attitude threatening the defendant in a manner which caused the defendant reasonably to apprehend a further assault.

His Honour then went on to deal with the issue of the force used by the respondent being no more than reasonably necessary to make effectual defence.

The first ground of appeal is that the learned trial judge erred in his finding that the conduct of the appellant immediately prior to the assault upon him constituted an assault upon the respondent for the purposes of s 248 of the Criminal Code. For the purpose of his argument Mr French has pointed to the common law definition of assault as consisting of the intentional creation in another person of an apprehension of imminent harmful or offensive

contact. See the definition in *Fleming on The Law of Torts* (5th ed, p 24) and *Halsbury* (3rd ed) par 1255, vol 38. The definition of an assault within the Code insofar as it is relevant refers to a person who threatens to apply force of any kind to the person of another without his consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose (s 222).

It is argued that because his Honour's reasons reveal that the appellant did not in fact intend to punch the respondent with his right hand, he did not address his mind to determine whether the threat made by the appellant was within the s 222 definition, that is, did the appellant possess the intent to cause apprehension in the respondent. If that be so, then of course, it would be necessary for there to be a retrial. It is conceded that the evidence to infer such a finding exists. The answer lies in the manner in which his Honour referred to the 'combination of actions and attitude threatening the defendant in a manner which caused the defendant reasonably to apprehend a further assault'. It is a fine argument but in the context of his Honour's finding that the respondent suffered apprehension I am not persuaded that he did not find that necessary element of intent in accordance with particular (a) …

Smith and Kennedy JJ: …

Section 222 contains no express reference to any particular intention with which the assailant must act, although, clearly, so far as an 'attempt' is concerned, it would seem to be obvious enough that an intention on the part of the assailant to apply force is necessarily involved (cf s 4). Furthermore, there can be no assault in the case of an attempt or a threat under the definition unless there is an actual or apparent ability to effect the assailant's 'purpose'. It would not normally be realistic to speak in terms of 'purpose' in a context such as this without there being an intention on the part of the assailant, although, in the case of a threat, the purpose which the assailant must have, or appear to have, a present ability to effect poses some difficulty, unless it be treated as the purpose conveyed by the threat (cf *R v Dale* [1969] QWN 30).

It is generally accepted that the section lays down the common law as understood at the time of enactment of the Code (see, for example, *Brady v Schatzel* [1911] St R Qd 206). At common law, the weight of opinion clearly favours the view that there must be, on the part of the assailant, an intention either to use force or to create an apprehension of the use of force on the part of the person being assaulted. That has not been of recent development. It is unnecessary to consider whether recklessness, where the assailant adverts to the consequence of his conduct, suffices for this purpose, although there is strong support for the view that it does. See generally *Russell on Crime* (12th ed), p 652; Smith and Hogan, *Criminal Law* (4th ed), p 353; *Tuberville v Savage* (1699) 1 Mod 3; 86 ER 684; *Wood v Bowron* (1866) LR 2 QB 21 at 30; *MacPherson v Brown* (1975) 12 SASR 184 at 188–9, 199–200, 212; *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439; *R v Venna* [1976] QB 421 and *Logdon v DPP* (1976) Cr L Rev 121 …

Although the authorities are surprisingly sparse in this area, we accept that an intention on the part of the assailant either to use force or to create apprehension in the victim is an element in an assault. Macrossan SPJ apparently had no doubt that the relevant intention on the part of the assailant was necessary to constitute an assault under the Code (see *R v McIver* (1928) 22 QJPR 173 and see also *Fogden v Wade* (1945) NZLR 724 at 728).

The question which then arises is whether the learned trial judge did proceed upon this basis in concluding that there was an assault, or whether he regarded it as being sufficient if there was simply some act of the appellant causing in the respondent reasonable apprehension of the application of force to him, whatever the intention of the appellant may have been.

The relevant passage in the judgment is quite short. His Honour said:

> … I conclude that although the plaintiff did not in fact intend to punch the defendant with his right hand he did move it, and that the plaintiff was by a combination of actions and attitude threatening the defendant in a manner which caused the defendant reasonably to apprehend a further assault.

…

The fact that his Honour found that, when the appellant moved his right hand, he had not intended to punch the respondent is not determinative of the present case. It would have been sufficient to constitute a threat if there had been an intention on the part of the appellant to cause apprehension to the respondent. His Honour expressed his finding in terms of the Code definition, in which the requirement of the relevant intent is implicit in the word 'threatens', and, in doing so, he set out what constituted the threat, namely, a 'combination of actions and attitude'. One of the meanings given to the latter expression in the *Oxford English Dictionary* is a posture of the body proper to or implying some action or mental state. The use by his Honour of this word, particularly in association with the word 'actions', appears to us sufficiently, in the particular passage, to connote the necessary mental element. In the end, we have not been persuaded that his Honour misunderstood the meaning of the word 'threatens' in the Code definition.

No doubt it would have been preferable had his Honour made an express finding of an intention on the part of the appellant to create an apprehension in the respondent; but the manner in which the judgment was expressed no doubt reflected the way in which the case was argued before him. We are unable to accept that his Honour failed to direct his mind to the question of the appellant's intent when he found that the appellant had threatened the respondent. In our opinion, the first ground has not been made out.

Before leaving this ground, we should add that we are by no means persuaded that, for there to be a 'threat' within the Code definition, there need not be an apprehension on the part of the victim. If this were not so, there could be a threat without the victim's being aware of it. We find that a difficult proposition to accept. So far as the common law is concerned, it is the apprehension of the use of force which is regarded as being of the essence of the tort (see *Clerk and Lindsell on Torts* (15th ed), pp 663–4, *Fleming*, op cit, p 24 and see also *Russell*, op cit, p 653 and *R v MacNamara* [1954] VLR 137 at 138). Whilst it will be observed that, in contrast to the second paragraph, the first paragraph of s 248 makes no reference to any apprehension on the part of the person assaulted, it does not follow simply from this that an apprehension is not relevant to the first paragraph, for the second paragraph is only dealing with a particular type of apprehension. Moreover, although this question was not fully argued, we should not be taken as accepting that the test is an objective one …

For the foregoing reasons, we would dismiss the appeal.

5.27C R v Secretary

(1996) 5 NTLR 96
Northern Territory Court of Criminal Appeal

Mildren J: This is a question of law reserved from the consideration of the court pursuant to s 408(1) of the Criminal Code (NT).

The special circumstances under which the question of law was reserved, as stated by the trial judge, are as follows:

On 27 November 1995 the accused Helen Patricia Secretary was arraigned on the following charge: That on 20th November 1994 at Darwin in the Northern Territory of Australia you murdered Darren Robert Geoffrey Nelson contrary to section 162 of the Criminal Code.

She pleaded not guilty to that charge. She stood her trial. Pursuant to the evidence given at the trial, it was open to the jury to be satisfied as follows:

The accused Helen Secretary had been married to the deceased in a de facto common law relationship for 11 years. That relationship was a violent one. For the last 8 years of the relationship the deceased had verbally, mentally and physically abused the accused and their children. In the last couple of months of their relationship prior to the killing the deceased's violence had increased and his abuse towards the accused had grown more violent. He had threatened to kill her. In this period he had been taking drugs (probably amphetamines) by injection. The pathologist's evidence is that the deceased was a chronic drug abuser. Approximately one month before the shooting he had beaten the accused with hands and a belt to the extent that neighbours hearing the same had reported the matter to the Police. Later that day the Police attended the household and seized two of his three guns. Other assaults on the accused were committed by the deceased following which she left the household and obtained a Restraining Order against the deceased. She spent just under a week at the Women's Shelter. The deceased left the household for about a week. Upon the accused returning to her house the deceased continued to breach the Order by visiting the household and ultimately moving back in. During this period the deceased sexually assaulted the accused. On the night he moved back in permanently he assaulted the accused's sister Lynette Shields and her child. The Police attended this night but no action was taken against the deceased. The accused explained his presence to the Police. This was done under threats from the deceased. The day before the shooting the accused, her young sister Jacqueline Treves and the deceased drove some neighbours down to Yarralin. Prior to leaving the deceased assaulted the accused by threatening her with a knife. He then used a knife to cut the telephone cord in the household. He did this in order to prevent her phoning the Police. The trip down to Yarralin was relatively uneventful. The return trip was not. The deceased drove the whole distance there and back. On the way back he assaulted the accused, verbally abused her and threatened to kill her. The deceased's driving was dangerous; speeding and driving off and on the road. He stopped the car several times and left the vehicle. At one stage the accused and her sister tried to drive away but failed. During this trip the accused saw the rifle, which the deceased had earlier told her he had thrown in a bin, in the back of the vehicle. During the trip back the accused injected himself, probably with amphetamine.

Upon their return to the house the deceased was still in an aggressive mood. He was swearing at the accused and other family members. The accused's sister deliberately stayed around for fear of the accused's plight. The deceased retired to his bedroom and summoned the accused there. At one stage the deceased threatened to use the belt against the accused. He assaulted her by punching her to the head and throttling her. He then ordered her to get him a drink of water which she did and then to get his cassette player which she did. Upon her going to leave the room the accused then sat up from his bed and said the following words: 'Hurry up, because I want you to come back and tickle my back because I'm gonna have a little sleep and, when I wake up, I'm fucking (inaudible) haven't fuckin' started.'

Following those words, the accused then feared for her life. She left the room, picked up a bullet from a cabinet in the living room, went downstairs and loaded the gun which

was in the back of the car. She walked back up the stairs, walked down the hall, walked into the bedroom and saw the deceased lying on the mattress, asleep. She walked around his head and pointed the gun at his back and fired. The deceased died almost immediately. At the point when the deceased uttered his last words the accused believed that this was the ultimate threat, the deceased was really going to kill her and her life was going to end very shortly.

After all the evidence from the prosecution and the defence was in, I made the following ruling on a Crown submission that the issue of self-defence should not be left to the jury:

I considered on the evidence in this case, taken in its highest in favour of the accused, that she cannot rely on section 28(f) of the Criminal Code to contend that her shooting of the then sleeping man, Darren Nelson, was justifiable homicide.

In other words, on the evidence I consider there is no case fit to go to the jury on the basis that the Crown may fail to establish beyond reasonable doubt that this killing was not justified because the accused, when she fired the rifle at Darren Nelson, may have been acting in self defence in terms of the Code.

Following the ruling, counsel for the accused applied under section 408(1) of the Criminal Code that the question of law the subject of the ruling be reserved for the consideration of the Court of Criminal Appeal. As a consequence of the ruling, the accused was re-arraigned at the request of the defence and pleaded 'not guilty' to the murder of Darren Nelson but guilty to his manslaughter, by reason of provocation. The Crown accepted that plea in full discharge of the indictment. I then instructed the jury that the only proper verdict they could return was a verdict of not guilty to murder but guilty of manslaughter, by reason of provocation. This they did and their verdict was recorded. No conviction was formally recorded, and judgment was postponed under section 408(2) of the Criminal Code until the question reserved had been considered by the Court of Criminal Appeal. The matter was meanwhile adjourned to 10 am on 22 January 1996, for mention. The accused's bail was enlarged to that date.

The question of law reserved by the trial judge is:

Was my ruling of 1 December 1995 correct, that self-defence was not open for consideration by the jury in the circumstances of this case?

…

Simply put, Mr Wild's submission was that self-defence could never be relied upon when the victim of the homicide was asleep at the time of his death at the hands of the accused. In order to understand this submission it is necessary to examine the provisions of the Code.

Section 28(f) of the Code provides:

In the circumstances following, the application of force that will or is likely to kill or cause grievous harm is justified provided it is not unnecessary force:

(a) to (e) …

(f) in the case of any person when acting in self-defence or in the defence of another, where the nature of the assault being defended is such as to cause the person using the force reasonable apprehension that death or grievous harm will result;

(g) …

Consequently, the elements of self-defence where the application of force will kill or is likely to kill or cause grievous harm which are relevant to this case are:

1. the accused must be acting in defence of herself from an assault by the deceased;
2. the assault must have caused the accused reasonable apprehension that death or grievous harm will result to her;
3. the force used to defend herself must not be unnecessary force.

Mr Wild's contention was that as the deceased was asleep at the time the accused shot the deceased, the accused could not have been acting in defence of herself from an assault by the deceased.

'Assault' is defined by s 187 of the Code as follows:

187. DEFINITION

In this Code 'assault' means —

(a) the direct or indirect application of force to a person without his consent or with his consent if the consent is obtained by force or by means of menaces of any kind or by fear of bodily harm or by means of false and fraudulent representation as to the nature of the act or by personation; or
(b) the attempted or threatened application of such force where the person attempting or threatening it has an actual or apparent present ability to effect his purpose and the purpose is evidenced by bodily harm movement or threatening words,

other than the application of force …

Mr Wild submitted that to establish an assault in this case there needed to be evidence of the following elements:

1. a threatened application of force by the deceased to the accused without her consent;
2. the deceased, at the relevant time had an actual or apparent present ability to effect his purpose;
3. the purpose was evidenced at the relevant time by bodily movement or threatening words.

Mr Wild submitted that as the deceased was asleep at the time he was shot, there could be no evidence that he then had an 'actual or apparent present ability to effect his purpose'. In effect, Mr Wild submitted that there was a temporal connection imported into s 28(f), ie, that at the time the accused acted in self-defence, the assault was in progress.

…

In my opinion s 28(f) does import a temporal connection between the assault and the force used to defend the assault. On the facts as stated, it was open to the jury, at the very least, to find that the deceased's threat to the accused, in the circumstances of this case, was an assault; that the deceased threatened the application of force to the accused without her consent and that he had, at the time of making the threat, the apparent present ability to carry out the threat. But here the threat was in relation to the future application of force. In effect, the inference open to be drawn from the words he uttered, having regard to the appalling history of his escalating violence upon the accused, was that when he awoke he intended to kill her or cause her grievous harm. The threat was, like all threats, of future violence, and unquestionably just as there was evidence that the accused had the apparent ability to carry out his threat at the time he made it, so was the evidence sufficient to support the conclusion

that, at the time when the deceased awoke, he would *then* have had the apparent ability to carry out his threat. I consider that s 187(b), when it refers to an 'apparent present ability' must be construed by reference to the actual situation to which those words relate. If the case is one of an attempted application of force, the apparent present ability to effect the purpose is to be evident at the time of the attempt; but if the case is one of the threatened application of force, then it must be evident from the facts known at the time the threat is made that at the time when the threat is to be carried out the person making the threat will then have an apparent ability to carry out the threat. This follows from the words 'apparent present ability to effect his purpose'. If one asks the question, what was the deceased's purpose, and the answer is to kill or cause grievous harm to the accused *when he awakes*, it follows that if he would not have had the apparent ability to have effected that purpose when he awoke, the threat would be an empty one. It would be a strange result if empty threats amounted to an assault. The reference in the section to 'present ability' means in this context, an ability, based on the known facts as present at the time of the making of the threat, to effect a purpose at the time the purpose is to be put into effect. On this view of the section, there was evidence which the jury might have accepted that the deceased had assaulted the accused immediately before he fell asleep.

However this does not necessarily mean that at the time the accused shot the deceased, she was defending an assault within the meaning of s 28(f). Clearly if the assault had been completed by the time the deceased fell asleep, the accused could not have been defending that assault, but a different one — an anticipated assault which she feared may occur in the future. The first question is therefore whether the assault postulated had been completed. In my view it was open to the jury to conclude that it was not completed. So long as the threat remained, and nothing changed to remove it, the threat continued. The circumstances as to the ability of the deceased to have carried out his threat when he awoke also had not changed. I see no reason why the assault should have been regarded as spent merely because the deceased was temporarily physically unable to carry out his threat. The Code definition of 'assault', by including the threatened application of force by the use of words coupled with an apparent present ability to effect the purpose (which may be evidenced solely by the use of threatening words) rationalised, if not reformed, the common law which required, at least in the view of some, something more than mere words and which would not, apparently, countenance mere threats to inflict harm in the future: see, eg, J C Smith and B Hogan, *Criminal Law* (4th ed, 1990), pp 351–2; G Williams, 'Assault and Words' [1957] Crim LR 219; 25 A Crim R 163. These limitations have been rightly criticised by those authors, and the Code in my view employs language which makes it clear that provided the threat is one which the person making it would have the apparent ability to carry out, it does not matter that the threat is evidenced by mere words, and nor is there a requirement for an apprehension of immediate personal violence. Threats by their nature relate to future conduct. The Code sensibly places no limitations upon how immediate the threat of future violence must be. It is interesting to observe that the common law has moved away from the requirement of immediacy, favouring a more flexible approach in the law relating to duress: see *Hudson* [1971] 2 QB 202, and in the law relating to self-defence: see *Zecevic v DPP (Vic)* (1987) 162 CLR 645; 25 A Crim R 163. The lack of any specific requirement for an apprehension of immediate personal violence, so far as the Code definition of assault is concerned, reinforces the view that an assault is a continuing one so long as the threat remains and the factors relevant to the apparent ability to carry out the threat in the sense explained have not changed.

The alternative view is that the word 'assault' in s 28(f) of the Code includes a threatened future assault. However I do not think this argument is open for two reasons: first, the

definition of 'assault' includes future threats, and in my view it is preferable to confine future threatened assaults to those threats which constitute an assault as defined; secondly, to do otherwise would appear to be impossible having regard to the definition of assault in s 187 of the Code.

…

The relevant test is whether there is evidence which, if believed, might reasonably have led the jury to return a verdict of not guilty on the ground of self-defence. On the stated facts the accused believed that the deceased's last words were the ultimate threat and that he was going to kill her and her life was going to end very shortly. Having regard to the history of escalating violence perpetrated upon the accused by the deceased, I consider that it was open to the jury to have a reasonable doubt about whether or not this belief was reasonably held. Having regard to the nature of the assault, the history of escalating violence, the breach of the restraining order which the deceased had committed, and the fact that the accused was in her own home when the deceased assaulted her, and when she shot the deceased, I consider it was open to the jury to have had a reasonable doubt as to whether or not the force used was unnecessary force.

I would therefore answer the question, 'No' …

I regard the jury's verdict as a conviction even though the trial judge did not formally record it. I would quash the conviction and order a new trial …

[**Angel J** wrote a separate judgment reaching the same conclusions as **Mildren J**. **Martin CJ** dissented.]

5.28C Horan v Ferguson

[1994] QCA 375; [1995] 2 Qd R 490
Queensland Court of Appeal

Demack J: On 17 February 1994, a stipendiary magistrate found the appellant guilty of nine charges of common assault on young girls. He did not record a conviction and discharged the appellant absolutely under the provisions of s 19(1)(a) of the Penalties and Sentences Act. The appellant has appealed against the findings of guilt.

The appellant is 50 years of age and he graduated as a primary school teacher in 1963. He taught in various primary schools in Queensland, until he commenced teaching at Caravonica State School in 1988. In March 1993, a complaint was received by the police from one of the girls at the school. Investigations were made in April 1993 and these led to the appellant being charged with 10 complaints of aggravated assault, the assaults being of a sexual nature. In all, there were seven complainant girls aged from 10 years to 13 years …

The magistrate's decision

After preliminary remarks including what he had observed of the witnesses, the stipendiary magistrate quoted the relevant passage from each complainant's evidence. It will be necessary to return to these in some detail. For present purposes, it is enough to note that generally the allegation involved touching upon the complainants' buttocks.

The magistrate then said he had no difficulty with the evidence of the young complainants that assaults did occur. He then dealt with the appellant's evidence and accepted that he touched his students on a regular basis. This included the habit of patting children on the buttocks to encourage them to move in the desired direction to dismiss them and as part of his rapport with his students.

…

The central issue in the appeal is whether a common assault occurs if a teacher touches a child on the buttocks or elsewhere to encourage the child to move in a desired direction. The only specific reference to which Mr Herbert QC directed the court is in the following passage in P W Young, *Law of Consent*, 1986, p 134:

> SCHOOL TEACHERS: The heading to this section might easily have been pupils because both the school teacher and the pupil are in a relatively closed system where by reason of their relationship they consent to what goes on as a normal part of the education process. It used to be thought that the school teacher possessed a delegated power from the parent, but more modern thinking suggests that it is the relationship of master and pupil which gives the teacher his authority and by virtue of the existence of the relationship, the pupil impliedly consents to that authority, see *Ramsay v Larsen* (1964) 111 CLR 16 at 28–9.

The relation of the parties will accordingly mean that the teacher will from time to time lay hands on the pupil to guide him or her, for instance, as to how to hold a cricket bat properly or to separate pupils in some squabble. The teacher may also enforce the discipline of the school by physical means.

…

The fifth complaint was discussed more fully by the stipendiary magistrate:

> The second complaint of M, where defendant took her by the shoulders, saying 'Hey M', to use complainant's words: 'Both his hands on my shoulders and he — and goes, "hey M" and then rubs and goes down'. On hearing and observing the complainant, I find I view this interchange as more likely to be a friendly greeting on the part of the defendant. Perhaps a rub to the shoulder and then falling away of his hands when he released them.

This incident was said to have occurred on the top of the stairs into the classroom. As it has been found by the magistrate, it is in the nature of a friendly greeting which involved touching on the shoulders.

The transcript of the video recording of this complaint includes:

> GH. Oh so it was before school? Okay and what did he do to you exactly?
> MT. He came around and UI puts his hands down me.
> GH. Put his hands down you?
> MT. Yeah.
> GH. You said he put his hands on your chest is that right?
> MT. Yeah then he UI and moved down there.
> GH. How far down did he put his hand?
> MT. I just walked off.
> GH. Where abouts did that happen in the class-room?
> MT. Oh near the doorway when you walk in.

GH is one of the investigating police officers and his third question seems to have clarified the earlier answer in a way the stipendiary magistrate did not accept. In cross-examination, M agreed that the officer suggested the word 'chest'. The passage which the magistrate quoted in the passage above was given in cross-examination. M had not spoken of touching on the shoulders in the video-recorded interview. She agreed, in cross-examination, that the appellant

would touch students on the shoulder, either to congratulate them on something they had done or to direct them to go in a particular direction. The finding is of a friendly greeting.

In respect of this conviction, it cannot be said that the evidence was satisfactory. The evidence quoted from the transcript of the video recording is of a very vague touching which assumed serious significance through the words of the interviewing officer. There was no earlier complaint of the touching of the shoulders. The stipendiary magistrate, in dismissing the allegation that this assault was of a sexual nature, disbelieved the allegation in the transcript of the video recording. He placed an innocent interpretation on the gesture, calling it a friendly greeting, and then found the appellant had committed an unlawful assault.

While there is no basis in the quoted passage from *Ramsay v Larsen* to support the idea that every child required by law to attend school impliedly consents to the exercise of the teacher's authority, there is every reason to accept the concept that a child attending school tacitly consents to receiving from a teacher tactile expressions of encouragement. The traditional pat on the shoulder for a significant achievement falls within this concept. To deny this concept would be to insist that schools become sterile, unemotional and devoid of normal expressions of friendly human interaction.

The description of this touching as a friendly greeting would mean that the touching does not amount to an unlawful assault, such greeting being tacitly consented to. The finding that the assault is unlawful cannot stand.

...

The tenth complaint is described by the stipendiary magistrate in these terms:

> The final complainant is a K. Her complaint differs from the others in that she made complaint on the day of the alleged offence. K complained that defendant touched her, it seems, while she was sitting near the computer. That is, at the opposite end of the classroom to the blackboard. In her video interview she states: 'in between my legs here and up the side of my bottom and top of my leg'.
>
> There is further complaint by K that she was at the time, lying on a couch known as the sick bed, in the verandah outside the classrooms. She stated that the defendant came up to her and placed his hand on her thigh. She gave a demonstration in the courtroom on the surface of the witness box, of the tips of two fingers and them moving approximately two inches. With this demonstration, it is easy to obtain a minds-eye picture of the action complained of.
>
> It is this complaint that the prosecution seeks to rely on in today's proceedings. This is the only instance complained of which defendant states he has recollection of. He states that it was to feel the temperature of the child, as he thought from her appearance that she appeared pale and cold.

The prosecution relied only on the alleged incident on the sick bed. There had been an earlier conviction in respect of charges arising from this complainant's evidence. The conviction was set aside on the basis that the complainant had given a very different account to a teacher which had not been known by the defence at the summary hearing. So it was that the prosecution relied only on the incident on the sick bed.

The stipendiary magistrate said:

> The complaint of K involves an allegation of defendant touching her in the area of the groin, though this is not the act relied on by the prosecution. I have viewed and reviewed the video interview with the child. It shows complainant at times distressed. Her

demonstration of what occurred reveals something like a semi flat-handed touch in the area of her lower abdomen, apparently on the outside of her skirt. There is a touch to her buttock as she was leaving defendant.

It is apparent that K did not relish her interchanges with her teacher. She professes her dislike for school. Defendant describes her as an under-achiever and the impression which came through to me from the video interview is that she finds her own shortcomings in her school work upsetting. Against this background, it is not hard to understand she found defendant's touching habit distressing and no doubt his hand did reach the area complained of. However, I would hesitate to accept that this occurred intentionally or as a result of a sinister motive.

From these findings, the appellant touched the complainant's lower abdomen on the outside of her skirt with his semi-flat hand. That cannot be regarded as correction. It certainly was not an effective way of checking her temperature. It is not easy to understand what the last sentence in the above passage means.

According to the findings, the touching was gentle and for a short duration. The finding seems to be that there was no intention to offend and no sexual overtones. Given the appellant's expressed concern about the complainant's well being, the finding supports the interpretation of this application of force as a gesture intended to encourage a child who was in the sick room. This would then fall within the restricted group of cases to which a child may tacitly consent within the school environment to which reference has already been made. The finding of common assault should not stand.

Since writing the above, I have had the opportunity of reading the draft reasons prepared by the President and McPherson JA. It is appropriate that I elaborate on my reasons for asserting that a child attending school tacitly consents to receiving from a teacher tactile expressions of encouragement.

First, I used the word 'tacit', meaning 'unspoken', rather than 'implied', in order to emphasise that this 'consent' may be withdrawn by a word or, indeed, a gesture. In other words, I do not suggest that children consent to receiving prolonged or effusive expressions of encouragement. The child must be allowed to respond negatively if that is that child's wish. What is involved in this case are instances of brief, gentle touching without any element of a sexual nature.

Secondly, the kind of 'jostling' of which Goff LJ (as he then was) spoke in *Collins v Wilcock* (1984) 1 WLR 1172, at 1177, will generally fall within the protection of s 23 of the Criminal Code as an event which occurs by accident. Section 24 of the Criminal Code may also apply, in other circumstances, to jostling. In my opinion, there is no need to give 'consent' an enlarged meaning to deal with the matters his Lordship raised.

Thirdly, I accept the criticism Lord Goff made of the concept of implied consent being extracted from children, particularly primary school children. They are required by law to be at school. To imply from their presence at school that they 'consent to what goes on as part of a normal part of the education process' invites the comment made by Wilde CJ in *Case* (1850) 1 Den 580; 169 ER 381, at 382: 'Children who go to the dentist make no resistance; but they are not consenting parties' …

Fourthly, while the Criminal Code must be construed according to its terms, so that it is not legitimate to look at the antecedent law, the Criminal Code is not 'an island, entire of itself'. It is 'a piece of the continent, part of the main', that is, part of the general law. Thus when the Criminal Code uses the word 'unlawful', that does not confine the issue within the limits of the Criminal Code itself. …

Fifthly, it is in this broad area of the statutory justification of acts which are otherwise unlawful that I would place the concept of the school child's tacit consent to receiving tactile expressions of encouragement. Section 24 of the Education Act 1964 speaks of progressive primary education which has regard to the age, ability and aptitude of the child concerned. Section 12 of the Education (General Provisions) Act 1989 speaks of a program of instruction that has regard to the age, ability, aptitude and development of the child concerned and which takes account and promotes continuity of the student's learning experiences. While neither Act defines the role of a teacher in the provision of this education or instruction, ordinary commonsense requires that children be encouraged in the process of learning. That is fundamental to the learning process. Tactile expressions of encouragement are not essential but they are a common form of human expression. So, in my opinion, it is consistent with the aims of the statutory scheme for primary education to allow as justification for the appropriate, non-sexual touching of a student by a teacher, the student's tacit consent to receiving encouragement.

The appeal should be allowed. The findings that the appellant was guilty of common assault are set aside and in respect of each charge enter judgment of acquittal.

[**Demack J** held that the physical contacts identified in the other complaints were lawful exercises of a teacher's power of correction under s 280 of the Criminal Code (Qld).]

McPherson JA: I agree with the reasons of Demack J, which I have had the advantage of reading. In respect of what, in those reasons, his Honour identifies as the fifth complaint and the tenth complaint I wish to add some particular observations of my own. …
[After noting that at common law a general exception exists to the need for consent, his Honour continued:]

It is not possible to apply this rationalisation directly to Queensland because of the way in which the term 'assault' is defined in s 245 and in which Chapter XXVI of the Criminal Code is structured. Touching or applying force of any kind to a person, which at common law constitutes a battery, is in Queensland now subsumed under the general definition in s 245 of 'assault', which at common law comprises technically only threats to apply force. By s 246 assault is made unlawful and an offence, unless it is authorised or justified or excused by law. Succeeding provisions of the Code identify particular forms of authority, justification or excuse that are available. It is not possible to bring touching like that involved in the fifth complaint here or in the tenth complaint within the terms of any of those provisions.

Any attempt to solve the problem must begin with the definition of 'assault' in s 245. Touching a person is defined as assault but only if it is 'without [the] consent' of the person touched. After saying it is unlawful and an offence unless authorised or justified or excused by law, the second sentence of s 246 goes on to add that 'application of force' may be unlawful although it is done with the consent of the person touched. The precise scope of this provision continues to provoke debate: see R S O'Regan QC, 'Consents to the Assaults under the Queensland Criminal Code', (1993) 17 *UQLJ* 287; but the tentative way in which it is expressed (may be unlawful) and the fact that it refers specifically to an application of force show that it is at most only a partial qualification of the definition in s 245. In general, a touching that is not 'without [the] consent' of the person touched cannot constitute an 'assault' as it is defined in that section. The matter of consent, or its absence, is an element of the offence which it is for the prosecution to prove beyond reasonable doubt as part of its case: *Lergesner v Carroll* [1991] 1 Qd R 206; (1990) 49 A Crim R 51.

Of course, it is not strictly necessary for the prosecution to prove that element of the offence through the mouth of the complainant himself or herself. The nature and extent of the

touching or the identity of the person touched will often be such as to enable it to be inferred that it took place without the consent of that person. Indeed, in the case of a baby or a person with serious intellectual disabilities it will often be impossible to adduce direct oral evidence relevant to that issue from the 'victim' in person. The proof in those cases will almost always be circumstantial.

Even if there is affirmative testimony from the complainant saying 'I did not consent to be touched', or words to that effect, it is not necessarily decisive of the issue. The question remains whether the testimony is to be believed. Despite what the complainant may say on the subject of consent, his or her conduct may directly contradict that oral testimony. The simple activity of going where inevitably one may be touched is sufficient to invite a degree of unavoidable physical contact, however unwelcome it may be to some people. Everyone knows that, and so, in going there at all, submits to what Lord Goff says is 'generally acceptable' in the ordinary conduct of everyday life. Artificial though it may be, it is difficult to avoid the impression that the reason why touching of that kind or degree does not amount to assault is because it is inferentially consented to or accepted by everyone who does not live a hermit's existence but elects to mix with other people in society. What is meant by 'generally acceptable' is, after all, that it is generally if tacitly consented to.

It is scarcely possible to restrict the word 'consent' in s 245 to a consent that is conveyed in express words. It plainly includes consent that is tacit or implied. Just as the absence of consent may be inferred from circumstances, so too equally its presence may be inferred. Cooper J gives some examples in *Lergesner v Carroll* (at 219, 64–5). Of course, a person may actively manifest his or her dissent from being touched at all, or in a particular way, or by a particular person. Anyone who, knowing that consent has been withdrawn, thereafter touches that person does so at the risk of committing an assault. Under circumstances like those it would seldom be possible to claim an honest and reasonable belief that the complainant was consenting to being touched. Section 24 of the Code would not afford exemption from criminal responsibility for that touching or assault.

The whole question of what, legally speaking, constitutes an assault is somehow more complex from the theoretical standpoint than it ought to be having regard to the generally trivial physical consequences that are usually involved. But that is often so where the law's efforts to grapple with conduct lie along the borderline of affronts to personal dignity or intrusions on bodily privacy. What is, however, essential to the concept of assault as defined in s 245 is that it should take place 'without consent' whether express, tacit, or inferred from the circumstances.

Curiously the question whether this essential element of the offence was established in the present case seems not to have attracted attention either at the hearing of the complaints in the Magistrates Court, or on appeal before us. Specifically in the case of the fifth and tenth complaints, there is no express evidence at all, either in the tape-recorded interviews or the oral testimony, that the touching in question took place without the consent of the complainant. If there had been, it would then have been necessary for the magistrate to consider whether or not he accepted that testimony beyond reasonable doubt; and also, in the circumstances disclosed here, whether or not the appellant might not have believed on reasonable grounds that the particular complainant consented to being touched in that manner and in those circumstances. Relevant inferences were perhaps capable of being drawn in either direction; but for guilt to be established, the magistrate would have to have been satisfied beyond reasonable doubt.

It is therefore clear that in regard to those two complaints a critical element of the offence was left unproved, or, if proved at all, was never found by the magistrate as a fact. It follows

that there has been a miscarriage of justice within the meaning of s 668E(1) of the Code. It is not one that is capable of being corrected under the proviso to that subsection. The findings or verdicts of guilty against the appellant on these two complaints therefore cannot be sustained. The same defect may also affect the verdicts on the other seven complaints as well, but in their case I am content to rest my decision on the reasoning of Demack J that any 'assaults' that may have been committed were authorised, justified or excused under the provisions of s 280 of the Code.

I would allow the appeal against the findings or verdicts of guilty in the case of each of the nine complaints; set aside those verdicts; and, in respect of each of them, enter judgment of acquittal.

[**Fitzgerald P** in a separate judgment also allowed the appeals.]

5.29C Lergesner v Carroll

[1991] 1 Qd R 206
Queensland Court of Criminal Appeal

Shepherdson J: The appellant John Glenn Carroll has appealed against his conviction in the Magistrates Court at Mareeba on 25 January 1990 on a charge that on or about 27 December 1987 at Mareeba he unlawfully assaulted one Peter Lergesner and thereby did him bodily harm …

… At the time of the alleged offence both the appellant and the complainant were members of the police force stationed at Mareeba, the complainant being a Sergeant Second Class and the appellant a Constable of Police. The appellant has since left the police force.

The grounds of appeal against conviction are:

1. The decision of the stipendiary magistrate was against the evidence and the weight of the evidence.
2. The decision of the stipendiary magistrate was wrong in law in that: …
   (b) He failed or failed properly to give consideration to the issue of consent between the parties.
   (c) He failed or failed properly to give consideration to s 24 of the Criminal Code (Qld).

…

The relevant events occurred in part of the police social club area near the Mareeba Police Station. On the night in question, both the appellant and the complainant had worked together on the same shift and there had at one stage during that shift been a heated discussion between them about mangoes. At about the time the shift ended both men went to the police social club area. The evidence of the appellant as transcribed shows that the appellant followed the complainant into the club and that when the appellant walked in, the complainant was positioned 'on the end of the bar on the other side'. Certain photographs in evidence showed this bar and it seems that there was a passage between the end of the bar and a wall and that the complainant was in this passage towards the other side of the bar. The appellant walked up to a position near the complainant. The complainant then referred to a tin of money belonging to the social club and said: 'I better put this tin away. You can't trust too many people around here.' The appellant told the magistrate that he had been the subject of a previous investigation for a stealing offence at Mount Molloy of which he

was acquitted and that he took this comment by the complainant as a remark made by the complainant to antagonise him. The appellant said to the complainant: 'What do you want from me? Do you want to settle this out on the grass outside?' and the complainant said, 'No, let's settle it right here and now'. The appellant described the complainant as having said that in a forceful voice and 'We just looked eye to eye — And I didn't know what to do see I just stood there. And it was for a couple of seconds and then he said, "Well".' In evidence in chief the appellant, when asked what he did when the complainant said that, answered: 'Just an instinct — and I hit him with the left hand to the right side of his face — no — to the left side of his face.'

The appellant went on to say that he instinctively hit the appellant with his left fist and that the complainant went back halfway down against a refrigerator. The appellant then moved around the corner into the space between the end of the bar and the wall and waited for the complainant to get up 'To fight on, fight on, talk or whatever'.

I pause to say that I have now set out what on a reading of his decision, seemed to the stipendiary magistrate to be 'the immediate events to the assault'.

To continue the saga however and what I now recount is virtually agreed in the evidence of both complainant and appellant, the complainant kicked out at the appellant, the kick being directed to the appellant's groin, the appellant then punched the complainant 'a few more times' on his head and body these blows taking a few seconds and the complainant then said, 'All right you won you won' or 'That's enough you've got me beaten'. I note that in cross-examination of the appellant the following appears, in reference to the punching after the kick to the appellant's groin:

Q. And then what did you snap then you say and punched into him?
A. Yes.
Q. A matter of seconds, but you punched into him a number of times?
A. That's correct.

Now the stipendiary magistrate also had before him evidence in the form of a signed record of interview between Detective Inspector Churchill and the appellant made on 28 December 1987 (Ex 2). That record of interview contains a version of events generally according with the appellant's sworn testimony. It also shows that the appellant said that the complainant at no time punched him.

I should here say that prior to and during the hearing, the prosecutor did not furnish to the appellant or his legal advisers any particulars of the alleged assault or bodily harm — nor were any such particulars sought.

I mention lack of particulars now and not only because it will be apparent from the above history of the events that there were a number of assaults and these assaults could well have been divided into two parts — the first part when the appellant struck the complainant one blow after the complainant had said 'Well' and the two men stood looking eye to eye and the second part when the appellant struck the complainant a number of blows after the complainant had kicked out towards the appellant's groin. I shall return later to the lack of particulars.

Given the way the case appears to have been conducted, the assault with which the stipendiary magistrate concerned himself was the first blow by the complainant. In his decision the stipendiary magistrate certainly appears to have taken that view and I now set out that part of his *ex tempore* decision commencing after he decided to accept the appellant's evidence 'as far as the immediate events are concerned':

> Now Mr Carroll followed Mr Lergesner to the social club it appears to me on the evidence that the, the emotions of both officers were at that stage or had abated at that stage and there wasn't any heat in the attitude of either of them. I accept that Mr Carroll followed Mr Lergesner to the social club to more or less straighten things out and, and have both of them settle down in their own minds and hopefully proceed without any further conflict, particularly in relation to their duties as police officers. However, Mr Carroll's evidence which I feel I must accept was that, that Mr Lergesner made what was obviously some sort of insult to him at the time and I have no doubt from that that the old flame was, the flame of a couple of hours before rekindled on the instant and Mr Carroll's temper flared. Words were spoken and as I understand the evidence Lergesner said, 'Well we'll settle here and now. We won't worry about going out on to the grass'. And they've had a confrontation face to face. And that it appears to have been a, a pause. And Lergesner said in a loud voice, 'Well'. To my way of thinking in the circumstances of this case it was nothing more than an invitation to Carroll, 'If you want to fight tell me if you want to fight'. I don't think it could be claimed to be a, an invitation to immediately to start raining blows on Lergesner. Now I come to that conclusion mainly because of the interview with Inspector Churchill. In the answer to Question 5, or part of the answer to Question 5, 'I immediately thought he was calling a bluff or baiting me'. Now that falls into line with my view of what was going on and what the person would reasonably expect was going on at the time. And I feel that it was an invitation to state or indicate in no uncertain terms that he wanted to engage in a fist fight at that stage. Now to draw a parallel similar to the analogy that Mr McCreanor spoke about and that is the one where people, or two people are engaged in fighting in a boxing ring. Now and certainly there's no question that each of them have consented to the other's assault. But I'll go further and make an illustration of this particular incident that it can in my view to, to boxers coming out into the ring, receive instructions from the referee and while this is going on one of them hauling off and hitting the other. And certainly there is no consent involved in that situation. I think that there can be no suggestion that the, that Lergesner consented to that particular blow initially given to him by Carroll. I think that there's nothing in the evidence which would suggest that he would reasonably believe that that consent was being given. And was being given. And certainly on my view there's nothing in the evidence to indicate provocation or, or to indicate that we can rely on the elements of provocation as they appear in the Criminal Code. Certainly he didn't act on the sudden to any insults that he may have felt Lergesner gave him in relation to protection of money. I don't see that there's … that he can take any advantage of the provisions of the Criminal Code in respect of self-defence either. I find that the, the assault was not authorised, justified or excused by law. I find in respect of all elements the offence the prosecution has proved beyond a reasonable doubt.

… As I read the decision in *Raabe* [[1985] 1 Qd R 115] one member of the court, namely Connolly J, decided that consent is not a defence to a charge of assault occasioning bodily harm pursuant to s 339 of the Code. Thomas J expressly reserved the question and as will appear from the above extracts from the judgment of Derrington J he did not agree that consent is not a defence to a charge of assault occasioning bodily harm pursuant to s 339 of the Code. The headnote to *Raabe* as I have earlier set out is, with due respect, incorrect. It seems to me that when an issue of consent to assault arises on a charge of assault occasioning bodily harm it is for the tribunal of fact, be it a jury or a stipendiary magistrate, to decide, in respect of the assault said to have been consented to, (assuming that tribunal finds there was consent) whether the degree of violence used in the assault exceeded that to which consent had been given.

In the view which I take of the matter, *Raabe* does not decide that consent is not a defence to a charge of assault occasioning bodily harm pursuant to s 339 of the Criminal Code. I think the true view is that in some cases of assault occasioning bodily harm the prosecution will, on the evidence, have to negative consent beyond reasonable doubt, ie prove that the assault was unlawful (s 246). Each case must be looked at in the light of its own facts. I favour the view that in the case of assault occasioning bodily harm where consent to the assault is an issue and there is evidence capable of amounting to such consent the tribunal of fact in deciding whether the prosecution has proved beyond reasonable doubt that the assault was unlawful must decide whether the degree of violence to the person assaulted exceeded that to which consent was given. This view generally accords with the views of Derrington J in *Raabe*. The definition of 'bodily harm' in s 1 of the Criminal Code is such that it would encompass a black eye or a bloodied nose received in say, a fist fight. To say that consent is no defence to a charge under s 339 when the injury is say a black eye or bloodied nose cannot be correct …

The lack of particularity in the evidence as to which blow caused the bodily harm admitted by the defence and the nature of the bodily harm has caused me concern. The admission by Mr McCreanor was first made during the evidence in chief of the complainant and without any regard to the fact that there was a series of assaults by the appellant, the first being followed only after the kicking by the complainant, by a number of blows to the complainant's head and body.

To return to his decision, the stipendiary magistrate appears to have found that there can be no suggestion that the respondent consented to the first blow given him by the appellant. In saying this I should point out that the transcript reads 'There can be no question' but both parties before this court agreed that that passage should read 'There can be no suggestion'. I should add that the extract from the decision earlier quoted, contains that correction.

At that stage of his decision then, the stipendiary magistrate had considered Mr McCreanor's first submission to him and apparently found against him. I thought this finding rather hard to understand when a short time earlier the magistrate had said that when the complainant said: 'Well' — It was nothing more than an invitation to Carroll 'If you want to fight me tell me if you want to fight'. Perhaps the magistrate expected the appellant to give an oral response to that invitation before accepting and beginning to fight.

The lack of particulars as to which blow or blows caused the admitted bodily harm and lack of particulars as to the nature of the bodily harm caused by the first and subsequent blows and the concession as to that made by Mr McCreanor have helped bring about an unsatisfactory result. Given the manner in which the case was conducted, the charge contained three elements — an assault (the first blow which was admitted); that that assault was unlawful and that that assault occasioned bodily harm (which bodily harm was admitted). There was no express admission as to the nature of the bodily harm admitted by Mr McCreanor in his address and, as I read his submissions, attributable only to the first blow. Mr McCreanor had expressly argued consent as going to the unlawfulness of that first blow. The magistrate said 'that there can be no suggestion that Lergesner consented to that particular blow initially given by Carroll'. How he reached that decision is not stated. It is certain that he had no details of the nature of the admitted bodily harm caused by that first blow. Without that detail, I cannot see how he could properly consider the issue of unlawfulness of the first blow. It may be that he thought that the appellant struck the complainant without warning and that the complainant was consenting only to a fight after the appellant had orally accepted his offer. It may be that he thought the violence offered by the first blow — and there were no details of the bodily harm caused by that blow — effectively negatived any consent by the complainant and thus he found as earlier stated. It seems to me that if the magistrate

were properly to consider Mr McCreanor's first submission his first question was 'Did the complainant consent to an assault by the appellant?' and in answering that question he had to consider whether the degree of violence offered by the appellant in the first blow exceeded that to which consent was given. The lack of particulars to which I have already referred and the lack of detail in the magistrate's reasons have left me with a distinct feeling of unease about the conviction which was later expressed by the magistrate as follows: 'I find in respect of all elements of the offence the Prosecution has proved beyond reasonable doubt.'

I now turn to s 24. The stipendiary magistrate, apparently having found against Mr McCreanor on his first submission, did not then go on to consider s 24. He did not mention it at all. Mr McCreanor, in his submissions is recorded as saying:

> The provisions of s 24 alone come into play in that a person reasonably and honestly believes that a person is consenting to a fight, but mistaken in that regard, then your Worship again, if that cannot be negatived the person is entitled to the benefit of it.

The initial finding of an invitation to Carroll to tell the complainant if he wanted to fight seems to me to overlook what effect the complainant's words and attitudes may have had on the appellant. They may well have been construed by the appellant as being an invitation to fight, an invitation which did not need any verbal response. If the appellant took such a view, it may be said that he was mistaken. It seems that Mr McCreanor's submissions were directed to this very point.

In my view the stipendiary magistrate should then have considered the s 24 defence. There was evidence from the appellant mentioned in the magistrate's decision and based on the applicant's answer to question 5 of the record of interview. In the course of his decision, after having referred to a particular part of the appellant's answer to question 5, namely 'I immediately thought he was calling a bluff or baiting me' he went on to say:

> Now that falls into line with my view of what was going on and what the person would reasonably expect was going on at the time. And I feel that it was an invitation to state or indicate in no uncertain terms that he wanted to engage in a fist fight at that stage.

There was in my view evidence sufficient to leave a s 24 defence to be considered and dealt with by the magistrate. In that event the question which the magistrate should have asked himself — assuming that there were evidence that the first blow did cause bodily harm and assuming that evidence of the nature of that bodily harm had been given — was 'Can I be satisfied beyond reasonable doubt that the appellant did not have an honest and reasonable belief that the complainant was consenting to the appellant fighting him?' and in answering that question the stipendiary magistrate as a tribunal of fact would of course have to have had regard to the extent of the bodily harm caused by that first blow and decide whether or not that bodily harm exceeded the assault consented to. As I have already said, there was no evidence as to the nature of the bodily harm caused by the first blow and therefore the stipendiary magistrate's task, had he addressed the s 24 defence, was made more difficult.

The stipendiary magistrate did not address the s 24 question and in this respect he erred. The error in my view is such that the conviction should be set aside and a new trial ordered.

…

[**Cooper J** delivered a separate judgment allowing the appeal. **Kneipp J** agreed with the reasons of **Shepherdson** and **Cooper JJ**.]

5.30C

R v BBD

[2006] QCA 441
Queensland Court of Appeal

Mackenzie J:...

5 This is an appeal against conviction for an offence under s 328 of the Criminal Code 1899 (Qld). The appellant is the grandmother of the complainant and his brother. They were seven and a half and nine and a half years of age respectively at the time of the incident. They and their mother had stayed overnight at the premises where the appellant and her husband lived and also carried on a general carrier business. A small forklift had very recently been acquired for the purpose of the business. On the evening before the incident which led to these proceedings, the boys' grandfather had instructed them how to drive it and given them safety instructions over a period of about an hour. The evidence is ambiguous as to whether they actually drove the vehicle that evening. Certainly the boys' grandfather familiarised them with how it operated. The complainant's brother who was driving the forklift the next day when the incident happened, was not unfamiliar with vehicles. He had previously been allowed to drive a tractor and a motor vehicle, perhaps two or three times each, in a paddock under the guidance of his grandfather. He had also won motocross and BMX trophies.

6 On the morning of the incident, their grandfather allowed the boys to drive the forklift back and forth on the driveway. The first period of driving passed uneventfully. Later they asked their grandfather if they could drive it again, which they were allowed to do. Soon after this, their mother who was ill with the flu went and lay down. Not long before the incident, the grandfather had left in his truck. According to the appellant, when the grandfather left, she took over watching the boys. She had intended to allow them to drive the forklift for another ten minutes or so and then stop them. She was about twenty feet or more away when she was watching them.

7 According to her record of interview, the complainant was sitting in a space beside the seat where her brother, who was driving the forklift, was sitting. They were driving backwards and forwards very slowly and turning. After ten to fifteen minutes the appellant was afflicted with a stomach pain that she said necessitated her going urgently to the toilet. She said she called out that she was going inside but it appears the boys did not hear her. Up to that point, there is no evidence that the boys were acting other than responsibly in connection with the forklift.

8 While the appellant was in the toilet, something happened which ended with the complainant under the forklift. His brother ran to get a jack and eventually the complainant was pulled out. He suffered a fracture to his right sacroiliac joint and to the pubic bone and soft tissue swelling.

9 The only account of what happened came from the complainant's brother who said that before the incident happened (and inferentially when the appellant was inside the house) the complainant began jumping off the forklift, catching up and jumping on again. Just before the driver began to turn the forklift the complainant jumped off again. The driver did not actually see what happened but surmised that the complainant had fallen over and been run over.

10 The elements of s 328 relevant to this case are that:

(a) a person omitted to do an act which it was the person's duty to do;
(b) the omission was unlawful; and
(c) the omission caused actual bodily harm.

The injuries undoubtedly constituted bodily harm. There was apparently a concession that the appellant was subject to the duties prescribed in s 286 and s 289. Whether there was an unlawful omission to comply with them was the critical issue as the trial was conducted. The record shows that it was accepted by defence counsel at trial, who also appears on appeal, that the appellant had a dangerous thing, the forklift, in her charge or under her control, enlivening s 289. In the case of s 286, the focus seems to have been a failure to take reasonable precautions to avoid danger to the child's safety, and perhaps failure to remove the child from danger.

11 The prosecution particularised three respects in which it was alleged the appellant had failed in her duties. One was that she allowed the complainant to ride on the forklift driven by his brother. Another was that, while she was supervising them before going upstairs, she was some distance away. Another was that she left them unsupervised and went upstairs. The essential question is whether, on the proven facts, the alleged breaches of duty particularised, separately or in combination, amounted to criminal negligence.

12 In a case where an accused person does not have actual physical possession of the dangerous thing, whether the person has it in his or her charge or under his or her control requires careful consideration.

13 In *R v Thomas* [2002] QCA 23, it was rightly pointed out that what amounts to being in charge of or having control of a thing (in that case a motor vehicle) will vary greatly according to the circumstances of the case. The issue will always be a question of fact for the jury to determine on the facts of each particular case. This is further highlighted by the distinguishing, in *R v Thomas*, of *R v Stott and Van Embden* [2002] 2 Qd R 313 and *R v Kidd* [2001] QCA 536 on the ground that they depended on the particular and peculiar facts of the respective cases. It may be added that, in *Thomas*, the occasion and the opportunity for intervention by the appellant to modify the driver's conduct were clearly more obvious and immediate than in the present case.

14 It is unnecessary, in view of the conclusion I reach as to the outcome of the appeal to do more than make those observations about the risk in assuming uncritically that a dangerous thing is in the charge of or under the control of a person merely because the person is in a position of authority to direct the person in actual physical possession to desist from using the thing in a particular way, or at all. As *Thomas* says, the facts of the particular case are determinative.

15 Subject to that, I am in agreement generally with the reasons of McMurdo J in the sections relating to the summing up, the first ground of appeal and the second ground of appeal. It follows that the appeal must be allowed and the conviction set aside.

16 The remaining question is whether a new trial should be ordered. Where duties such as those in s 286 or s 289 are relied on as the foundation for a criminal offence, criminal negligence must be proved (*R v Scarth* [1945] St R Qd 38). That concept involves a departure from reasonable standards of care that is serious enough for the state to intervene and punish the person because he or she has behaved with so little regard for the safety of others that

the person deserves to be punished as a criminal. The conduct must demonstrate a serious departure from the standard of care that a reasonable member of the community would observe in the same circumstances. Since it involves an assessment of the standard of care a reasonable member of the public would use in those circumstances and the seriousness of the degree of departure from it by the accused, once there is evidence sufficient to reach the threshold at which criminal negligence may be left to the jury, it is a matter for the jury to decide whether the conduct was criminally negligent or fell short of the degree of deviation from proper standards necessary to prove criminal negligence beyond reasonable doubt.

17 The facts have been set out at the beginning of these reasons. Up to the time the appellant went inside to go urgently to the toilet, the boys had been using the forklift for some time. They had been behaving responsibly, as they had been taught. There was, of course, the reasonably foreseeable possibility, inherent in childhood, that one or other of them might act mischievously, but there was no sign of it actually occurring up to the time she went inside. When the accident occurred, it was primarily caused by the complainant jumping off and somehow being run over. There was nothing to suggest that the applicant intended to absent herself for longer than was necessary.

18 On those facts, it is in my view not a case where, as it was put in *R v Bateman* (1925) 19 Cr App R 8, the applicant showed 'such disregard for the life and safety of others as to amount to a crime against the state …'. In my view, while the appellant in all probability was negligent in the civil sense, the case falls short of one in which a properly instructed jury might reasonably find that she had been criminally negligent. I would therefore order that the appeal be allowed, the conviction quashed, that there be no new trial, and that a verdict of acquittal be entered.

Philip McMurdo J: …

41 The learned trial judge directed the jury as to the degree of fault which had to be proved, in terms which closely followed the Court's benchbook. Her Honour at first correctly referred to the difference between criminal and civil negligence, and told the jury that they had to be satisfied that the appellant's conduct 'so far departed from the standard of care incumbent upon her to use reasonable care to avoid a danger to life, health and safety as to amount to recklessness involving grave moral guilt deserving of punishment.' Her Honour then added that the question had two parts, which were whether the appellant had used reasonable care and, if not, whether that amounted to recklessness involving grave moral guilt deserving of punishment.

42 No challenge was made by either counsel to that direction. Indeed it plainly appears from the summing up that the appellant's counsel had already read to the jury the same passages from the benchbook. The ground of appeal concerns what happened when the jury later sought a clarification of that direction.

43 About 45 minutes after the jury had retired, they sent a note as follows:

> The jury needs to hear the three points of law regarding duty of care … performed or omitted to be performed, an act that resulted in bodily harm, did omission … required standard of care as to be regarded as 'recklessness' and direction regarding these points.

Her Honour then had typed for the jury a document which was intended to answer those questions. The document is not within the appeal record but neither counsel suggests that it is now significant. Her Honour described the document as 'essentially just extracts from the

direction'. The transcript shows that the document again repeated the phrase 'recklessness involving grave moral guilt deserving of punishment'.

44 Before the jury had returned, the appellant's counsel suggested that the jury was asking for assistance with the meaning of the word 'recklessness'. From my reading of the jury's note, they were. But the appellant's counsel then submitted that they should not be told what 'recklessness' means, saying that 'we shouldn't get into trying to explain "recklessness" to them', to which her Honour agreed.

45 The jury then returned to be given the typed document and were asked 'Is that OK Mr Speaker?'. His response was to say:

> The point that we found we were having a little bit of trouble with was the final few words of (indistinct) two on here as amount of recklessness involving grave moral guilt. Our sticking point, I think, was the word 'recklessness'.

Her Honour immediately responded that the term 'does not have a legal meaning', to which each counsel added his agreement. Her Honour told them that the meaning was its 'ordinary dictionary community ordinary meaning'. She added:

> I suspect some of you, from time to time, accuse your partner or your children or somebody you know of being reckless. Grave moral guilt is perhaps a little old fashioned but then a lot of our Criminal Code is and I think you understand it.

The jury then retired and within half an hour, had found the appellant guilty.

46 The appellant now argues, by the same counsel who told the trial judge that the term 'recklessness' need not be explained, that the jury should have been given an explanation. He now says that the jury should have been told that 'reckless' meant 'utterly careless of the consequences of action; without caution'[3] or 'devoid of caution, regardless of consequences, rash, heedless of danger'[4]. He further submits that instead of being told that the appellant's conduct had to involve 'grave moral guilt deserving of punishment', the jury should have been told that the conduct had to be not only reckless but 'so far outside the ordinary range of acceptable conduct as to merit punishment by the criminal law'.

47 As already mentioned, the directions to the jury, at least before their note to the judge, followed the draft direction recommended by the benchbook. That draft direction derives from what was said in *R v Hodgetts and Jackson* [1990] 1 Qd R 456. In particular, Thomas J there said[5] that appropriate directions in relation to criminal negligence are well established and 'they require, *inter alia*, recklessness involving grave moral guilt.' His Honour there cited, amongst other cases, *Evgeniou v The Queen* (1964) 37 ALJR 508, where in the joint judgment of McTiernan and Menzies JJ it was said that:[6]

> Negligence sufficient to meet the standard of civil liability is not enough to constitute a breach of s 289; there must be negligence according to the standard of the criminal law, which may be described shortly as recklessness involving grave moral guilt.

48 The difficulty with directing a jury that criminal negligence involves an essential element of recklessness is in the fact that recklessness has many meanings, both according to ordinary speech and in law. It is that ambiguity which made the jury's inquiry in this case, as to what is meant by recklessness, an unsurprising one. Contrary to what the learned trial judge said

to the jury, with which each counsel expressly agreed, the term 'recklessness' not only has a legal meaning: it has several. Thus in *Banditt v R* [2005] HCA 80; (2005) 223 ALR 633, which concerned the express element of recklessness in s 61R(1) of the Crimes Act 1900 (NSW), Gummow, Hayne and Heydon JJ began by noting that the term 'reckless' has various uses as a criterion of legal liability, so that when used in the tort of negligence, the yardstick is objective rather than subjective, but when used in the context of an action in deceit, it involves an inquiry as to the defendant's actual state of mind. In England, the meaning of 'recklessness' was the subject of considerable controversy after the decision of the House of Lords in *R v Caldwell* [1982] AC 341, which culminated in the overruling of that decision by a unanimous decision of the House in *R v G* [2004] 1 AC 1034. It is unnecessary to discuss here that controversy or instances of a similar debate in Australian case law, in jurisdictions applying the common law or a statute which expressly provides for an element of recklessness. It suffices to say that the meaning of 'recklessness' has been controversial in certain contexts, and as was recently noted in *Banditt*, its meaning varies from one context to another. Their Honours there cited the judgment of Gibbs J in *La Fontaine v The Queen* (1976) 136 CLR 62, in which, as their Honours said, Gibbs J discountenanced, in those States where legislation did not adopt terms such as 'reckless' or 'reckless indifference', their use in summing up in a trial on a murder count. Gibbs J there said:[7]

> To tell a jury that they may convict of murder when they are satisfied that the accused acted with recklessness or reckless indifference is to invite confusion between murder and manslaughter resulting from criminal negligence. In many, if not most, cases where the Crown alleges that the accused acted knowing that his act would probably cause death or grievous bodily harm it will also be alleged by the Crown, in the alternative, that the accused was guilty of criminal negligence. The expression 'reckless' is also used to describe that very high degree of negligence which, if it causes death, amounts to manslaughter. It is not easy to explain to a jury the difference between the reckless indifference which, if it exists, may justify a conviction of murder and that recklessness which would warrant a conviction for manslaughter. The purpose of a summing up is not to endeavour to apprise the jury of fine legal distinctions but to explain to them as simply as possible so much of the law as they need to know in order to decide the case before them.

49 Undoubtedly it was recklessness of the second kind described by Gibbs J which Thomas J (and Ambrose J who relevantly agreed with him)[8] had in mind in *Hodgetts*. However the problem is that a jury might not have the same meaning in mind, so that without further instruction, they might be under a misunderstanding. And if further instructions as to the particular meaning of recklessness must be given, the jury must then be apprised of what Gibbs J described as fine legal distinctions which go beyond an explanation of so much of the law which that jury needs to know.

50 In Queensland, where recklessness is not an express element of an offence under s 328, it is unnecessary, and in my respectful view, conducive to unnecessary complication to direct a jury that they must find recklessness. What is essential is that a jury understands that the prosecution must prove that the defendant's default was so serious that it should be regarded as a crime and deserving of punishment. Accordingly the standard direction according to the benchbook makes the distinction between negligence which supports a civil claim for compensation and that more serious act or omission which warrants criminal punishment. In making that distinction, it is apt to tell juries that the defendant's conduct must be deserving of moral condemnation.[9] Hence the benchbook direction as to the element of 'grave moral

guilt deserving of punishment'. But it is unnecessary and undesirable to add recklessness, as if it were a separate element of the offence.

51 The learned trial judge, at first, was simply following the benchbook. Although it would have been preferable for her Honour to have departed from it by making no reference to recklessness, her initial directions are not said to have caused any misunderstanding. It is what her Honour said in response to the jury's questions, and in particular as to the speaker's question, which are challenged. At that point, the jury had made it clear that they did not understand what was meant by 'recklessness involving grave moral guilt' and in particular by the word 'recklessness'. What her Honour needed to then explain was that the jury had to be satisfied that any want of due care by the appellant was also so serious that it deserved punishment as a crime. Instead, her Honour said of recklessness that 'I suspect some of you, from time to time, accuse your partner or your children or somebody you know of being reckless', a comment which was likely to diminish the level of culpability which had to be proved, by equating criminal behaviour with that the subject of everyday family life. Then when referring to 'grave moral guilt', her Honour's comment that this notion was 'a little old fashioned' was, with respect, unhelpful and again was likely to diminish the level of misconduct which the prosecution was required to prove. And unfortunately, in these answers to the jury's critical question, her Honour did not remind them that they had to be satisfied, as members of the community, that the defendant's negligence was so serious as to warrant the community's punishment as a crime. The result was that the jury were not properly instructed as to what the prosecution had to prove to establish a breach of duty.

[**Philip McMurdo J** agreed with **Mackenzie J** that the conviction should be quashed. **Jerrard JA** wrote a separate judgment to the same effect. **Philip McMurdo J** would have ordered a new trial. **Jerrard JA**, however, agreed with **Mackenzie J** that an acquittal should be entered.]

Footnotes

3. A Delbridge *et al*, *The Macquarie Dictionary*, 3rd ed, Macquarie Library Pty Ltd, St Leonards, 1997.
4. J B Sykes (ed), *The Concise Oxford Dictionary of Current English*, 6th ed, Claredon Press, Oxford, 1976.
5. [1990] 1 Qd R 456 at 461.
6. (1964) 37 ALJR 508 at 509.
7. (1976) 136 CLR 62 at 76–7.
8. [1990] 1 Qd R 456 at 477.
9. See *R v Lavender* (2005) 79 ALJR 1337 at 1361; [2005] HCA 37 at [127].

5.31C Houghton v R

[2004] WASCA 20; (2004) 28 WAR 399
Western Australia Court of Criminal Appeal

Steyler and Wheeler JJ: …

93 The applicant was convicted, on 3 October 2002, of unlawfully doing grievous bodily harm to the complainant, contrary to s 297 of the Criminal Code. The grievous bodily harm was found to have been caused to the complainant by way of the transmission to her, by the applicant, of the human immunodeficiency virus ('HIV').

94 The applicant was diagnosed with HIV at the beginning of 1990. In his evidence at the trial, he said that he was thereafter counselled by medical practitioners and others about safe sex practices. He said that this counselling led him to believe that if he did not ejaculate semen into a sexual partner he would not pass on the virus.

95 Some years later, in 1999, he formed a relationship with the complainant. In the course of it, he had unprotected sexual intercourse with her (in the sense that no condom was used) between 1 June 1999 and 30 September 1999. At no time during that period, or prior to it, did the applicant tell the complainant that he was HIV positive. He said that this was so because he did not want to 'scare her off'. The complainant discovered, in January 2000, that she had contracted HIV as a consequence of her unprotected sex with the appellant.

96 Expert evidence which was led at the trial established that HIV may be transmitted from one person to another by blood or bodily fluids, including, but not limited to, semen and that the belief which the appellant claimed to hold that the virus could not be transmitted during unprotected sexual intercourse if there was no ejaculation was consequently false. The Crown case was that the applicant did not, in truth, hold that belief and that he knew that there was a risk of passing on the virus in the course of unprotected sex even if he did not ejaculate. It contended that he had, in any event, ejaculated into the complainant on one of the occasions of unprotected sexual intercourse with her. It led evidence from the complainant to the effect that, on this occasion, during which the applicant had anal sex with her, she felt liquid near her anus at the completion of the act of sexual intercourse. When she washed herself, she noticed that the liquid was an off-white colour. She believed, from this, that the applicant had ejaculated in her anus, but said that she could not be certain. The applicant, on the other hand, not only denied that he had ever ejaculated into the complainant, but denied, also, that he had ever had anal sex with her.

The Grounds of Appeal

97 The applicant has raised some 15 grounds of appeal against his conviction. The substance of those grounds will be apparent from the judgment of Murray J. We are in general agreement with what has been said by his Honour in respect of all grounds of appeal, other than grounds 9 and 13, although we wish to make some comments of our own in respect of ground 8. We shall consequently restrict ourselves to a consideration of those three grounds.

Ground 13

98 It is convenient, first, to deal with ground 13. As will be apparent from Murray J's judgment, the applicant contends, in effect, that the trial Judge erred in construing the word 'unlawfully', where it appears in s 297, as meaning only that the prosecution was required to prove that what the applicant did to the complainant in causing her grievous bodily harm was not authorised, justified or excused by law.

99 Murray J has considered various provisions of the Code in which the word 'unlawful' has been used. We will not repeat all that his Honour has said in that respect. It is enough to say, as Murray J has done, that in some sections in which the word is used its meaning has expressly been provided and in others the meaning is provided by the context in which the word is used. In the case of s 297 no definition of the word 'unlawfully' has been provided, with the consequence that the Court is left to determine the meaning of that word from its context, aided by a consideration of such cases as might be of assistance in fixing the meaning of that word.

100 As to the case law, we are aware of only two Australian cases which are directly in point.

101 The first of these is *R v Knutsen* [1963] Qd R 157. There the Queensland Court of Criminal Appeal was called upon to consider the provisions of s 320 of the Criminal Code (Qld). That section then read as follows:

> Any person who unlawfully does grievous bodily harm to another is guilty of a crime and is liable to imprisonment with hard labour for seven years.

102 The section is consequently in identical terms, so far as is relevant for present purposes at least, to s 297 of the Western Australian Code.

103 Philp J, who was in dissent in the result, expressed the opinion (at 163) that the word 'unlawfully' required the Crown to prove that the doing of the grievous bodily harm was 'contrary to law and not excused', although he added (at 164) that, as he saw the position, 'if the act of the accused, whether an assault or not, mediately or immediately effects grievous bodily harm on another guilt is established, subject to the exculpatory provisions of the Code or other relevant law'.

104 Stanley J, in that case, found it unnecessary to consider the point. The third Judge, Mack J, while finding it unnecessary to deal at length with the meaning of the word 'unlawful', said (at 187) that all grievous bodily harm arising out of assaults is unlawful unless authorised, justified or excused by law and that one looks to the provisions of the Code or other Statute law to find the authority, justification or excuse. However, his Honour was there applying s 246 of the Queensland Code and did not address a situation in which the harm does not arise out of an assault.

...

121 In the end, it seems to us that the word 'unlawful', in its context in s 297, should be given what we take to be its ordinary meaning of 'prohibited by law' or, to put it differently, contrary to law and not excused (being the meaning put upon that word by this Court in *Kuczynski*). There is, in our opinion, nothing in the context of s 297 which would require that the word be given anything other than its ordinary meaning. While we recognise, from Murray J's comprehensive survey of the legislation, that there is no consistent approach, in the Code, to the use of the word 'unlawfully', it seems to us to be significant that, in the case of s 277, which provides that any person 'who unlawfully kills another' is guilty of a crime, the legislature has seen fit to include, by way of s 268, a definition of unlawfulness by providing that it is unlawful to kill any person unless such killing is authorised or justified or excused by law. In our opinion, had the legislature intended that the word 'unlawfully' should be similarly understood in s 297, it would have said so. Further, as we have noted, to the extent that the pre-existing law may assist in understanding the Code, *R v Clarence* supports what we would take to be the ordinary meaning of 'unlawfully'.

122 It may very well be the case that the act in question was unlawful in this case. Section 266 of the Criminal Code provides as follows:

> 266 **Duty of persons in charge of dangerous things**
>
> It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of

> any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

123 In *R v Mwai* [1995] 3 NZLR 149, the New Zealand Court of Appeal considered a similar provision in the form of s 156 of the Crimes Act 1961 …

124 There, the Court had to deal with a situation in which the appellant had unprotected sexual intercourse with several women at a time when he was infected with HIV and, in the course of doing so, infected two of those women. He was charged, *inter alia*, with criminal nuisance, contrary to s 145 of the Crimes Act which, so far as is relevant, made it an offence, *inter alia*, to omit to discharge any duty, knowing such omission would endanger the life, safety or health of any individual. The evidence was that the appellant had failed to disclose his infection to any of the women and also that he had not used a condom on any relevant occasion. The appellant submitted that, as he had no control over the virus, he had not omitted to discharge any legal duty in respect of it. On the other hand, the Crown, in its submissions to the Court, formulated what it contended had been the appellant's duty in terms of s 156 by saying that the appellant had under his charge and control seminal fluid infected with HIV and, because the infected semen might endanger human life in the absence of precaution or care, reasonable precautions and reasonable care required that the appellant use a condom if engaging in sexual intercourse.

125 The Court said, of this contention, that it was 'certainly arguable' that there would be no duty if the partner had consented to run the risk, with the consequence that the duty to use a condom would arise only if there were a failure to disclose (page 156). However, that distinction was not significant in that case (as it is not in this case) because the appellant had there both failed to disclose his condition and to use a condom. The Court went on to say (at 156–157) that the expression 'anything whatever', coupled with the adjectives 'animate or inanimate', was one of deliberately wide import and that there seemed no reason to limit it by excluding a part of the bodily makeup that otherwise meets its definition. That being so, it said (*ibid*), there was 'a strong argument' that the statutory duty was established, on the part of the appellant, in respect of his bodily fluid containing the virus.

126 Applying that logic to this case (and we do not see the word 'whatever' in the New Zealand statute as adding anything of significance to the words 'anything whether animate or inanimate'), it seems to us to be strongly arguable that the doing of grievous bodily harm to the complainant in this case was unlawful in that it was done in breach of the duty imposed by s 266 of the *Code*. That said, it also seems to us that the question whether or not the appellant's conduct was unlawful was one for the jury, rather than for this Court on an appeal. That issue never having been placed before the jury, the trial substantially miscarried in such a way as to exclude, in our opinion, the operation of the proviso to s 689(1) of the *Code*. As was said by Brennan, Dawson and Toohey JJ in *Wilde v The Queen* (1988) 164 CLR 365 at 373:

> It is one thing to apply the proviso to prevent the administration of the criminal law from being 'plunged into outworn technicality' (the phrase of Barwick CJ in *Driscoll v The Queen* (1977) 137 CLR, at p 527); it is another to uphold a conviction after a proceeding which is fundamentally flawed, merely because the appeal court is of the opinion that on a proper trial the appellant would inevitably have been convicted. The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred,

then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice.

…

Conclusion

136 It follows, in our opinion, that leave to appeal should be granted, that the appeal should be upheld, that the appellant's conviction should be quashed and that a retrial should be ordered.

[**Murray J** dissented and would have dismissed the appeal. With respect to s 266, he said at [51]:

> In this regard, it does not seem to me to be necessary, or possible, to rely on s 266 of the Code, the duty to use reasonable care and take reasonable precautions imposed upon those who have in their charge or under their control, dangerous things, to make the infection by HIV, the doing of grievous bodily harm, unlawful. I do not think it is possible to regard the virus as a thing falling within s 266, in the charge or under the control of the applicant, of which he has the 'use or management'. I would not accept the contrary view expressed in *R v Mwai* [1995] 3 NZLR 149.

In Queensland, serious disease is not a form of grievous bodily harm, so that there is no liability for negligent transmission under s 320 (Qld). There is liability only for intentional transmission under s 317 (Qld).]

5.32C R v Reid

[2006] QCA 202; [2007] 1 Qd R 64
Queensland Court of Appeal

…

Keane JA:

24 On 8 December 2005, the appellant was convicted after a trial by jury of unlawfully transmitting a serious disease with intent to do so, in contravention of s 317(b) of the Criminal Code. On the following day, he was sentenced to imprisonment for 10 and a half years.

25 The appellant seeks to appeal against his conviction on the grounds that:

(1) The verdict is unreasonable and cannot be supported having regard to the evidence;
(2) The learned trial Judge erred in the directions he gave to the jury as to the manner in which they should approach the issue of intent; and
(3) The learned trial Judge erred in failing to direct the jury in relation to the absence of motive.

26 The appellant also seeks to appeal against his sentence.

27 A consideration of the appeal against conviction must commence with a summary of the evidence at trial.

The evidence at trial

28 The Crown case was that the appellant, who knew that he was HIV positive, transmitted the HIV virus to the complainant, who until then was HIV negative, when the two of them had unprotected sexual relations between 1 January 2003 and 4 March 2003. The Crown case was that the appellant transmitted the HIV virus to the complainant with intent to do so. The Crown also charged the appellant, in the alternative, with unlawfully doing grievous bodily harm to the complainant in contravention of s 320 of the Criminal Code. Because the jury convicted the appellant on the first charge, they did not need to consider the alternative count.

29 The complainant gave evidence that he met the appellant in mid January 2003. The complainant said that the appellant told him that he, the appellant, was HIV negative, having been tested on 2 November 2002.

30 The complainant said that on the day after they met, they had oral sex followed by anal intercourse in which the complainant penetrated the appellant. The complainant said that he told the appellant that he did not like using condoms, and that the appellant said 'that it was fine because [the appellant] was HIV negative'. The appellant told the complainant that he too did not like using condoms. Later that day, they had anal sex in which the appellant penetrated the complainant.

31 It was the complainant's evidence that, thereafter, the appellant and complainant had unprotected anal intercourse three or four times a week in which they penetrated each other on a roughly equal basis. The complainant said that the appellant ejaculated inside him.

32 The complainant said that he became ill in mid February 2003 when he developed diarrhoea, a high fever and welts all over his body. He could not keep food down, and 'had no energy at all'. He was tested for HIV and, at first, the tests were inconclusive. When he told the appellant, the appellant said that the complainant's former sexual partner must have given him the HIV virus. The appellant said that he too would have a blood test performed. From that time, the complainant did not have sexual contact with the appellant. Ultimately, the complainant was diagnosed as positive for HIV.

33 The complainant made an appointment to see Dr Roy Whittaker, a medical practitioner specialising in the treatment of HIV, who was the same doctor that the appellant was seeing. The appellant suggested to the complainant that the complainant should tell Dr Whittaker that the appellant and complainant 'were having safe sex from the beginning'. Shortly thereafter, the complainant came to believe that it was the appellant who had transmitted the virus to him; and their relationship came to an end.

34 After the relationship had broken down, the appellant taunted the complainant in front of other patrons at a hotel saying: 'Who'd want you now? You're HIV positive.'

35 The complainant gave evidence that he had had no sexual partners other than his former partner and the appellant from the time when his relationship with his former partner began until the termination of his relationship with the appellant.

36 In cross-examination, the complainant admitted that he had suffered severe injuries in a motor vehicle accident in 1988. As a result, part of his face was reconstructed. It was suggested to him that he insisted that he and the appellant not use condoms while they had anal intercourse. He denied that he had so insisted, but agreed he 'didn't like' using condoms. It was also suggested that the complainant was a heavy drinker who, while drunk, had had

sexual partners, other than his former partner and the appellant, after his relationship with his former partner had terminated in January 2003. The complainant denied that he had had other sexual partners.

37 The Crown called Dr James McCarthy, a medical practitioner specialising in infectious diseases and who has been caring for HIV patients since 1986. Dr McCarthy said that a very common form of transmission of the HIV virus is sexual transmission by reason of the exchange of bodily fluids. His evidence was that symptoms of the kind said to have been experienced by the complainant in mid February 2003 are common in about half the people who contract HIV. The onset of such symptoms usually occurs within two to four weeks of being infected. The complainant's hospital records were in evidence. Dr McCarthy said that the complainant's hospital records supported the inference that he had become infected with HIV in January 2003.

38 Dr McCarthy said that, with any particular episode of anal intercourse, the risk of infection is less than one per cent. The risk of infection increases according to the frequency of unprotected intercourse.

39 Dr McCarthy also gave evidence that there was treatment available which could have prevented infection if administered within 24–48 hours of exposure to HIV.

40 The complainant's former partner gave evidence. He said that he had a sexual relationship with the complainant between June 2002 and mid January 2003. He said that he was tested for HIV in 2003 because of what he was told by the complainant of the complainant's HIV status. The tests were negative.

41 The appellant did not give evidence. The appellant had, however, given an interview to the police on 4 December 2003. The record of interview was in evidence. In the course of that interview, the appellant said that he had been HIV positive since November 1987. He said that he and the complainant met in January 2003. For a time, they lived together and had sex. The appellant said that the complainant knew that he, the appellant, was HIV positive because he had told him so. Nevertheless, the appellant said that the complainant insisted on having intercourse without condoms. The appellant said that the complainant had said to him: 'You know, I've had my head reconstructed. I mean, what else can kill me?' The appellant said that he agreed to have unprotected sex. He said that they had unprotected anal intercourse 'once or twice' when he was the 'receptive partner'. The appellant also said that 'on occasions' he sexually penetrated the complainant. He also said that they had engaged in oral sex but without ejaculation. The appellant said that he knew the complainant was HIV negative before their relationship began and that he was now HIV positive. The appellant said that his relationship with the complainant ended acrimoniously with the complainant assaulting him.

42 When the appellant was asked whether he had ejaculated while having sex with the complainant, he said: 'I have no idea. Probably not. I — I still can't ejaculate even with a positive partner. You know? Inside of me, it still feels like I'm carrying a loaded gun with me.' When asked 'Why do you say that?', he said: 'Well, for goodness sake, I've got a terminal disease. I'd rather not pass it on to somebody else. I've had 16 years of hell. Why the hell should I give somebody else that?' Later in the course of the interview, the appellant admitted that he had ejaculated inside the complainant.

43 In the course of this interview, the appellant also acknowledged his awareness of the availability of post-exposure prophylaxis which can prevent infection.

44 Later in the course of his interview, the appellant described his conduct in having unprotected sex with the complainant as 'completely irresponsible', and 'stupid in the extreme'.

Was the verdict reasonable?

45 The issue here is whether, on the whole of the evidence, it was reasonably open to the jury to be satisfied of the appellant's guilt.

46 The jury were clearly entitled to accept the uncontradicted evidence of the complainant that it was the appellant, and no-one else, who infected the complainant with the HIV virus.

47 The principal issue agitated by the appellant on appeal under this rubric was whether it was reasonably open to the jury to accept the Crown's contention that the appellant intended to transmit the HIV virus to the complainant. In this regard, the jury had to be satisfied of the appellant's intent to transmit the virus.

48 There can be no doubt that the jury were entitled to conclude that the appellant well understood that, by having unprotected sex with the complainant, he was deliberately putting the complainant at risk of being infected by the HIV virus. That the complainant became infected with the HIV virus was a natural consequence of the appellant's deception. The jury were also entitled to conclude that the appellant intended to ensure that the complainant should be unaware of the risk to which he was exposing himself.

49 The question here, though, is whether the jury could reasonably conclude beyond reasonable doubt that the appellant did subjectively intend to inflict the HIV virus upon the complainant. The issue is whether the jury, acting reasonably, could have rejected, as a rational inference, the possibility of the absence of an intent to infect the complainant with the HIV virus.[1]

50 In this regard, the appellant points first to the evidence of Dr McCarthy to the effect that, with any given episode of anal intercourse, the risk of infection is less than one per cent. It is said that the earlier in the relationship the infection occurs, the less likely it is that the appellant intended to infect the complainant. Because the infection seems to have occurred very early in the relationship, it is, therefore, less likely to have been a result intended by the appellant.

51 There are two flaws in this aspect of the appellant's argument which may conveniently be mentioned now. The first is that it attributes Dr McCarthy's appreciation of the chances of infection to the appellant. There is no evidentiary support for that attribution. Secondly, and more importantly, the issue here turns on what the appellant himself actually intended, not upon an objective appreciation of the prospects of his achieving that intention. In this latter regard, there can be no doubt that the appellant well understood that unprotected sex with the complainant was likely to infect him with HIV. That this is so is readily apparent from the 'loaded gun' remark in his record of interview. There are, in my opinion, further flaws in this aspect of the appellant's argument to which I shall return.

52 The strength of the appellant's first ground of appeal, it seems to me, is in the argument that it is possible that the appellant was merely, either 'completely irresponsible' or 'stupid in the extreme', in deceiving the complainant as to the appellant's HIV status in order to persuade the complainant to have sexual intercourse in the unprotected way which the appellant preferred. On this view, the appellant's motivation is sufficiently explained by a selfish recklessness as to whether or not the HIV virus was transmitted to the appellant. The appellant contends that there was no evidence of actual ill-will on his part towards the complainant which would provide a rational basis for a conclusion that the appellant was

motivated by a subjective desire to transmit the disease to the complainant. That contention is not, however, accurate in two important respects.

53 First, there was the complainant's evidence of the appellant's taunting after the complainant had been diagnosed as HIV positive. The complainant's evidence in this regard was unchallenged and uncontradicted. The jury were entitled to regard the evidence of the appellant's taunting of the complainant with the fact that the complainant was now HIV positive as providing an insight into the appellant's state of mind at the time he infected the complainant. The appellant's taunting of the complainant may have been seen by the jury as evidence of the proverbial love of misery for company. From the appellant's evident satisfaction that the complainant had been stricken by the same condition with which the appellant was afflicted, the jury were entitled to conclude that the appellant's conduct had indeed been calculated to achieve that result.

54 Secondly, there was the evidence that the appellant knew that post-exposure prophylaxis might have prevented the complainant becoming infected. There was no suggestion that the appellant alerted the complainant to the desirability of seeking treatment after unprotected sex had occurred. From the facts that the appellant knew that the complainant was at risk, and that the appellant refrained from taking steps, which he knew were available, to avert that risk, the jury could reasonably infer that the appellant actually desired that the complainant should become infected.

55 Considerations of motive must, in any event, be put to one side. Intent must not be confused with motive or desire. What the appellant actually did was, as the appellant knew, plainly apt to achieve the result that the complainant would become infected. It was open to the jury to regard the appellant's statement about the 'loaded gun' as affording a clear insight into the appellant's understanding and intention. The appellant's reference to the 'loaded gun' may reasonably have led the jury to conclude that, just as someone who fires a loaded gun at another may reasonably be taken to have intended to do grievous bodily harm to the victim, so the appellant's acknowledged appreciation of the lethal risk of unprotected sexual contact with himself established that when he engaged in such contact with the complainant he intended that risk to come home. Such an inference could have been strengthened beyond reasonable doubt by the appellant's failure to alert the complainant to the need for him to seek available treatment immediately after their first acts of unprotected intercourse.

56 Further in relation to the appellant's argument that the infection may have occurred very early in the relationship, it may be said that this possibility is in no way inconsistent with the existence of an intention to pass on the disease at that time. This argument seems to accept that, the more frequent the occurrence of acts of unprotected sex, the stronger is the inference that the appellant intended to infect the complainant. But the jury were entitled to infer that the appellant's intention in that regard was the same at the time of the first act of unprotected sex as it was throughout the sexual activity between the complainant and the appellant. There was nothing in the evidence to suggest that some change occurred in their relationship during that period which was apt to alter the appellant's intention.

57 Moreover, the offence with which the appellant was charged was not 'having a particular act of intercourse with intent on a particular day'. The relevant offence consists of transmitting the disease with the intent to do so. Thus, the issue was not what the appellant's intent was at the time of any particular act of sexual intercourse, but whether it can be said that the conduct of the appellant which resulted in the transmission of the disease was informed by

the necessary intent. For the reasons stated above, I consider that it was reasonably open to the jury to come to an affirmative conclusion on this issue.

58 In relation to the first ground of appeal, I conclude that the jury's verdict cannot be said to have been unreasonable.

The trial judge's directions — Intent

59 The appellant's next ground of appeal involves the contention that the trial judge erred in failing to direct the jury that, before they could be satisfied beyond reasonable doubt that the appellant intended to infect the complainant with HIV, they would have to be satisfied beyond reasonable doubt that this was not a case of mere reckless disregard by the appellant as to the potential consequences of his actions.

60 The appellant also argues under this ground of appeal that the learned trial judge's directions to the jury did not properly explain the use which the jury could make of the statements made by the appellant in the record of interview.

61 As to the appellant's criticism that the trial judge's directions were deficient in the absence of a specific direction that mere reckless disregard by the appellant for the welfare of the complainant would not suffice to establish the element of intent, one may say immediately that such a direction would have been one way of explaining to the jury that it is a strong thing to find that one person intended to inflict HIV on another. But to say this is not to accept that a sufficient explanation of the issue may not be given by a trial judge without resort to a dichotomy between 'reckless disregard' and 'intent to infect'. Counsel for the appellant was not able to cite any authority to support the proposition that failure to direct the jury in terms of this dichotomy is an error of law.

62 To the extent that the issue is to be considered more broadly in terms of the trial judge's function to ensure that the jury understand so much of the law as is necessary for them fairly to resolve the issues of fact in the case, it is necessary first to set out the directions which the trial judge gave to the jury on this point. His Honour said:

> To enable the jury to bring in a verdict of guilty based on circumstantial evidence, it's necessary not only that guilt should be a reasonable inference, it has to be the only reasonable inference, the only rational inference that the circumstances enable the jury to draw. This follows from the general requirement that guilt must be established beyond reasonable doubt. If there's any reasonable explanation of proved facts consistent with innocence, it's the jury's duty to acquit the accused. It's for the jury to say whether the inference of guilt exists actually and clearly and so completely overcomes all over [sic] inferences or hypotheses or explanations as to leave no reasonable doubt of guilt in the jury's mind.
>
> One of the things which the prosecution set out to prove in count 1 is the intention of [the appellant]. Success for the prosecution depends on it being proved to your satisfaction that [the appellant] had intent to transmit a serious disease to [the complainant]. You cannot actually see a person's intention, of course. *'Intent' and 'intention' are familiar words in English. In this legal context, they carry their ordinary meaning. In ascertaining the defendant's intention, you are entitled to draw inferences from facts which you find have been established on the evidence relevant to the defendant's state of mind*. One Judge once said that, although you can't see the state of a man's mind, it's as much a fact as the state of his digestion.

> *The intention of a person may be inferred or deduced from the circumstances and from the conduct of the defendant in particular, in those circumstances. Of course, whatever a person says about his intention may be looked at by a jury for the purpose of deciding what his intention was at the relevant time*. You may think people ordinarily intend the foreseeable or ordinary consequences of their actions, but that's just one of the considerations, among others, that I've been discussing with you. *So this is a circumstantial case in which you have to decide whether, assuming that [the complainant] does have HIV, the defendant gave it to him, and in count 1 you have to decide whether the defendant intended to do that*. You may think that only the Almighty knows the exact situation and the whole truth, although the defendant, in principle, would know what he intended. (emphasis added)

63 His Honour administered a redirection to the jury in the following terms:

> Two things, ladies and gentlemen, that I have to fix up. The first relates to intent in count 1. The focus is not on the 'ordinary consequences of the defendant's actions', a phrase which I used as an example of one factor that you might consider. *The focus is on what the defendant actually intended*. In count 1 the Crown has to prove an actual intention to transmit a serious disease. (emphasis added)

64 It should also be borne in mind here that the appellant was charged in the alternative with unlawfully doing grievous bodily harm to the complainant. In that regard, his Honour gave the jury a direction in relation to criminal negligence in the course of which his Honour said:

> To convict you must be satisfied beyond reasonable doubt that his conduct here in engaging in unprotected sex, if you find that that happened, so far departed from the standard of care incumbent upon him to use reasonable care to avoid danger to life, health, safety as to amount to recklessness involving grave moral guilt deserving of punishment.

65 It may be noted that the jury did not seek any further direction or assistance in relation to what was involved in the element of intent. To suppose that the jury, so instructed, did not understand that the element of intent involved in the first count was something quite different from, and not satisfied by, the reckless disregard relevant to the grievous bodily harm charge is to assume, without warrant, that the jury were not able to understand the direction which they were given. It is well-established by authority that the jury may be taken to have understood and acted upon the directions they were given.[3]

…

Conclusion and orders

87 The appeal against conviction should be dismissed and the application for leave to appeal against sentence should be refused.

Chesterman J:

88 I have read the draft judgment prepared by Keane JA and agree entirely with the orders proposed by his Honour and with the reasons given for dismissing the appeal and application. However, because of the importance of the point on which the Court is divided in opinion, I intend to give some brief reasons of my own.

89 The Criminal Code includes in its definition of a number of offences a statement that an intention to bring about a particular result is an element of the offence. Section 317, with

which this appeal is concerned, is one such provision. The section provides, relevantly, that any person who, with intent, transmits a serious disease to another is guilty of a crime. Another well known example is found in s 302(1)(a) which provides that a person who unlawfully kills another is guilty of murder if the offender intended to cause death or if the offender intended to do grievous bodily harm. A third example is afforded by s 320A which provides that a person who tortures another person commits a crime, and defines torture to mean 'the intentional infliction of severe pain or suffering …'.

90 The Code does not define 'intention'. In ordinary, every day, usage, 'intention' means the act of 'determining mentally upon some result'. Intention is a 'purpose or design'. If an accused intends to kill, or transmit a disease, he means to kill or transmit the disease. His actions are designed to bring about the result.

91 To my understanding this meaning has always been the one ascribed to the word 'intent' or 'intention' where the Code makes that mental state an element of an offence.

92 This view was expressly, and indeed emphatically, stated by the Court of Criminal Appeal in *R v Willmot (No 2)* [1985] 2 Qd R 413. Connolly J (with whom Moynihan J agreed) said (at 418):

> The mental element which must be proved when a case of murder goes to the jury under s 302(1) is intention to cause death or to do grievous bodily harm. The ordinary and natural meaning of the word 'intends' is to mean, to have in mind. Relevant definitions in *The Shorter Oxford English Dictionary* show that what is involved is the directing of the mind, having a purpose or design.
>
> … [T]here is … no ambiguity about the expression … and it is not only unnecessary but undesirable, in charging a jury, to set about explaining an ordinary and well understood word in the English language. It is a truism that it is the Code itself which speaks and that it is … wrong in principle to gloss it.

93 The same approach was taken in this court in a recent decision in a case of torture, *R v Ping* [2005] QCA 472. The court emphasised the necessity for the prosecution to prove an actual, subjective intention on the part of the accused. The judgment, in which all the members of the court agreed, said (at [27]):

> To make out a case of torture the prosecution must prove … that an accused intended his acts to inflict severe pain and suffering on his victim. It is not enough that such suffering is the consequence of the acts, and that the acts were deliberate. The prosecution must prove an actual, subjective, intention on the part of the accused to bring about the suffering by his conduct. The acts in question must have as their object the infliction of severe suffering; that must be their intended consequence.

94 The judgment criticised the summing up which had suggested that intention could be proved by 'what a person of ordinary knowledge and common sense would realise would follow … from what they did …'. The court said that that passage was misleading (at [37]–[38]):

> It suggests that intention to bring about a result is to be presumed where the consequence of an act is foreseeable, and the act is performed. Alternatively it suggests that intention is to be assessed by an objective evaluation of what is a likely consequence of an act, so that if a result is intended if it was objectively likely to follow the act.

> What the jury should have been told was that the Crown had to prove that the appellant had an actual subjective intention to cause the complainant to suffer … and that his conduct was designed to achieve that result.

95 'Intent' and 'intention' must have the same meaning wherever they appear in the Code. If an actual, subjective, intention to bring about a particular result, such as death or the infliction of severe pain and suffering, must be proved before a jury may convict of murder or torture, the same must be true of intent in s 317. What is necessary to prove intent is proof that an accused (here the appellant) meant to transmit his HIV to the complainant.

…

106 In *The Queen v Crabbe* (1995) 156 CLR 464 the High Court had to consider a charge of murder when 'the rules of the common law governed the question what mental element is necessary to constitute the crime of murder, or, to use the traditional terminology, what is meant by malice aforethought.'

107 The court had regard to *Stephen's Digest*, the relevant part of which appears in the passage quoted from the judgment of Viscount Dilhorne. The court (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ) said (469):

> Indeed, on one view, a person who does an act knowing its probable consequences may be regarded as having intended those consequences to occur. That view is expressed in *Reg v Hyam* … by Viscount Dilhorne, Lord Diplock … and possibly by Lord Cross … although Lord Hailsham … denied its correctness. … It is however unnecessary to enter upon that controversy. If an accused knows when he does an act that death or grievous bodily harm is a probable consequence, he does the act expecting that death or grievous bodily harm will be the likely result. … That state of mind is comparable with an intention to kill or to do grievous bodily harm.

108 What emerges from this passage is that equating knowledge, or foresight, of the probable consequences of an act with the intention of bringing about that consequence is controversial and, as the division of opinion in the House of Lords demonstrates, lacks distinct authority. A definite answer to the controversy is unnecessary when one relies upon malice aforethought as constituting the necessary mental element to constitute the crime of murder. Either state of mind is sufficient. The Code does not speak of malice aforethought. It speaks of intention.

109 To say that the two states of mind are comparable for the purpose of imposing criminal liability is not to say that the two mental states are identical or that proof of foresight of the consequences of a deliberate act is proof that an accused intended to bring about that consequence.

110 It will be appreciated that the question at common law in cases of homicide is: did the accused act with malice aforethought? The question which the Code poses is: did the accused intend the particular result?

111 As a matter of evidence, proof that an accused knew, or foresaw, that the probable consequence of his deliberate act was, for example, death, will usually establish that the accused intended to cause the death. One is not here concerned with questions of evidence but of an essential element of a statutorily defined offence. When that element is intention it is not helpful to consider that proof of a different mental state may afford cogent proof of the existence of the statutorily required element. It is, I think, instructive to recall

that in *Director of Public Prosecutions v Smith* [1961] AC 290 the House of Lords flirted with the proposition that an accused is deemed to have intended the natural and probable consequence of his deliberate acts. The High Court immediately dissented in a significant case, *Parker v The Queen* (1963) 111 CLR 610, Dixon CJ saying (at 632):

> In *Stapleton v The Queen* [(1952) 86 CLR 358] we said: 'The introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous' [(at 365)].

The effect of the decision in *Smith* was abolished in England by s 8 of the Criminal Justice Act 1967.

112 It is similarly dangerous to deem that an accused intends the consequences of his actions which he knows will follow them, or foresees will probably follow them.

113 In my respectful opinion the Code requires nothing less than proof of intention.

114 To make good the charge against Reid the Crown had to prove that he engaged in intercourse with the complainant intending, by that conduct, to transmit the HIV virus to the complainant. Applying *Willmot* and *Ping*, the Crown had to prove that the appellant's conduct was designed to achieve that result, that his purpose in engaging in intercourse was to infect the complainant.

115 I agree with Keane JA that the trial judge's summing up was adequate to instruct the jury as to that element of the offence and that the evidence was sufficient to support the conviction.

116 I would dismiss the appeal and the application for leave to appeal against sentence.

[**McPherson J** dissented on the ground that the trial judge did not properly instruct the jury on the meaning of 'with intent to transmit'. Although he would have allowed the appeal, his preferred conception of intent was much broader than that of the other judges. It would have encompassed any consequence known to be probable or likely. In *Ping* [2005] QCA 472, Chesterman J was speaking for a unanimous Court of Appeal when he espoused the same conception of intent as that espoused by the majority in *Reid*: restricting it to purpose or design.]

Footnotes

1. *Knight v The Queen* (1992) 175 CLR 495 at 503, 505; *Cutter v The Queen* (1997) 71 ALJR 638 at 641, 648.
2. *R v Hyam* [1975] AC 55 at 73; *Cutter v The Queen* (1997) 71 ALJR 638 at 648.
3. *Crofts v The Queen* (1996) 186 CLR 427 at 440–1; *Gilbert v The Queen* [2000] HCA 15 at [13] and [31]; (2000) 201 CLR 414 at 420 and 425; *R v Davidson* [2000] QCA 39, CA No 369 of 1999, 28 July 2000 at [13]; *R v DAK* [2005] QCA 211, CA No 45 of 2005, 17 June 2005 at [17].

Sexual Violence and Fraud

CHAPTER 6

THE STRUCTURE OF OFFENCES OF SEXUAL VIOLENCE

6.1 In recent years, offences of sexual violence have been reformed in many jurisdictions, including Queensland and Western Australia. The present law of the two states relating to these offences is the same in some respects, but differs in other respects.

Both Codes retain the traditional common law distinction between:

(a) an offence involving sexual penetration of another person's body without consent, which is subject to very severe penalties: Codes s 349 (Qld)/s 325 (WA); and

(b) a lesser offence of assault without penetration carrying lower penalties: Codes s 352 (Qld)/s 323 (WA).

The dividing line is drawn differently in the two states.

The focus of this chapter is on the offences of penetration and assault. The reach of the law has, however, been extended further:

- In Queensland, for example, it is an offence to procure a 'sexual act' by coercion or false pretence: Code (Qld) s 218(1)(a)–(b).
- In Western Australia, it is an offence to compel a person to provide a 'sexual service': Code (WA) s 331B.

6.2 Analogous to offences of sexual violence are offences relating to sexual interaction with children or other people presumed to be unable to give meaningful consent or whose consent is otherwise viewed as questionable. See, for example, anal intercourse with a young person or an intellectually impaired person (Code s 208 (Qld)); sexual intercourse or indecent dealing with children (Codes ss 210, 215 (Qld)/ss 320, 321 (WA)); sexual intercourse or indecent dealing with an intellectually impaired person: Codes s 216 (Qld)/s 330 (WA).

Both Queensland and Western Australia, as part of a national scheme, have enacted legislation to combat the use of the internet to engage children in sexual activity: Codes s 218A (Qld)/s 204B (WA). It does not matter that the victim is a fictitious person represented to the adult as a real person. Moreover, the offence may occur within the state or elsewhere, The effect is to allow police officers to enter chat rooms and social media sites and to use SMS and emails to entrap adult offenders, sometimes luring them into the state before arrest.

6.3 Queensland has retained the traditional common law term 'rape' for its most serious offence: Code (Qld) s 349. Rape is punishable by a maximum of life imprisonment. The offence covers various forms of non-consensual sexual penetration, with exceptions for cases where the penetration is carried out for proper medical, hygienic or law enforcement purposes: s 347. The offence covers:

(a) 'carnal knowledge' with or of a person;

(b) penetration of the vulva, vagina or anus of a person by any object or bodily part other than a penis; and

(c) penetration of the mouth of a person by a penis: see s 349.

The term 'carnal knowledge', when used without qualification, has traditionally meant penile–vaginal intercourse. However, the term has been extended by definition to cover penile–anal intercourse: Code (Qld) s 6(2), where the definition of carnal knowledge includes 'sodomy'. The offence is complete upon penetration to any extent, so that ejaculation is not required: s 6(1). This reflects the common law.

6.4 Most other forms of sexual violence in Queensland are subsumed within the offence of sexual assault under the Code (Qld) s 352. Sexual assault is an indictable offence ordinarily punishable by up to 10 years' imprisonment: s 352(1). The maximum penalty increases to 14 years for coercive oral–anal and oral–genital contact: s 352(2). Life imprisonment is the maximum prescribed if a weapon or the pretence of a weapon is used to facilitate the offence, or if the offender is in company with another person: s 352(3)(a). Life imprisonment is also the maximum penalty prescribed for forcing the victim to penetrate the offender: s 352(3)(b)–(c).

In its principal form, a sexual assault is an assault which is committed 'indecently': s 352(1)(a). The offence has, however, been extended beyond true assaults to include the coercive procuring the commission of or the witnessing of acts of gross indecency: s 352(1)(b). This covers cases beyond assault because the victim is forced to perform or to witness sexual acts rather than being subjected to sexual acts. 'Gross' has been said to mean 'plain, evident, obvious': see *R v Whitehouse* [1955] QWN 76 per Philp J.

There is also an offence of procuring sexual acts by coercion or false pretence under the Code (Qld) s 218(1)(a)–(b). 'Sexual acts' can include acts done to a person's own body and also acts involving no physical contact: s 218(2)–(3).

In none of the offences is there any limitation on the gender of offenders or victims.

6.5 Western Australia uses the term 'sexual penetration' for the most serious offence of sexual violence: Code (WA) s 325. The offence carries a maximum penalty of 14 years' imprisonment. The offence of sexual penetration encompasses a variety of forms of sexual penetration without consent: see the definition of 'to sexually penetrate' in s 319(1). Penetration may be of the vagina, the anus or the urethra. Furthermore, penetration may be effected by any bodily part or with any object (although an exception is made in cases where the penetration is carried out for proper medical purposes). In addition, the offence encompasses coercive oral–anal and oral–genital contact. The offence is complete upon penetration to any extent, so that ejaculation is not required: Code (WA) s 6.

6.6 Other forms of sexual violence in Western Australia are classified as the offence of indecent assault, which carries a maximum penalty of 5 years' imprisonment: s 323. In addition, there are offences of sexual coercion and compelling sexual servitude. Sexual coercion is an offence under s 327 with a maximum penalty of 14 years. The offence is committed whenever a person

compels another person to engage in sexual behaviour and covers cases beyond assault because the victim is forced to perform sexual acts rather than being subjected to them. Compelling sexual servitude is an offence under s 331B with a maximum penalty of 20 years if the person is a child or an 'incapable' person and 14 years otherwise. The offence is committed when a person is compelled to provide a sexual service. A 'sexual service' need not involve physical contact; the term is defined broadly to mean 'the use or display of the body of the person providing the service for the sexual arousal or sexual gratification of others'.

6.7 A feature of the Code (WA) is the provision for increased penalties where there are 'circumstances of aggravation'. When such circumstances are present, the maximum penalties prescribed are 20 years' imprisonment for sexual penetration, 7 years for indecent assault and 20 years for sexual coercion: ss 324, 326, 328. Circumstances of aggravation are defined in s 319(1) to comprise the following:

- committing bodily harm;
- being armed with a dangerous or offensive weapon or instrument, including pretending to be so armed;
- doing an act 'which is likely seriously and substantially to degrade or humiliate the victim';
- committing the offence in the company of other persons;
- threatening to kill the victim; and
- the victim being of or over the age of 13 years and under the age of 16 or of or over the age of 60.

In none of the offences is there any limitation on the gender of offenders or victims.

6.8 The scope of the offences of sexual assault in Queensland and indecent assault in Western Australia is determined by three factors:

1. the general definition of assault in the Code: s 245(1) (Qld)/s 222 (WA);
2. the meaning the courts have given to the term 'indecently'; and
3. the range of acts excluded from the offence in order to constitute either rape in Queensland or sexual penetration in Western Australia.

The offence of indecent assault in Western Australia is slightly narrower in scope than the offence of sexual assault in Queensland. This is because some forms of oral–genital contact that fall within the offence of sexual penetration in Western Australia would be defined in Queensland as sexual assault.

In both states, the general definition of assault allows the offence to be committed by way of threat or attempt as well as by actual physical contact: see **5.7** on the definition of assault.

6.9 'Indecent' and 'sexual' do not have precise or fixed meanings. Rather, their meanings depend on prevailing community standards as well as specific statutory contexts.

In *R v Bryant* [1984] 2 Qd R 545, discussed in *Drago v R* (1992) 8 WAR 488 (**6.27C**), the court was concerned with the offence of doing an indecent act contrary to the Code (Qld) s 227(1)(b). It was held that it was insufficient to instruct the jury that indecency is 'anything that is unbecoming or offensive to common propriety'. Indecency was said to require an element of 'moral turpitude', acting in a 'base or shameful manner', or even 'lewdness'. Otherwise, it was said, the scope of the offence would be too wide. In *R v McBride* [2008] QCA 412, the Queensland Court of Appeal applied the ruling in *Bryant* to the offence of sexual assault.

The court in *McBride* did not discuss the decision in *Drago*, above, where the Western Australia Court of Criminal Appeal took a different view. *Drago* was concerned with the meaning of indecency in the context of indecent dealing with a young person and, by way of *obiter dicta*, other offences involving indecent dealing or indecent assault. It was held that, in these contexts, it was sufficient to instruct the jury that indecency means conduct that is 'unbecoming or offensive to common propriety'. *Bryant*, above, was distinguished on the ground that the Codes s 227(1)(b) (Qld)/s 203(2) (WA) require a narrow definition of indecency in order to give some specificity to its otherwise very general language. It was said that the offences of indecent dealing and indecent assault already have this specificity because they involve bodily contact of a sexual nature. Moreover, it was said that the idea of moral turpitude or blameworthiness is necessarily incorporated in the requirement for sexual contact without consent or sexual contact with persons who are too young to give consent. The court in *Drago* did not define when conduct becomes 'sexual' in character.

In *R v Chase* [1987] 2 SCR 293, it was said that the Canadian offence of sexual assault (which is roughly equivalent to sexual assault in Queensland and indecent assault in Western Australia) is an assault committed in circumstances that violate the sexual integrity of the victim and there is no requirement for any particular part of the body to be involved. On this approach, the 'sexual' character of conduct could conceivably come from the accompanying words or surrounding circumstances rather than from the character of the physical contact itself.

6.10 An indecent or sexual assault does not necessarily require a sexual motivation or purpose: see *Drago* at **6.27C**. The sexual character of the assault is determined objectively, by reference to how the recipient might be expected to characterise it rather than how the assailant might do so. Nevertheless, it has been held that the purpose accompanying the act can affect how it is ultimately characterised: see *Drago* at **6.27C**. An outwardly innocent act may be indecent because of its purpose; conversely, an innocent purpose may legitimise conduct that would otherwise be questionable. Motivation or purpose is, however, only one variable and it is not determinative. Conduct indecent on its face remains so whatever the purpose which accompanied it.

THE ISSUE OF CONSENT

6.11 The offences of sexual violence under the Codes ss 347, 352 (Qld)/ss 323–328 (WA) require lack of consent to the interaction.

- The general provision on lack of consent for assault in s 245(1) (Qld)/s 222 (WA) is applicable to the offences of sexual assault in Queensland (s 352(1)(a) (Qld)) and indecent assault in Western Australia: s 323 (WA).
- Lack of consent is an express element in the offences under ss 349, 352(1)(b) (Qld)/s 325 (WA), and it is implied by the use of the word 'compel' in s 327 (WA).

Consent may be implied or tacit as well as expressed: see *Horan v Ferguson* [1994] QCA 375; [1995] 2 Qd R 490 at **5.28C**. The boundaries of implied consent are particularly problematic in cases where physical advances are made with the intention or hope of persuading the other person to agree to sexual interaction. Nevertheless, there is no special licence to engage in acts of persuasion, even as between regular sexual partners: see *Case Stated by DPP (No 1 of 1993)* (1993) 66 A Crim R 259 (SACCA).

6.12 Consent for the purposes of offences of sexual violence has a statutory definition (Codes s 348(1) (Qld)/s 319(2)(a) (WA)) and means 'consent freely and voluntarily given'. The Codes further state that, without limiting the scope of the general definition, consent is not freely and voluntarily given if it is obtained in certain proscribed ways. An expression of consent induced by one of the proscribed means is simply treated as no consent at all, even if there has been an outward expression of consent.

- In the Code (Qld), the proscribed means are force, threat or intimidation, fear of bodily harm, exercise of authority, misrepresentations about the nature or purpose of the act, and impersonations of the victim's sexual partner.
- In the Code (WA), the proscribed means are force, threat, intimidation, deceit, or 'any fraudulent means'.

These definitions are expressed to be for the purposes of the relevant Code chapters dealing with offences of sexual violence. A question arises about their applicability to offences of sexual assault in Queensland and indecent assault in Western Australia. This is because lack of consent is required for these offences by virtue of the underlying definition of assault (s 245 (Qld)/s 222 (WA)) rather than the words of the provisions creating the sexual offences. Nevertheless, it is to be expected that the definitions will be applied to all offences of sexual violence.

6.13 The interpretation of the broad phrase 'freely and voluntarily' in the Codes s 348(1) (Qld)/s 319(2)(a) (WA) is yet to be determined.

There may be room for debate over the significance of harassment and economic pressure as forms of threat or intimidation. However, in *Michael v State of Western Australia* [2008] WASCA 66; 183 A Crim R 348 at [74] (6.28C), Steytler P denied that a threat of physical violence need be involved.

There may also be room for debate over the significance of some misrepresentations. The Western Australian list of proscribed means refers generally to deceit or any fraudulent means, while the Queensland list identifies only misrepresentations as to the nature and purpose of the act and impersonations of a sexual partner. This difference in wording may not matter. Other forms of misrepresentation in Queensland may still be held to negative free and voluntary consent. Conversely, not every misrepresentation in Western Australia may be held to negative free and voluntary consent. In particular, the significance of minor or vague misrepresentations remains uncertain.

In *Michael v State of Western Australia* (6.28C), judges of the Court of Appeal took different positions on whether 'deceit or any fraudulent means' should be given some kind of restrictive interpretation. Steyler P at [86] expressly left the question open. In contrast, EM Heenan AJA at [361] proposed excluding 'fraudulent deceptions which do not go to the nature or quality of the act or its purpose or to the identity of the person proposing the sexual activity'. Miller JA at [178] rejected such a restrictive interpretation but did not otherwise answer the question.

6.14 In *R v Cuerrier* [1998] 2 SCR 371, the Supreme Court of Canada held that fraud in cases of sexual assault should have the same elements as in commercial cases: dishonesty and deprivation. However, it was also ruled that, in order to avoid trivialising offences, the deprivation should be of a kind involving at least a risk of serious bodily harm. On that basis, the Supreme Court upheld the conviction of an accused who had concealed his HIV positive condition

when he had unprotected sexual intercourse. Australian courts might be similarly attracted to the idea of consent being invalidated only by a category of serious misrepresentations. However, it might still be questioned whether non-disclosure as well as active misrepresentation should fall within such a category.

6.15 Physical submission by itself is clearly not consent. This is affirmed in the Code (WA) which expressly provides that mere failure to offer physical resistance does not constitute consent: s 319(2)(b). However, neither Code addresses difficult questions about the relationship between consent and such states of mind as acquiescence, tolerance and submission.

In *Holman v R* [1970] WAR 2 at 10, the proposition was accepted that '"a reluctant submission" induced by a long persuasion' could be 'a completely willing consent'. This might be so if 'submission' is taken to mean something like 'acquiescence' or 'tolerance'. However, the use of 'submission' in this sense is misleading. The term is commonly used to describe an absence of resistance, where a decision to forgo or to cease physical resistance is still accompanied by an attitude of rejection. In that sense, submission would not be consent.

Recent authorities have tended to draw a clear distinction between submission and consent. In *Case Stated by DPP (No 1 of 1993)* (1993) 66 A Crim R 259 (SACCA), it was said that 'submission is not consent'. Similarly, in *Wagenaar v R* [2000] WASCA 325 at [16], the statement that 'there is a difference between consent and submission' was approved.

6.16 Even when consent is given to sexual interaction, it may still be withdrawn. If sexual interaction continues without consent — that is, after consent has been revoked — an offence is committed. Moreover, supervening unconsciousness causes an inability to agree or consent: *Saibu v R* (1993) 10 WAR 279. It is sufficient that lack of consent occurs at any time in an interaction, subject to one exception. An initial denial of consent may be vitiated by a subsequent change of mind. In *R v Redgard* [1956] St R Qd 1, it was suggested that a preliminary non-consensual act and a subsequent consensual act may be so connected that they should be regarded as forming 'one transaction'. The grant of consent is then taken to characterise the whole transaction.

MISTAKES

6.17 There may be cases in which the physical contact alleged to be indecent was unintentional: see **5.11–5.13**. But the conduct will be intentional in most cases of sexual contact and effectively in all cases of sexual penetration. In cases where fault is a separate issue, it is usually because of an assertion by an accused of a mistaken belief in consent. The operation of mistake as an excuse for an act of unwanted sexual contact is a contentious area of the criminal law.

6.18 The rule relating to mistaken belief in consent in the Codes of Queensland and Western Australia is quite different from the equivalent rule at common law. Under the Codes s 24, the mistake must be reasonable as well as honest if it is to afford a defence. At common law, however, an honest but unreasonably mistaken belief in consent is a good defence: see the discussion of *DPP v Morgan* [1975] 2 All ER 347 in *Attorney-General's Reference No 1 of 1977* [1979] WAR 45 at **6.29C**. Under the common law approach, the reasonableness of the accused's belief is relevant only to the question whether it was genuinely held. The decision in *Morgan*, above, created a political controversy which has largely bypassed Queensland and Western Australia because of s 24. In *Attorney-General's Reference No 1 of 1977* (6.29C), the

court affirmed that the text of the Codes does not permit the adoption of the common law rule respecting mistakes.

The Codes s 24 effectively imposes liability for negligence, since holding an unreasonable belief is a form of negligence. The courts have not considered whether it would be appropriate to import the standard of criminal negligence: see 4.33. In any event, it can be argued that a negligent belief in consent to sexual interaction is always grossly negligent because any question about consent can be easily resolved.

6.19 In *Attorney-General's Reference No 1 of 1977* (6.29C), it was noted that, even though an honest but unreasonable belief in consent is not a defence to rape, it is a defence to attempted rape. This is because any attempt to commit an offence requires an intention to commit it: Codes s 4; and see 19.11–19.14. A belief in consent is inconsistent with an intention to commit rape, no matter how unreasonable the belief may be. In the absence of any requirement to prove intent for the completed offences of rape, sexual penetration, sexual assault and indecent assault, the Codes s 24 require a mistake to be reasonable if it is to afford a defence.

6.20 Mistake is to be distinguished from mere ignorance. Under the Codes s 24, there must be a positive belief in the existence of a state of things: see 12.11. There is no defence for a person who did not advert at all to the question of whether or not there was consent.

6.21 In *R v Mrzljak* [2004] QCA 420; [2005] 1 Qd R 308 (6.30C), Holmes J observed, at [81], that the issue under s 24 is what the accused might reasonably have believed, not what a reasonable person might have believed. Furthermore, Holmes J held, at [89], that personal characteristics of the accused could be taken into account in determining what might have been reasonable: for example, intellectual impairment, psychiatric disorder, and language. Williams JA concurred on this point, although he noted, at [55], that this accommodation could not extend to taking account of an accused's intoxication, because the Codes s 28 lays down restrictive rules as to when intoxication can be relevant to criminal responsibility: see Chapter 18. Subject to this reservation, a majority of the court favoured a flexible approach with the issue being what might have been reasonable for the particular accused, taking account of any limitations or impairments of the accused.

A similar approach was taken in *Aubertin v State of Western Australia* [2006] WASCA 229; 33 WAR 87 (6.26C). McLure JA said: '… reasonableness is to be judged by reference to the personal attributes and characteristics of the accused that are capable of affecting his or her appreciation or perception of the circumstances in which he or she found himself or herself': at [43]. Nevertheless, McLure JA excluded intoxication and 'a person's values' as relevant factors in assessing the reasonableness of a belief.

6.22 The accused in *Mrzljak*, above, happened to suffer an intellectual handicap that may have affected his ability to discern the absence of consent to sexual intercourse (with his capacity for understanding being further limited by his poor command of English). Fresh evidence of this intellectual handicap was accepted by the majority of the court as a basis for overturning the conviction for rape and ordering a retrial.

6.23 McMurdo P took a different approach to intellectual handicaps in *Mrzljak*. She was only prepared to accept that the assessment of what would be reasonable should take account of the physical attributes of the accused, such as deafness, blindness and

language difficulties, and a limited range of factors which might affect cognitive capacity: in particular, immaturity and a psychological syndrome sometimes called 'battered wife (or woman) syndrome': see 14.38. However, her view was that not only do the intoxication rules under the Codes s 28 prevent intoxication being taken into account, but also that the insanity rules under the Codes s 27 prevent an intellectual handicap being taken into account: see [23]–[26].

6.24 In *R v Dunrobin* [2008] QCA 116, a differently constituted Queensland Court of Appeal applied the majority approach from *Mrzljak*. The accused suffered from chronic paranoid schizophrenia and, as a result, had been on anti-psychotic medications. There was evidence that his decision-making capacity was impaired, that he tended to think in black and white terms and that he had difficulty interpreting hesitancy, ambiguity, complexity and vagueness. Convictions of rape and indecent assault were unanimously quashed because the trial judge had failed to address the relevance of the accused's psychiatric condition when directing the jury on s 24. Nevertheless, one judge, Fryberg J, expressed a reservation, observing at [75] that the decision in *Mrzljak* 'is probably not the last word on the topic, but it is not appropriate to undertake an analysis of it in the present appeal'.

6.25 The flexibility sought by the majority in *Mrzljak* could just as easily be achieved by conceiving the 'reasonable person' as one with the limitations or impairments of the accused. The general issue as to how much flexibility should be built into objective tests should be addressed as a question of principle: the answer is not dictated by whether or not reference is made to the reasonable person.

The issue as to how much flexibility should be built into an objective test can arise in connection with the objective components in criminal negligence and in defences such as accident, self-defence, provocation, compulsion and emergency. See 4.40, 14.14–14.15, 14.38, 15.15–15.18, 16.26. Divergent views have been expressed by judges in jurisdictions such as Canada and England. Some judges favour uniform objective tests which set common standards for cognition and volition, with everyone expected to meet these standards unless they fall within certain narrow exceptions such as insanity. The principle of equality before the law is often invoked in support of this position, meaning formal equality in which the same standards apply to everyone regardless of differences in capacity to meet these standards. Other judges favour flexible standards geared to the capacities of the particular accused, in order to ensure that criminal responsibility is reserved for failure to meet a standard that was easily within the person's grasp. Within Australia, the leading authority is the decision of the High Court in *Stingel v R* (1990) 171 CLR 312; 97 ALR 1 (15.35C). *Stingel* decided that, in the defence of provocation, the 'ordinary person' test (ie, the test of whether the provocation was sufficient to deprive an ordinary person of the power of self-control) should be adaptable only for the youth of an accused. *Mrzljak* and *Aubertin* might therefore be regarded as radical decisions.

6.26 The Queensland Court of Appeal has held that s 24 allows for the possibility of various beliefs about some matter each being reasonable. In *R v Wilson* [2008] QCA 349; [2009] 1 Qd R 476 (12.18C) — a case on s 24 but not on mistaken belief in consent to sexual interaction — it was held to be an error to direct a jury to consider whether an ordinary, reasonable person would or should have made the mistake. The issue for the jury to consider is whether there were reasonable grounds for the belief held by the accused and there may be reasonable grounds even though someone else may have held a different belief.

6.27C

Drago v R

(1992) 8 WAR 488
Western Australia Court of Criminal Appeal

Nicholson J: This appeal concerns the meaning of the word 'indecently' in s 189(1) of the Criminal Code (WA) (the Code). That section makes it an offence for a person to unlawfully and indecently deal with certain other persons. The appellant was convicted of an offence under s 189(3) in that on a date unknown between 1 June 1990 and 31 July 1990 at Albany he unlawfully and indecently dealt with a child under the age of 13 years.

The Crown case against the appellant was as follows. In January 1990 the child in question, together with his parents and siblings, moved into a community house in which the appellant lived. On a number of occasions the appellant went into the room where the child was sleeping, lifted up parts of his pyjamas and ran a biro over parts of his body. Specifically it was alleged that on one occasion in June 1990 at some time between 7.00 pm and 7.30 pm the appellant had taken down the child's pyjama pants and run a biro over the top of and around the child's penis. After that incident the child and his family left the community house …

… The appellant's case was that the child was unsettled in the evenings and to avoid him disturbing another child sleeping in the room he had used the biro to relax him. On the particular evening in question it was said by the appellant that the child was excessively unsettled and that touching was done as part of the relaxation technique.

In his directions to the jury his Honour said that the one fact they had to decide was whether the act in which the appellant ran the biro over and around the boy's penis was indecent, the occurrence being admitted by the appellant. He then said:

> … Was the act, which is admitted, indecent? Because the defence is that it was part of massage treatment and that in itself, the defence says, was for the purpose to settle him down and that therefore it was not indecent. It was, of course, an act that he knew the parent did not agree with and was very much opposed to. Naturally a parent would object to such an act but that does not mean to say that the accused says, 'notwithstanding that, what I did I did purely as a part of massage treatment to calm him down and when I did run the pen over and around his penis it was still just part of that treatment'.
>
> So that brings us to the question of what is indecent. You have heard it already referred to, as I say, quite properly by counsel but let us go over it again. As to the meaning of the word 'indecent' the word 'indecent' has no definite legal meaning and it must be taken therefore in its modern and popular acceptation. In other words, it is for you to decide what is indecent in this present day and age like this very moment about the question you are now considering in all the given circumstances. In the standard dictionary 'indecent' is defined as being 'Anything that is unbecoming or offensive to common propriety'. Indecency must always be judged in the light of time, place and circumstances. So, unbecoming or offensive to common propriety and must be judged in the light of the time, place and the circumstances, and you the jury have to decide that on the evidence you have heard in this particular case.
>
> The Crown says it brought this charge against the accused because no matter which way you look at it, particularly a person who has been told by the mother to chop it out then goes on and runs a biro about the naked torso, naked upper part of the lower body of the child, and goes to the extent of running the biro around the penis and over the top of it of the child, and the Crown says quite rightly and naturally, 'We lay the charge because of that conduct' which is admitted by the accused. The accused says it was all part of the

> calming down process however you like to put it — you have heard the evidence about it — and there was no indecency at all about it.
>
> That is the issue you have to resolve.

At the conclusion of his directions to the jury, counsel for the appellant referred his Honour to *Bryant* [1984] 2 Qd R 545 and submitted that his Honour had been in error in directing that indecency should be found by the jury on a test of 'unbecoming or offensive to common propriety'. On the authority of that Queensland case he contended that his Honour should have directed in terms involving moral turpitude or acting in a base or shameful manner. Having heard argument on the point, his Honour declined to redirect.

Meaning of 'indecently'

The first ground of appeal is that his Honour erred in law and misdirected the jury as to the meaning of the word 'indecent' in that he erroneously directed the jury that the word included within its meaning 'conduct that is unbecoming and offensive to common propriety'.

The Shorter Oxford English Dictionary (3rd ed, 1973) at p 1053 defines 'indecency' as 'unseemliness; unbecoming or outrageous conduct …' and 'indecent' as 'unbecoming; in extremely bad taste; unseemly' and as 'offending against propriety or delicacy; immodest; suggesting or tending to obscenity'.

The word is also to be comprehended within the context of the section in issue before his Honour and the context of the Code in which that section appears as it stood at the time of the appellant's offence …

Before turning to the common law, it is important to remember the role of the common law in relation to interpretation of a provision of the Code. In *Ward* [1972] WAR 36 at 42 the Full Court said: '… ss 2 and 4 of the Criminal Code Act require the Code to be construed without any assumption that common law doctrines still apply except in so far as they are expressly adopted'. In *Brennan* (1936) 55 CLR 253 at 263 the High Court said of s 8 of the Code in relation to common intention:

> But it forms part of a code intended to replace the common law, and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which would leave the law unaltered.

This authority was referred to by Toohey J in *Falconer* (1990) 171 CLR 30 at 66; 50 A Crim R 244 at 270. At CLR 65; A Crim R 269 he said that there is little controversy that common law decisions may be examined to determine the extent to which they may throw light upon the language of the Code and to explain expressions in it, but not to determine the scope for operation in the area of criminal responsibility of common law doctrines because as he said (at CLR 66–7; A Crim R 270–1) 'there was no reason to conclude otherwise than that the provisions in the Code were a comprehensive statement of that responsibility'. The examination of the common law to which I now turn is therefore made in order to throw light on the use of the word 'indecent' or 'indecently' as it appears in s 189(1) incorporated by reference in s 189(3) and not to find how the law stood before the Code and then to see if the Code would bear an interpretation leaving the law unaltered.

The authority relied upon by his Honour the trial judge was *Purves v Inglis* (1915) 34 NZLR 1051. That is the authority cited in *Carter's Criminal Law of Queensland* in relation to the equivalent section to s 189(1) of the Code. In *Purves* at 1053 Sim J said 'the word "indecent" has no definite legal meaning, and it must be taken therefore, in its modern and popular acceptation … In the *Standard Dictionary* "indecent" is defined to be anything that is unbecoming or offensive to common propriety.' …

In *Crowe v Graham* (1968) 121 CLR 375 the High Court was concerned with the meaning of the words 'obscene' and 'indecent' in a statute dealing with the publication of any indecent or obscene picture or printed or written matter. Windeyer J (at 390) said:

> Let us turn to the words 'obscene', 'indecent'. Each is a well-known word. Each has been long used in law. Apart from any definitions given them by statutes, they are both to be understood with the meanings they have for common law; and for present purposes each must be understood with any colour it takes by their collocation. I say this because the adjective 'indecent' has long been used in law to describe multifarious forms of offensive or objectionable conduct. In this general sense it sometimes denotes lewd forms of misbehaviour, but not always. Indecent exposure, indecent assaults involve lewdness. Indecent language does not: see, eg, *Norley v Malthouse* [1924] SASR 268. Brawling in church, maltreating corpses, grave-snatching have all been punished as indecent. Sometimes indecent conduct was punished at common law because it created a public nuisance. Sometimes simply as, in Lord Mansfield's words, 'against public decency and good manners'. The House of Lords has said that for the common law the list is not closed.

… It was against this background that the concept of indecency came before the Court of Criminal Appeal of Queensland in *Bryant*. In that case the appellant had been convicted of the offence of wilfully doing an indecent act with intent to insult the complainant contrary to the Queensland equivalent of s 203(2) of the Code. The indecent act alleged was handing the complainant a jewellery box containing the testicles of an animal. At his trial the judge directed the jury in *Purves v Inglis* terms. The majority of the court allowed the appeal on the ground that the direction as to the meaning of the 'indecency' was in error.

Sheahan J, who agreed with the reasons of McPherson J, commenced by referring to the location of the section creating the offence within Ch 22 of the Code concerning 'offences against morality' in juxtaposition to sections, in one way or another, related to sexual impropriety or conduct containing the element of lewdness. … The question he considered requiring answer was whether the words 'indecent act' in the section creating the offence were intended to cover, in addition to lewdness, conduct which, however outrageous or offensive to common propriety, did not involve the human body, bodily actions or bodily functions in a sexual way. He said (at 549):

> However that may be, I consider that the word 'indecent' in s 227 should be construed so as to exclude conduct which is 'unbecoming' or 'offensive to common propriety' in a section which makes an offence thereunder a misdemeanour and the offender liable to imprisonment with hard labour for two years. There must be an infinite variety of conduct which would satisfy the test of 'unbecoming' or 'offensive to common propriety' but could not, on any view, justify trial on indictment. I think that having regard to the context in which s 227 of the Code is found, the legislature intended to strike at conduct which

is lewd or prurient, and not 'unseemly' or 'in extremely bad taste', two of the various meanings given to the word 'indecent' in the *Oxford Dictionary*.

…

For the appellant, reliance is placed on *Bryant's* case, the contention being that his Honour should have directed the jury that, for criminal responsibility to attach, they should have found that the appellant had acted in a base or shameful manner and that an element of moral turpitude was involved. In a situation where the appellant had contended that he acted from innocent motives it was not enough that the jury should not have their mind directed to these elements.

In my opinion the decision in *Bryant's* case is directly referable to the language and context in the Queensland equivalent of s 203 of the Code. The important difference between s 203 and s 189 lies in this: the reference to indecent act in s 203 does not carry with it as a matter of language any reference to what Sheahan J described at 548 of *Bryant's* case as 'the human body, bodily actions or bodily functions in a sexual way'. That is not the case in s 189(1) where the word 'indecent' appears in juxtaposition to the words 'deals with'. By incorporation of the meaning assigned to the words 'deal with' by subs (7), s 189(1) applies to actions by a person which, if done without consent, would constitute unlawful and indecent assault on another person. The act of assault itself involves the human body, bodily actions or bodily functions. In its context, the word 'indecent' confines those matters to ones involving sexual conduct. It is quite apparent that the Code deals elsewhere with assault *simpliciter* and that s 189 is directed to something more than assault. In that context the word 'indecent' can only be referable to the involvement of the human body, bodily actions or bodily functions in a sexual way. As a consequence, there is not any necessity to construe s 189(1) and (3) in a way which precludes actions devoid of sexual conduct. The language of the section restricts it to such a situation.

The question then becomes whether in that context criminal responsibility can only be imposed if there is an element of moral turpitude or acting in a base or shameful manner present. In my view that cannot be the case. The section is directed at certain bodily actions or bodily functions involving the human body in sexual conduct. The element of moral turpitude or blameworthiness arises from the carrying out of the act which by its nature constitutes an offence against morality. As Bray CJ said in *Johnson* [1968] SASR 132 at 135, in addressing the absence of factors important to constituting indecency, sexual affront to the victim and danger of corruption are important factors, and dealing with a sexual portion of the anatomy of a victim must be a sexual affront. It is not necessary to circumscribe the operation of s 189 by reference to a test devised to limit the otherwise general language of the equivalent of s 203 of the Code. In the context of s 189, what will be 'indecent' is a dealing by one person with another person in circumstances which include actions constituting an assault where that conduct is unbecoming or offensive to common propriety. What is unbecoming or offensive to common propriety in those limited circumstances is not such as would open itself to the objection of allowing undue scope to the varying standards of different juries. In my opinion, this result follows from the wording of s 189 and from its context …

It follows that I consider that his Honour was correct in the manner in which he directed the jury. In the context of s 189 and with specific reference to the charge faced by the appellant his Honour was correct to direct the jury in terms of the remarks of Sim J in *Purves v Inglis*. Accordingly I consider the appeal fails on the first ground.

Appellant's intention

The second ground of appeal is that the learned trial judge erred in that he failed to adequately direct the jury that it was necessary for the Crown to prove not only that the appellant intentionally dealt with the victim but that in doing so he intended to commit an act which right-minded persons would regard as indecent. The third ground of appeal, that the verdict of the jury was unsafe and unsatisfactory, is pressed in terms of the second ground, namely, a failure to direct the jury as to the element of *mens rea* …

Next, in relation to these grounds, reference was made to the evidence in chief of the appellant to the effect that he had carried out the actions with the biro to calm the complainant to induce sleep and that at no time had he the intention of sexually stimulating the child. … In the submissions for the appellant it is contended that the appellant's evidence was sufficient to support a finding of fact by them that the appellant had an innocent intention if they found as a fact that he had touched the penis of the complainant child with a biro.

From there the argument proceeds in terms of *Court* [[1989] AC 28]. In that appeal the House of Lords held that where a charge of indecent assault contrary to the provisions of s 14(1) of the Sexual Offences Act 1956 (UK) was founded on facts capable of being an innocent as well as an indecent interpretation, it was necessary for the prosecution to prove not only that the accused intentionally assaulted the victim but that in doing so he intended to commit an assault which right-minded persons would think was indecent and that evidence as to the accused's motive intending to explain the cause for his conduct was admissible to establish whether he intended to commit not only an assault but an indecent assault. Much reference was made to the *dicta* in that case but in my view it is not necessary to make extensive reference to it because the argument entirely fails …

The argument made for the appellant based on *Court* was that an act *prima facie* indecent could be rendered decent by reference to the intention with which it was done. Not only does reliance on that authority do violence to the Code in the manner indicated but it also seeks to draw from the authority a conclusion not warranted by it. The proposition dealt with in *Court* is to the opposite effect to that advanced on behalf of the appellant. Furthermore, the circumstances of the present case disclose an act which was inherently indecent and in relation to which the majority in that case considered need not involve proof of sexual motivation. It is unnecessary to explore this in terms of the *dicta* in that case because what was there said has no place in the interpretation of the provisions of the Code relating to criminal responsibility …

For these reasons I consider that the second and third grounds of appeal wholly fail. The appeal should be dismissed.

Murray J: In respect to this appeal, I have had the advantage of being able to peruse in draft form the reasons for decision of Nicholson J. I agree entirely with his Honour's conclusion that the appeal against conviction in this case must be dismissed, and I agree generally with his Honour's reasons for that conclusion. However there are one or two observations which I would wish to add …

In my opinion, whether an act may be described as indecent because it offends against community standards of decency, may depend not only upon the nature or quality of the act in itself, but upon the motive or purpose of the actor. That would be so under the Code in my view, just in the same way as at common law.

Court [[1989] AC 28] was such a case. There the alleged indecent act committed by a shop assistant was to smack a 12-year-old customer on the bottom on the outside of her shorts

for no apparent reason. When asked by the police why he had done such a thing, he said, 'I don't know — buttock fetish'. As Lord Griffiths said (at 35):

> Whether or not right-thinking people will consider an action indecent will sometimes depend upon the purpose with which the action is carried out. An obvious example is the examination of an unconscious woman's private parts. If carried out by a doctor for a proper medical purpose no-one would consider such an examination indecent. If carried out by a stranger for a prurient interest everyone would consider it indecent … The fact is that right-thinking people do take into account the purpose or intent with which an act is performed in judging whether or not it is indecent. If evidence of motive is available that throws light on the intent it should be before the jury to assist them in their decision.

That in my opinion is precisely the position achieved by the Code, s 23. In commenting upon the facts of that case, Lord Griffiths (again at 35) said:

> If a juryman is asked to decide whether a man beating a young girl's bottom is acting indecently, the first question he is likely to ask is — why was he doing it?

It would of course, as his Lordship observed, be an entirely different thing that the accused was spanking the girl for legitimate disciplinary purposes, or that he was doing so to satisfy a buttock fetish. In expressing the same point of view (at 42–3), Lord Ackner made the point that there may of course be some conduct which the jury regards as so offensive to common standards of decency, that it should be regarded as indecent of itself, regardless of the motivation for the conduct. But where the act in question was capable of being regarded as indecent, but was not necessarily to be so regarded in itself, the motivation of the actor might operate in one of two ways. It might of course confer the quality of indecency upon an act which might, differently explained, be held not to be so. On the other hand, the motive of the actor might render innocent an act which otherwise, without explanation, might be regarded as indecent …

I agree that the appeal should be dismissed.

[**Wallwork J** agreed with **Nicholson J**.]

6.28C Michael v The State of Western Australia

[2008] WASCA 66; (2008) 183 A Crim R 348
Western Australia Court of Appeal

Steytler P:

1 On 24 November 2006 the appellant was convicted by a jury on five charges of sexual penetration without consent. He was sentenced to a total term of 2 years and 10 months' imprisonment. He has appealed against his convictions…

Prosecution evidence at the trial

2 The offences involved two prostitutes, 'P' and 'T'. They were drug addicts. Both gave evidence at the trial. The critical aspects of their evidence were as follows.

3 P had worked at a brothel in Perth. In late 2003 or early 2004 the appellant went to the brothel. He had sex with P after paying in advance. Afterwards, he showed her a police

badge which he had obtained through the internet. He told her, untruthfully, that he was a police officer. P believed him. She was worried because she had previously been arrested for engaging in prostitution.

4 In February 2004, P was walking in Highgate, hoping to attract custom. She knew that this was illegal. The appellant was driving down the street upon which P was walking. He stopped his car. P got into the car. She asked the appellant whether she knew him from somewhere. He told her that he was the policeman who had previously met her at the brothel. P told the appellant that her price for 'oral and sex' was $150. He repeated that he was a policeman and showed her his badge. He said words to the effect that she should discount the price of her services 'or else'. She was afraid that the appellant might arrest her if she did not comply with his request. She consequently agreed to discount her fee to $100. The appellant paid her that sum and then had sex with her. P said that, if she had not believed that the appellant was a police officer, she would not have provided the services she did provide for a fee of $100. She also said that she would not have allowed the appellant to do other things that he did, including kissing and licking her breasts and kissing and licking her face.

5 The events concerning P gave rise to the first three charges on the indictment.

6 Some two months later, T was working illegally on a street in Northbridge. She was picked up by the appellant. She offered to provide oral and vaginal sex for $100. The appellant told her that he was a police officer and that she should provide those services for no charge. She could not remember the exact words used by him, but the effect of them was that she would be in 'big trouble' if she did not do what he wanted her to do for no charge. She had previously had trouble with police because she was a known drug user. She did not want any further trouble. She consequently did as he asked. She made no protest, but had tears in her eyes. She said that she would not have provided the services for free if she had not believed that the appellant was a police officer who was able to arrest and charge her.

7 These events gave rise to counts 4 and 5 on the indictment.

The appellant's evidence

8 The appellant, while admitting that he performed the sexual acts spoken of by P and T, said that each freely and voluntarily consented to these acts. He said, in respect of P, that he was asked to pay $150 but that P agreed to provide the services sought by him for $100. In respect of T, he said that he was asked to pay $100 but that she agreed to provide her services for $80 and he paid her that sum. He admitted having previously told P that he was a police officer. He denied that he repeated this to P on the night in question but said, in cross-examination (ts 532), that, while he believed that he had not repeated this, he could not 'swear on oath'. He denied that he said or did anything, at the time of his negotiations with P, to suggest that a discount should be given because he was a police officer.

9 The appellant also denied ever having told T that he was a police officer. However, earlier in the trial, when his then counsel cross-examined T, he had put to her (ts 224) that the appellant had said something like, 'Look, I am actually a cop but I'm not working to-day. How about looking after me on price'. T denied that the appellant had said this. She insisted that he had told her that he was a policeman and that he had intimated that he would make trouble for her if she did not do as he asked. When asked, in cross-examination, why his counsel had put this proposition to T if, as the appellant said, he had never told T that he was

a police officer, the appellant had some difficulty responding. After having acknowledged that he had heard the questions asked and that he had listened carefully to the evidence (ts 529), he at first said that he had obviously been 'mistaken between what was said the other day and what's being said now' and that he had been mistaken 'the other day' (ts 529). Then he said that he hadn't corrected his counsel because he had 'obviously missed it' (ts 530). Then, he said that he did recall his counsel asking these questions and that he guessed that what had been put by his counsel had been put on his instructions (ts 531). When asked whether he had changed his version in that respect, he said, 'Well, it would seem so' (ts 531).

…

29 By ground 5 the appellant contends that the verdicts of the jury cannot be supported by the evidence 'because there was no absence of consent as defined by s 319(2)(a) of the Code'. The argument put by counsel for the appellant was essentially that, even accepting the prosecution evidence, there was a free and voluntary consent in each case and the threats, intimidation, deceit or fraudulent means related only to the price to be paid for the services provided. He argues that each of the complainants was willing to engage in sex with the appellant and that the only issue between each complainant and the appellant was one of the amount that should be paid for that sex.

30 These contentions put in issue the proper construction of s 319(2)(a) of the Code. That section is best understood when regard is had to the legislative history.

Legislative history of s 319(2)(a)

31 As at 1 July 1972 the Code provided for the offence of rape. This was defined in s 325 as follows:

> Any person who has carnal knowledge of a woman or girl, not his wife, without her consent, or with her consent if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime which is called rape.

32 As from 9 December 1976, that provision was amended by the addition, after the words 'not his wife', of the words, 'or his wife whilst he is separated from her and they are not residing in the same residence'.

33 There was, at this time, no statutory definition of the word 'consent'. The word was consequently given its ordinary meaning.

34 The issue of consent induced by fraud was considered by the High Court in *Papadimitropoulos v The Queen* [1957] HCA 74; (1957) 98 CLR 249. In that case the appellant deceived the complainant, who could speak no English, into believing that the two of them had been married in the course of a visit to a registry office. In that belief, she had sexual intercourse with the appellant. After a few days he left her and did not return. She discovered that there had not been a marriage ceremony. The appellant was charged with rape. The trial judge directed the jury that, if the complainant had acquiesced to sexual intercourse only upon the basis that she was married to the appellant and that belief had been brought about by the appellant's deliberate misrepresentation to her, made with the intention of persuading her to consent, then there would be no consent at all. The appellant was convicted.

…

36 When the matter came before the High Court, it was unanimous in allowing the appeal and quashing the appellant's conviction. The court (Dixon CJ, McTiernan, Webb, Kitto & Taylor JJ) said (261):

> Rape, as a capital felony, was defined with exactness, and although there has been some extension over the centuries in the ambit of the crime, it is quite wrong to bring within its operation forms of evil conduct because they bear some analogy to aspects of the crime and deserve punishment. The judgment of the majority of the Full Court of the Supreme Court goes upon the moral differences between marital intercourse and sexual relations without marriage. The difference is indeed so radical that it is apt to draw the mind away from the real question which is carnal knowledge without consent. It may well be true that the woman in the present case never intended to consent to the latter relationship. But, as was said before, the key to such a case as the present lies in remembering that it is the penetration of the woman's body without her consent to such penetration that makes the felony. The capital felony was not directed to fraudulent conduct inducing her consent. Frauds of that kind must be punished under other heads of the criminal law or not at all: they are not rape …

37 In *Holman v The Queen* [1970] WAR 2, attention was given, in this state, to the meaning of the word 'consent'. Jackson CJ (with whom Burt J was in agreement) was critical of the use, by the trial judge, of the expression 'willing consent' when addressing the jury in a rape case. Jackson CJ said (6):

> It is clear that in the first passage cited his Honour when using the phrase 'willing consent' is seeking to distinguish between a consent which is obtained by threats or by fear and one which is not so obtained. But the adjective 'willing' is apt to convey a very different meaning. The *Concise Oxford Dictionary* defines it as 'not reluctant, cheerfully ready', terms which when applied to 'consent' in relation to rape could be positively misleading. The further use of the phrases 'complete willingness' and 'a completely willing consent' emphasizes, in my view, a concept which is not in any way justified by the statutory definition, which is simply intercourse 'without her consent'. A woman's consent to intercourse may be hesitant, reluctant, grudging or tearful, but if she consciously permits it (providing her permission is not obtained by force, threats, fear or fraud) it is not rape. In my opinion, the passages to which I have referred in the summing-up constituted a misdirection in law.

38 This was how the law stood in 1980, when Mr Michael Murray QC (as Murray SPJ then was) was commissioned to review the Code. In June 1983, he reported his conclusions to the then Attorney General in two volumes titled: 'The Criminal Code: A General Review' (Murray Report). In his report, Mr Murray identified what he saw as 'deficiencies in [s 325] as it defines consent'. He said (220, 221):

> It is illogical it seems to me to say that a consent is obtained at all where acquiescence is gained by threats or fear or intimidation, or any of the other matters mentioned in the section. Those occurrences are events which logically mean that an acquiescence, which is not true consent, has been obtained. The definition of consent should emphasise that what the law is interested in is a free and voluntary consent given without any form

of pressure.Also, for example, the definition makes it clear that the only types of fraud recognised as vitiating consent are those involving the identity of a person as the husband of a married woman or as to the nature of the act of intercourse itself. There are other types of fraud which should, but have been held not to, vitiate consent so as to constitute the offence of rape and I refer in this regard for example, to the High Court decision of *Papadimitropoulos* [1957] HCA 74; (1957) 98 CLR 249, 261 where the fraud concerned was as to the legality of the act because there were fraudulent representations as to the nature of a ceremony which had been performed which was in fact a bogus wedding ceremony. That clearly affected the question of consent to intercourse because the woman concerned clearly consented on the basis that she was married to the accused when in fact that was not so.

39 He went on to suggest a definition of 'consent' that he had devised. This read as follows (528):

'Consent' means a consent freely and voluntarily given and, without otherwise affecting or limiting the meaning of the word, a consent is not freely and voluntarily given if it is obtained by force, threats or intimidation, or by any deception or fraudulent means.

40 Subsequently, the Criminal Code was amended by the Acts Amendment (Sexual Assaults) Act 1985 (WA). This came into effect on 1 April 1986. Amongst other changes that were made to the Code, it repealed s 325 and inserted, in lieu, s 324G, which read as follows:

324G (1) For the purposes of this chapter, 'consent' means a consent freely and voluntarily given and, without in any way affecting or limiting the meaning otherwise attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deception or fraudulent means.

(2) A failure to offer physical resistance to a sexual assault does not of itself constitute consent to a sexual assault.

41 In a case involving sexual penetration, that section was to be read with (amongst others) s 324D, which provided that a person who sexually penetrates another person without the consent of that person is guilty of a crime.

42 As Miller JA has pointed out, subsequently, in *Ibbs v The Queen* [1988] WAR 91, the Court of Criminal Appeal revisited what had been said in *Holman*. In his judgment (93) Burt CJ said:

[If] not positively wrong, it would be highly dangerous for a jury now to be told that for the purpose of the new offence of sexual penetration without consent: 'A woman's consent to intercourse may be hesitant, reluctant, grudging or tearful, but if she consciously *permits* [emphasis mine] it, providing her permission is not obtained by force, threats, fear or fraud, it is not' sexual penetration without consent.

Brinsden J expressed similar views (101). Smith J generally agreed with what had been said by the Chief Justice and by Brinsden J. (See also *Wagenaar v The Queen* [2000] WASCA 325 [19] (Ipp J, Kennedy & Pidgeon JJ concurring).)

43 On 1 August 1992 the Acts Amendment (Sexual Offences) Act 1992 (WA) came into operation. This repealed s 324G and substituted for it s 319(2) in its present form, quoted earlier in these reasons. That section is substantially similar to s 324G save that the word 'deception' was replaced by 'deceit' and the word 'any' was introduced before 'fraudulent means'. The amending Act also replaced s 324D with s 325, which was in identical language.

44 Section 319(2) and its predecessor, s 324G, substantially altered the common law, at least if read at face value. That is because the words 'obtained by force, threat, intimidation, deceit or any fraudulent means' are not expressly limited in any way.

…

Significance of the legislative change in Western Australia

50 There has been some debate concerning the significance of the change to the common law introduced by the definition of 'consent', as it presently stands in this state. This has centred around the absence of any express limitation of the words 'deceit, or any fraudulent means' and of the words 'threat' and 'intimidation'.

51 Under the common law, the notion that consent obtained by fraud is no consent at all, in this context, has not been well received. In the well-known case of *R v Clarence* (1888) 22 QBD 23, Wills J, after commenting that this notion is not true as a general proposition either in fact or in law, went on to say (27):

> If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent. In respect of a contract, fraud does not destroy the consent. It only makes it revocable.

In the same case, Stephen J said (43–44):

> It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification … Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instance by promises not intended to be fulfilled. These illustrations appear to shew clearly that the maxim that fraud vitiates consent is too general to be applied to these matters as if it were absolutely true … The only cases in which fraud indisputably vitiates consent in these matters are cases of fraud as to the nature of the act done.

Stephen J went on to say (44):

> Consent to a surgical operation or examination is not a consent to sexual connection or indecent behaviour. Consent to connection with a husband is not consent to adultery. I do not think that the maxim that fraud vitiates consent can be carried further than this in criminal matters. It is commonly applied to cases of contract, because in all cases of contract the evidence of a consent not procured by force or fraud is essential, but even in these cases care in the application of the maxim is required, because in some instances suppression of the truth operates as fraud, whereas in others at least a suggestion of falsehood is required. The act of intercourse between a man and a woman cannot in any case be regarded as the performance of a contract … The woman's consent here was as

> full and conscious as consent could be. It was not obtained by any fraud either as to the nature of the act or as to the identity of the agent.

These comments accorded with what Stephen J had earlier said, in his *Digest of the Criminal Law* (3rd ed, 1883) 185, to the effect that 'where consent is obtained by fraud the act does not amount to rape'.

52 In Australia, the High Court adopted a similar approach to that taken in *Clarence* when it said, as I have earlier mentioned, that the 'essential inquiry' is whether 'the consent is no consent because it is not directed to the nature and character of the act': *Papadimitropoulos* (260). That, taken with the court's other comments (261) to which I have referred, effectively meant that, unless the fraud was directed to the nature and character of the act of penetration, it was irrelevant to the question whether there had, or had not, been consent.

53 In England, *Clarence* has since been applied in *R v Linekar* [1994] EWCA Crim 2; [1995] QB 250. In that case the appellant had approached the complainant, a female prostitute, and negotiated a fee of 25 pounds for sexual intercourse. At the time he had no money on him and no means of paying, but deliberately concealed this from the complainant. After he had had sexual intercourse with the complainant, the appellant ran off without making any arrangement for payment. He was charged with rape, contrary to s 1 of the *Sexual Offences Act 1956* (UK). That section provided that:

> A man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at the time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.

The appellant was convicted. The Court of Appeal quashed the conviction. After relying upon the passages to which I have referred in the judgments in *Clarence*, and after referring to what the High Court had said in *Papadimitropoulos*, the Court of Appeal concluded that the prostitute had consented to sexual intercourse with the appellant. The court found that the 'reality' of that consent was not destroyed by being induced by the appellant's false pretence that his intention was to pay the agreed price of 25 pounds for her services.

54 Subsequent to the decision in *Linekar*, the *Sexual Offences Act 2003* (UK) was enacted. Section 76 of that Act raised a number of presumptions that were conclusive of the issue of consent and, consequently, when intercourse was proved, conclusive of guilt. One of these (s 76(2)(a)) operated when 'the defendant intentionally deceived the complainant as to the nature and purpose of the relevant act'. In *R v Jheeta* [2007] EWCA Crim 1699, the Court of Appeal (Sir Igor Judge, Simon J & Judge Goldsack QC) considered that provision. The court provided a number of examples which, it said [27], demonstrated the 'likely rarity of occasions when the conclusive presumption in s 76(2)(a) will apply'. One of these was the situation that occurred in *Linekar* which, the court said [27], would not fall within its ambit.

55 As Miller JA has mentioned, in an article entitled 'Rape: When Does Fraud Vitiate Consent' (1995) 25 *University of Western Australia Law Review* 334, Mr G Syrota considered whether *Linekar* would have been differently decided in this jurisdiction. He suggests that the common law approach still applies, in Western Australia, in a case of that kind. He argues that there are three difficulties with the view that virtually any false pretence (and not merely those which relate to the identity of the perpetrator or the nature of the act) may negative consent, leaving the perpetrator guilty of an offence under s 325.

56 The first difficulty is that this would leave the then s 192(2) (now s 192(1)(b)) of the Code largely or wholly redundant. That section makes it an offence for a person to procure a woman, who is not a common prostitute or of known immoral character, by any false pretence, to have unlawful carnal connection with a man. Mr Syrota points out that, as with the corresponding English legislation, it has long been established that any false pretence is sufficient for the purposes of that section, provided that it induces the woman to engage in an unlawful carnal connection. He suggests that there would be little point in retaining that offence if any false pretence was also capable of bringing an offender within the ambit of s 325.

57 His second difficulty arises from the then provisions of s 202 of the Code (now s 192(2)). That section provides that it is no defence to a charge under s 192 that the act was done 'with the consent of the person with respect to whom the act was done'. Mr Syrota suggests that it is implicit in that section that there must be at least some types of false pretence which may induce a woman to have sexual intercourse with a man, but which do not vitiate her consent to it. He offers the same example as was given by Wills J in *Clarence*, in the extract from his judgment quoted above. Mr Syrota suggests that, if this type of pretence does not negative consent for the purposes of s 192(2), it must also not do so for the purposes of s 325, which requires proof of sexual penetration without consent.

58 Mr Syrota's third difficulty concerns the wording of s 325. He refers, in this respect, to the distinction drawn in *Papadimitropoulos* between the consent to the physical act of penetration and the inducing causes of that consent. He suggests that, as under the common law, it is the consent to the sexual penetration that is in question under s 325 and, so long as the woman comprehends the nature of the act and knows the identity of the man, her consent is established whether or not there has been fraud as regards a collateral matter. He goes on to say:

> It is true that section 319(2)(a), which applies to section 325, speaks not merely of 'consent' but of 'a consent *freely and voluntarily given*'; but it is doubtful whether these words alter the fundamental requirement that consent relates exclusively to the 'physical fact of penetration' and that an inquiry into 'inducing causes' is not in point.

59 Consequently, Mr Syrota concludes that, to vitiate consent and bring an accused person within s 325, the fraud must relate either to the identity of that person or to the nature of the act. He suggests that other frauds, which do not vitiate consent, can be dealt with either under s 192(2) or s 409 (which deals generally with the offence of fraud).

60 Mr Syrota's view, while shared by some (see EJ Edwards, RW Harding and IG Campbell, *The Criminal Codes: Commentary and Materials* (4th ed, 1992) 542 and see, also, E Colvin and J McKechnie, *Criminal Law in Queensland and Western Australia: Cases and Materials* (5th ed, 2008) [6.10]), is not shared by others. Simon Bronitt, 'Rape and Lack of Consent' (1992) 16 *Criminal Law Journal* 289, 300–01, suggests that the approach adopted by the then s 324G of the Code is such that 'any fraudulent behaviour which induces a person to have intercourse will vitiate consent'. RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (6th ed, 2004) says (307) that the definition of consent in s 319(2) of the Code 'does not limit the deceit or fraudulent means to the nature of the sexual act and these terms may be broad enough to extend to the wider aspects of deception such as arose in *Papadimitropoulos*'.

61 Neil Morgan, 'Oppression, Fraud and Consent in Sexual Offences' (1996) 26 *University of Western Australia Law Review* 223 compares what he refers to as the 'narrow view' taken by Mr Syrota and others with the 'wide view' of s 319(2)(a) taken by Mr Bronitt and others (including B Fisse, *Howard's Criminal Law* (5th ed, 1990) 180–3).

62 Professor Morgan suggests, rightly, that the ramifications of the wide view are truly dramatic. He offers examples of a man who falsely professes his undying love for a woman who agrees to have sexual intercourse only because she believes his protestations; of a woman who tells a man that she is unmarried when she is in fact married; and of a woman who agrees to sexual intercourse on the basis of the man's false promise that he intends to marry her. He suggests that it cannot have been intended that the law of sexual assault should reach so far or that attempted sexual assault charges might lie in the case of failed 'seductions'.

63 However, Professor Morgan takes a different approach from that adopted by Mr Syrota. He acknowledges that those who adopt the common law approach, notwithstanding the definition in s 319(2)(a), are able to point to the fact that, before referring to 'force, threats, intimidation, deceit, or any fraudulent means', that section specifically states that these factors do not 'in any way [affect] the meaning attributable' to the requirement that consent must be freely and voluntarily given. However, he suggests (231) that the more natural reading of the definition would seem to be that the phrase is intended to extend rather than to restrict the possible operation of the law. He points out that this would be more in line with what was said in the Murray Report. He goes on to say (231):

> It is therefore submitted that section 319(2)(a) requires the courts to focus on the defendant's fraud rather than the victim's mistake. This ensures a clearer focus on the defendant's culpability and also accords with the policy behind modern sexual assault laws which … should seek to protect victims from violence and various forms of exploitation and not from their own mistakes.

64 Professor Morgan draws a distinction between cases involving force, threats and intimidatory behaviour, on the one hand, and fraud, on the other. He suggests (233) that, in cases other than fraud, judges should leave it to the jury to decide whether, as a matter of fact, there was free and voluntary consent as opposed to mere acquiescence. However, he says that, since sexual assault laws target cases of violence and the abuse of power, they should not be used, in cases such as *Linekar*, to regulate what may be regarded as essentially commercial transactions. He points to the fact that the victim of Mr Linekar's deception had agreed to have sexual intercourse with him and was under no misapprehension as to the nature or moral quality of the act or the reasons for it. He argues (234) that a conviction for a lesser offence of fraud rather than sexual assault would adequately and appropriately reflect the degree of criminality. He consequently argues that the courts should reject the view that any type of fraud can vitiate consent, describing that view as unworkable and as generating many practical difficulties. He suggests that the courts should adopt legal rules which delimit the situations in which fraud vitiates consent, by reworking the common law rules, and that they should not regard this as merely a question of fact for the jury.

65 There is a helpful discussion of the factors that should vitiate consent in a discussion paper published by the Model Criminal Code Officers Committee in 1996, headed 'Chapter 5: Sexual Offences Against the Person'. The authors favour the Western Australian Code's use of the words 'consent freely and voluntarily given'. They say (49) that this phrase makes it clear that lack of consent is not confined to physical circumstances involving the use of force

or violence and that it emphasises that consent should be seen as a positive state of mind. They say, as regards fraud, that the argument in favour of a wide view is that there is 'little justification for restricting the basic offence to fraud as to the identity or nature of the act, thereby excluding the circumstances which arise in cases such as *Papadimitropoulos* and *Mobilio*'. This last reference is to *R v Mobilio* [1991] 1 VR 339, in which the fraud caused the victim to believe that penetration (by a medical instrument) was being effected for medical diagnostic purposes. This argument in favour of the wide view suggests (55) that, because the victim consents in such cases only because of the deception, it should be open to prosecute the accused 'for the basic offence'. The contrasting view put up by the Committee is that 'the basic offence should be restricted to cases involving force or the threat of force, whether express or implicit'.

66 The authors say (55), in regard to fraud, that it is conceded that the common law categories are correct. They go on to say:

> However, to allow consent to be negated by *any* type of fraud threatens the seriousness of the offence. The basic offence should not be extended to cover conduct that is merely *dishonest*. To do so would mean that unlawful sexual penetration could be committed by mere deceit or trickery:
>
> 'The possibilities of misrepresentations are endless, ranging from one spouse's lie that he has obtained a job or that he is the benefactor of the delivered flowers, to assurances about possession of sexual dexterity and declarations of love and respect, to proffering a prostitute a worthless cheque.' (Cunliffe I 'Consent and Sexual Offences Law Reform in New South Wales' (1984) 8 Criminal Law Journal 271 at 281).
>
> Again, while inducing others to take part in a sexual act by deceptive means may not be acceptable to most people, there is no public interest served in making this type of behaviour subject to the sanction of the criminal law. Alternatively, there may be some particular acts of fraud which should come under the criminal law. However, these ought to be the subject of some lesser offence such as those relating to procuration.

67 The words 'obtained by force, threat, intimidation' have also given rise to difficulty. In *Howard's Criminal Law* above, Fisse suggested that these words, notwithstanding their literal width, left room for doubt in four directions (183). These were:

> … first, whether threats or the actual application of force is limited to [the victim]; secondly, whether threats or intimidation are limited to serious bodily harm; thirdly, whether [the victim's] belief that she has been threatened need be reasonable; and fourthly, whether the threats need be immediate.

68 The first and fourth of the questions posed by Fisse do not arise in this case. The threats were made, in each case, to the victim and they were immediate. However, it is difficult to see why, on the ordinary meaning of the words used in s 319(2)(a) of the Code, the threat should be one directed at the victim or why it should be 'immediate'. The question for the jury will always be whether or not the consent was freely and voluntarily given or, relevantly to this issue, whether it was obtained by threat. On the face of it, it is difficult to see why the legislature should have chosen to distinguish between a threat, for example, to a spouse or sibling of the victim, so as to force the victim to consent to intercourse, and one of harm to the victim himself or herself. As will be apparent, s 325 of the Code, in its original form,

referred to 'threats or intimidation of any kind'. However, it does not seem to me that the deletion of the words 'of any kind' was intended to limit the words 'threat' and 'intimidation'. Section 324G, which followed the Murray Report, merely adopted the form of words suggested in that report. Equally, because the question is whether or not the consent was 'obtained by' force, threat, intimidation, deceit, or any fraudulent means, it is difficult to see why the threat should necessarily be immediate. The victim may be as much induced to consent by a threat of something that is to happen in the future as by something that will happen more immediately. However, because these questions were not addressed, at all, in argument, it is unnecessary to reach any final decision in respect of them.

69 The second, and perhaps the third, of the questions posed by Fisse do arise in this case, although, once again, no argument was addressed to them. Both questions were touched upon in *R v P S Shaw* [1995] 2 Qd R 97. That case concerned the proper construction of s 347 of the *Criminal Code 1899* (Qld) and, in particular, the meaning of the words 'by means of threats or intimidation of any kind'. Pincus JA considered the meaning of those words (114). He arrived at the following conclusion:

> The types of cases in which the threat has been one of creating for the complainant a problem in returning home illustrate the difficulty associated with holding that the reasonableness or proportionality of the reaction to the threat is irrelevant; if the threat not to take a complainant home is one which, if carried out, would cause her mere inconvenience or minor expense, but nevertheless induces consent, it would seem odd that this should be treated as rape. In the present case the jury might rationally have arrived at the conclusion that the complainant's submitting to intercourse and the other acts involved was, considering her personal characteristics and situation, a response to the threat which one might expect such a young girl to make. The appellant's previous treatment of the complainant was such as to give the threat that the complainant would not go home a particular significance, referred to in the Crown's submission below, namely that of a threat to keep her in the location in Innisfail where she would be 'available for sexual misuse at the hands' of the appellant. So that if, as I think one should, one reads the reference in the statute to consent obtained by means of threat as confined to instances in which the threat is one of substantial harm, the evidence is sufficient to support a conviction. Further, the judge's directions were sufficient to convey to the jury the notion that substantial harm must be threatened.

70 McPherson JA took a wider view of the operation of the section. He said (115):

> The question here was not whether a woman of average fortitude, maturity, or determination would have ignored or resisted a similar threat if made to her, but whether the consent of this particular complainant was induced by the threat made to her by the appellant. Under s 347 it was sufficient for the purpose if the complainant's consent was in fact obtained by means of threats or intimidation 'of any kind'. The section does not require that the threats or intimidation must, objectively speaking, be substantial. That is not surprising when it is borne in mind just how much human attitudes and behaviour may vary from one individual to another.

71 The third judge, Fitzgerald P, found it unnecessary to consider the issue. However, he said (111):

> If the law is to be amended, care should be taken not only to ensure that the law does not punish as rape conduct which ordinary members of the community would not place in that category; the law's protection should not be denied to women who are weak or vulnerable to domination and exploitation, whose consent to intercourse can be obtained by taking advantage of their condition, and is not a free and informed exercise of will.

72 There are other suggestions that reasonableness of the victim's response to the threats or intimidation is not a requirement. Joscelyn Scutt, 'Consent v Submission: Threats and the Element of Fear in Rape' (1977) 13 *University of Western Australia Law Review* 52, 66 said:

> If the idea of consent is applied as a subjective standard — which would seem to be the only intelligible standard which could be applied to the term — then it would seem irrelevant that another person would not have been terrified, or her reason overcome, by a threat of a similar nature. What might validly interfere with one person's ability to consent may be of no moment to another. The definition of rape is *not* that it is 'sexual intercourse without consent of the reasonable man'.

This approach is supported by S Bronitt and B McSherry, *Principles of Criminal Law* (2nd ed, 2005). The authors suggest (578) that this subjective approach to fear is consistent with the policy of 'taking your victims as you find them'.

73 As to the nature of the threat, Colvin and McKechnie suggest [6.10] that the interpretation of the broad phrase 'freely and voluntarily' is yet to be determined and that there may be room for debate over the significance of harassment and economic pressure as forms of intimidation.

74 It seems to me that, on their ordinary meaning, the words 'threat' and 'intimidation' are not limited to the threat of physical violence. A threat is as much a threat if it is one, for example, of blackmail as it is if it is one of physical violence. The same is true of a threat of substantial economic harm. However, there remains a question whether a line should be drawn and, if so, where.

75 Mr Syrota suggests (344) that the word 'threat', in the definition of consent, does not mean 'any threat'. He says:

> Suppose, for example, that D threatens a woman that, if she does not submit to intercourse with him, he will (i) report her to the Tax Office for tax evasion; or (ii) make sure that she is dismissed from her job; or (iii) make it difficult for her to get a bank loan which she desperately needs; or (iv) cease 'dating' her on a regular basis. Surely the Criminal Code requires a line to be drawn somewhere, but regrettably section 319(2)(a) gives no clue as where it is to be drawn.

He suggests that judges should direct juries, as a matter of law, as to which types of threat may vitiate consent, in the sense of rendering it other than free and voluntary.

76 There is an obvious difficulty, in circumstances in which no limitation has been imposed by the legislature, in the notion that judges should direct juries, as a matter of law, as to which types of threat may vitiate consent in the sense to which I have referred. While difficulties may arise if any threat is to suffice, it seems to me that the legislature has chosen to impose

a subjective test which does not have regard to the nature of the threat except insofar as the jury is required to assess whether the victim's consent was in fact 'obtained by' the threat or intimidation.

77 The meaning of the words 'obtained by' was considered by the Queensland Court of Appeal in *R v BAS* [2005] QCA 97. Fryberg J (Davies JA concurring) said [98] that the question whether consent was obtained 'by' a representation involved an inquiry into whether there was evidence of a causal link between the representation and the obtaining. Although regarding it as inappropriate in the circumstances of that case to embark upon an examination of the concept of causation in this context, Fryberg J said:

> I must however disclose the basis upon which I approach the present case. First, the law does not require the representation to be the sole cause of the obtaining of consent; it is sufficient if it plays a substantial (ie more than trivial) part in that process. Second, (without determining whether the reasoning in *March v E & M H Stramare Pty Ltd* ((1991) [1991] HCA 12; 171 CLR 506) can be applied in the present context) the concept of causation in this context is one of practical or commonsense causation and for that reason, particularly suited to determination by a jury. What was said of negligence in *Bennett v Minister of Community Welfare* is applicable here: 'In the realm of negligence, causation is essentially a question of fact, to be resolved as a matter of commonsense ((1992) [1992] HCA 27; 176 CLR 408 at pp 412–13)'. Third, that being so, when a material representation is made which is calculated to induce the representee to give consent and that person in fact gives consent, it is open to the jury to infer that she was induced to do so by the representation (compare *Gould v Vaggelas* (1985) 157 CLR 215 at p 236 per Wilson J). In practice I do not think that proposition involves any reversal of the onus of proof. The jury will always be deciding the question in a context; whether they draw the inference will depend upon the context.

78 It is important to bear in mind that the consent referred to in s 325 is one that is freely and voluntarily given: s 319(2)(a). The definition makes it clear that consent is not freely and voluntarily given 'if it is obtained by force, threat, intimidation, deceit, or any fraudulent means', without in any way affecting the meaning attributable to the words 'freely and voluntarily given'. As Professor Morgan points out, the more natural reading of the words 'without in any way affecting' is that the phrase is intended to extend rather than restrict the possible operation of the provision. Also, that interpretation accords with the recommendation made in the Murray Report. (Although other submissions were also received prior to the enactment of the *Acts Amendment (Sexual Assaults) Act 1985* (WA), it seems very probable, from the fact that the Act effectively adopted the definition in the report, that the recommendation was accepted by Parliament.)

79 On the face of it, the question whether or not consent has been obtained by any of the forbidden means is a factual question to be determined by the jury.

The present case

80 In the present case, in my opinion, the consent of the victims must have been found by the jury to have been obtained 'by' threat or intimidation. The jury must have accepted the evidence of each of the complainants to the effect that she agreed to provide the sexual services, in circumstances in which she would not otherwise have done so (payment of less

than an acceptable amount or non-payment), solely because she was afraid that the appellant would arrest her or otherwise make trouble for her.

81 That seems to me inevitably to follow from the fact of the convictions (more especially when regard is had to the way that the case was run by both prosecution and defence). I have mentioned that, in T's case, the appellant denied that he had said that he was a police officer and asserted that he had negotiated, and paid, a lower price. The jury must have rejected his evidence and accepted that of T. If the appellant told T that he was a policeman that, of itself, would have carried an implied threat. It could not sensibly be suggested (and nor was it) that he could have had any other reason for telling her that. It was not in dispute that P was under the impression that the appellant was a police officer (although the appellant said that this was only because of what he had previously told her in an attempt to 'big note' himself). The jury must have accepted P's evidence that it was only because of her belief that he was a police officer (with or without the other words said to have been spoken by him) that she was induced to agree to provide her services at a discount. That, in turn, could only have been because of the implicit threat (or an express threat, if her evidence in that respect was accepted) that, if she did not do so, he could make trouble for her because of his status as a police officer, given her vulnerable situation.

82 In these circumstances I am unable to accept that the jury could have thought that the appellant's deception of the two women played any part at all in inducing consent, other than by reason of the fact that it facilitated the making of the express threats spoken of by the two women or by means of the implicit threat that the very fact of being a police officer would have conveyed to each of the women. Each spoke of being induced to consent by her fear that the appellant would otherwise arrest her. There was no suggestion by either that her consent was induced by anything else. The only inducing factor that was put to each of them in cross-examination was that of payment of an agreed fee.

…

85 Next, it seems to me that, whatever limitations there might be, if any, as regards the kind of threat that is comprehended by s 319(2)(a), a threat, whether express or implied, made to a vulnerable person to make trouble for that person by arresting her or taking other legal steps against her, in circumstances in which the person making the threat is apparently in a position to carry it out, is a threat or intimidation of the kind contemplated by the section.

86 On this analysis, there is no need to decide what is comprehended by 'deceit or any fraudulent means'. The fact that the threat or intimidation was made possible only by the appellant's dishonest behaviour seems to me to be unimportant, even if it should be thought that dishonest behaviour of that kind does not fall within the phrase 'deceit or any fraudulent means' (an argument which must cope with the width of the language used). In circumstances in which the consent was in each case obtained by threat or intimidation, it does not matter whether the ability to make the threat, or to intimidate the victim, was or was not brought about by deceit or any fraudulent means. I have mentioned that the case was left with the jury by the trial judge upon the basis that, if they were to find that any one of threat, intimidation, deceit or fraudulent means had induced the consent, they should find that consent had not been freely and voluntarily given. However, as I have said, in this case the deceit or fraudulent means (if it could be so categorised) constituted by the appellant's claim to be a police officer could only have induced consent by the resulting threat or intimidation. As I have

stressed, that was the way in which the case was run by both parties and it was not (and, in my respectful opinion, could not have been) suggested otherwise. Consequently, nothing turns upon the distinction for present purposes.

87 I am also unable to accept that the consent was freely and voluntarily given, in each case, because the threat or intimidation related only to the amount to be paid. An analysis of that kind assumes that, merely because each complainant was prepared to have sex with the appellant at a price, she had freely and voluntarily consented to have sex with him regardless of whether or not he was willing to pay the price. That was not the case. In P's case, were it not for the threat and intimidation, she would not have provided the services provided by her at all. She was willing to give her free and voluntary consent only if $150 was paid. That was the plain effect of her evidence. The fact that the appellant might have provided her with an extra $50, had she held firm, is not to the point. He did not provide, or offer to provide, the extra $50. Similarly, in T's case, it is obvious from her evidence that she would not have had sex with the appellant at all, were it not for his threats and intimidation of her. She was a drug addict who needed money. It was only for that reason that she was willing to have sex with the appellant. The fact that the two complainants were prostitutes seems to me to be irrelevant in this context. While each was prepared to provide sex in return for money, neither was prepared to do so for less than the rate stipulated by her.

88 I should also say that it seems to me that, as desirable as this might be, it is no easy matter to distinguish between threats and intimidation, on the one hand, and deceit or any fraudulent means, on the other, in the way suggested by Professor Morgan. The words of the definition were plainly intended by the Murray Report to be given a wide operation and, as I have said, the wording suggested by that report was substantially adopted. It also seems to me that s 319(2)(a) cannot be read down by resort to s 192 and s 202, as suggested by Mr Syrota. The fact that the same conduct might give rise to more than one offence under the Code is a slender basis upon which to read down the plain meaning of the words used. Finally, I should say that the suggestion that this court might rework the section according to common law rules is not without its difficulty. The court is, of course, bound by the legislation enacted by the Parliament. Resort to the common law, when interpreting a statute, is appropriate only when its language is ambiguous or in other special circumstances (which are not presently applicable): *Brennan v The King* [1936] HCA 24; (1936) 55 CLR 253, 263 (Dixon & Evatt JJ); *R v Barlow* [1997] HCA 19; (1997) 188 CLR 1, 18–19 (McHugh J).

89 Because of these difficulties (in respect of which I express no final opinion, it being unnecessary for me to do so), it seems to me that the most appropriate solution is that the legislation should be amended. Plainly, the use of the words 'deceit or any fraudulent means' renders the section susceptible to an interpretation that is dramatic in its reach, for the reasons suggested by Professor Morgan and Mr Syrota, amongst others. There is obviously a need for some limit to be placed upon the meaning of those words. That is best done by the legislature.

90 I would grant the appellant leave to appeal on ground 5. However, for the reasons given I would decline to uphold that ground.

91 It follows that I would dismiss the appeal against conviction.

EM Heenan AJA (dissenting):

383 I consider that the 1985 and 1992 amendments to these provisions of the Criminal Code were obviously intended by Parliament to deal with these emerging issues and with some perceived inadequacies in the pre-existing law. It must be accepted that the reformulation of the offence of sexual penetration without consent now contained in s 319(2) and s 325 of the Code has achieved at least the following effects:

(a) the retention of the reform that a man could be convicted of an offence of unlawful sexual penetration of his wife even within marriage;
(b) the complete elimination of the *Holman* approach that grudging or tearful submission could amount to consent replacing this with emphasis upon necessity for free and voluntary consent coupled with the express stipulation that a failure to offer physical resistance does not of itself constitute consent;
(c) a broadening of the scope of fraud involving impersonation to expand it beyond a false pretence that the person performing the act of penetration is a husband, to any sexual partner of either sex or to any person, other than the accused, with whom the complainant would have been willing to engage in sexual penetration even if for the first time;
(d) to include as a deceit or fraud relating to the nature of the act or its purpose, those instances involving bogus medical treatment; or other deceptions concerning the purpose of the activity such as, for example, the singing teacher type of cases;
(e) to apply to the sham marriage variety of cases, such as *Papadimitropoulos*, because the deception there goes to the legal status between the two participants (ie marriage) and becomes tantamount to the fraud of impersonating a husband (or for that matter a wife).

384 Nevertheless, because of the need to limit the application of s 319(2) to avoid indiscriminate applications to acts of deceit or other fraudulent means going only to antecedent matters, such as representations about payment when dealing with prostitutes, or fraudulent blandishments intended to make a person more attractive, such as the wiles of a seducer, the full comprehension of the nature and the purpose of the sexual activity involved and agreed participation will not make that consent ineffective or not freely and voluntarily given.

385 None of this was explained to the jury in the appellant's case. The jury was not directed to consider whether or not the consents by P and T were freely and voluntarily given in the sense that each woman fully comprehended what Michael desired to do with them, that the proposed activity was for sexual gratification and had not been disguised as being for some other necessary plausible purpose.

386 Had the jury been directed in that fashion, it would have been open, on the facts of this case, to conclude that Michael's deceit, or fraudulent means, had been directed to and was only material to the discussions about price. If that was so, he could not properly have been convicted of any of these charges insofar as the allegations in the charges depended upon consent which had been given being ineffective because of the alleged deceit or fraudulent means. It would still have been possible, however, for the jury to have concluded that the deceit and/or fraudulent means had a dimension and effect which went beyond the antecedent matter of price and carried with it implied threats or intimidation. If they were satisfied of that, to the requisite degree of proof, then convictions for each of the offences would have been justified. However, these important distinctions were never explained to the jury and, for

reasons already canvassed, one cannot be satisfied that their verdicts are founded solely upon a conclusion that the consents given by these two women were ineffective because of threats or intimidation by the appellant as there is a distinct risk that the appellant may have been convicted for conduct which could not amount to an offence within the meaning of s 325.

387 I would therefore allow these appeals, quash each conviction and order a new trial…

[**Miller JA** wrote a separate judgment agreeing with Steytler P that the appeal should be dismissed.]

6.29C Attorney-General's Reference No 1 of 1977

[1979] WAR 45
Western Australia Court of Criminal Appeal

Burt CJ: This is a reference made upon the request of the Attorney-General of two questions of law which arose at a trial presided over by Wickham J. The indictment was presented against four men. Two of the accused were charged with the commission of two acts of rape, one was charged with one act of rape and with one count of attempted rape and the other accused was charged on one count of attempted rape. Each was charged as a principal offender. No application was made for separate trials. Each charge related to the same woman and the offences arose substantially out of the same or closely related facts: s 586(7) of the Criminal Code …

The learned trial judge directed the jury as follows:

> The Crown must prove that the accused did not at the time honestly believe that he had voluntary consent and the reason for that simply is that a man, or a woman for that matter, is not guilty of a crime if he or she has done what has been done under an honest mistake.
>
> In assessing the question of whether a belief is honest or not you can, of course, take into consideration the facts of the case and give consideration as to whether such a belief would, on the facts of the case, be a reasonable belief, but that is only an aspect of deciding upon whether the man honestly held the belief. The element or the ingredient in the crime which the Crown has to prove (and it is really a negative element) is that the Crown has to satisfy you beyond reasonable doubt that the accused did not have an honest belief that he had voluntary consent.

This gives rise to the second question asked in the reference it being whether that direction is 'a correct statement of the law pertaining to the nature of the belief in consent relevant to the crime of rape'. That is a question which with reference to the common law felony called rape has been much debated of recent times and it is a question which is, I think, best formulated as it was in *DPP v Morgan* [1975] 2 All ER 347, as being: 'Whether, in rape, the defendant can properly be convicted notwithstanding that he in fact believed the woman consented if such belief was not based on reasonable grounds.' That question for the purposes of the law of England has been finally answered in the negative by the decision of the House of Lords in *Morgan's* case …

As I understand the reasoning which leads to this conclusion it is that it is an element of the crime of rape at common law that the man should intend to have intercourse with the woman whether she consents or not or, as expressed by Lord Hailsham in *Morgan's* case (at 362 of the report), 'the prohibited act is and always has been intercourse without consent of the victim and the mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy-nilly, not caring whether the victim consents or not'. Once that is accepted then it follows from it, and I express this without regard to the siting of the onus of proof, that an honest, but mistaken, belief held that the woman is consenting negatives the requisite intent and this remains true whether the belief held is based upon reasonable grounds or not.

The question to be decided under the Criminal Code can then be seen to be whether the offence created by it and by it called rape has a like mental element. The offence is created by s 325 of the Criminal Code which is in these terms: 'Any person who has carnal knowledge of a woman or girl, not his wife, without her consent, or with her consent if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime which is called rape.'

It is immediately apparent that that section has nothing to say about intention and nothing to say about belief. It seems to me that the section simply says what s 1 of the Sexual Offences Act 1956 (UK) does not say, namely that 'a man who has sexual intercourse with a woman' not his wife 'who does not consent commits' the offence called rape: see Lord Cross in *Morgan's* case at 353. Whether upon the proof of the elements of the offence as they appear in that section the man is criminally responsible will then depend not upon anything to be found by way of implication within the section but upon the application to him of one or other of the sections appearing in Ch V of the Code and more particularly for present purposes upon the application to him of s 24. … In the crime called rape, consent or no consent of the woman is, I think, a 'state of things' within the meaning of that section and hence if the man does the act — 'has carnal knowledge of the woman … not his wife without her consent' — but does that act under an honest and reasonable but mistaken belief that she is consenting, then he is not guilty of the offence called rape. But the belief to be within s 24 of the Code must be both honest and reasonable. Honest belief not based upon reasonable grounds is not enough.

I would for those reasons answer the question in the negative.

The question which has been answered was asked specifically with reference to the crime of rape. The direction, however, appears to have been given with reference both to the crime of rape and to the crime of attempted rape. Intention is an element of the crime of attempted rape. It is made so by s 4 of the Code and with reference to that crime the direction was, I think, correct and this because the holding of an honest belief that the woman is consenting to the carnal knowledge which the man is attempting to have will negative the intent to have carnal knowledge without her consent and this is so whether the belief is based upon reasonable grounds or not. The honest belief prevents it being held that the accused is 'a person intending to commit' rape as defined by s 325. This conclusion is no way dependent upon the application of s 24 of the Code.

[**Jones J** delivered a short judgment agreeing with the reasons of **Burt CJ. Smith J** agreed with **Burt CJ**.]

6.30C

R v Mrzljak

[2004] QCA 420; [2005] 1 Qd R 308
Queensland Court of Appeal

McMurdo P:

1 I agree with Holmes J that the appeal should be allowed and a new trial ordered. The relevant facts and issues are set out in the reasons of Holmes J. I will only repeat or add to those as necessary to explain my own reasons for reaching different conclusions on some issues.

Some relevant facts and issues at trial

2 The appellant was charged and convicted after a trial of two counts of rape, the first involving penile penetration of the vagina, the second involving penile penetration of the mouth. The issue at trial was consent or honest and reasonable mistake as to consent.

3 The complainant, who was intellectually impaired, gave evidence that the appellant committed the charged acts. She did not want to have sex with the appellant on the night of the offences. She told him to 'stop', said 'no', then tried to push him away. Although he kissed her, she did not kiss him back. He asked her to take off her clothes and she complied. She touched his penis and moved her hand up and down on it because he asked her to.

4 Psychologist Dr Attwood gave evidence for the prosecution that the complainant had an IQ of 52. This placed her clearly within the intellectually disabled range, giving her a mental age of between six and ten years. She was within the meaning of 'intellectually impaired person' as defined in s 229F Criminal Code. Whilst her disabilities would be easily apparent to anyone speaking to and engaging with her, someone who did not speak English would have more difficulty in detecting those disabilities, although her disabilities would also become manifest in non-verbal ways. The complainant had cognitive capacity to give consent to sexual acts, but that ability was lessened by her intellectual incapacity.

5 The appellant, a Bosnian immigrant, gave evidence through an interpreter that he did not realise the complainant was intellectually impaired. He spoke very few words of English. The complainant was responsive to his physical advances and he helped her undress. She fondled his penis and voluntarily put it in her mouth before they had vaginal intercourse. He withdrew before ejaculating, wiped up the ejaculate and they each dressed. She did not say 'no', nor 'stop', nor did she push him away …

6 The prosecution case was primarily that the complainant did not consent and made it perfectly plain to the appellant that she was not consenting to the sexual acts. The prosecution's secondary position was that the complainant did not have the cognitive capacity to consent[1] to the sexual acts. An alternative count open on the first count of rape was that the appellant had unlawful carnal knowledge of an intellectually impaired person under s 216(1) Criminal Code. The term 'intellectually impaired person' in s 216 Criminal Code, defined under s 229F Criminal Code, is a much wider concept than that of 'cognitive capacity' under s 348 Criminal Code. The absence of consent is not an element of an offence under s 216 Criminal Code and it is rightly uncontentious that an intellectually impaired person as defined can have the cognitive capacity to consent and can give consent within the meaning of 'consent' in s 348 …

The direction on cognitive capacity

7 I agree with Holmes J that his Honour's direction to the jury as to consent confused the concept of the complainant's cognitive capacity to give consent referred to in s 348(1) Criminal Code with the much wider concept of 'intellectually impaired person' defined in s 229F Criminal Code. There was a real danger that, on the direction given, the jury may have thought that because the complainant was intellectually impaired within s 229F, they must then conclude that she necessarily lacked the cognitive capacity to give consent under s 348(1) Criminal Code. That was not so. In fact, her evidence seemed more consistent with her being intellectually impaired and having the cognitive capacity to give consent but not consenting. This is, however, very much a question for a jury who have the real advantage of observing her give her testimony. It follows that the appeal must be allowed and a re-trial ordered.

The further evidence called on the appeal

8 The much more difficult question for me is whether the further evidence adduced on this appeal is relevant on any re-trial to the issues of criminal responsibility because of either mistake of fact under s 24 Criminal Code or insanity under s 27 Criminal Code.

9 Material placed before this Court, which was not before the primary court, establishes that the appellant, as well as the complainant, is probably in the intellectually disabled range. It seems he has an IQ of 56 and, like the complainant, he is also an 'intellectually impaired person' within s 229F Criminal Code. Psychiatrists, Dr Fama and Dr van de Hoef, both gave evidence in the appeal.

10 Dr Fama said that an IQ of between 50 and 69 earns the diagnosis 'mild mental retardation', a distinct handicap making the sufferer unable to perform normally at school, in training or in a job; some people in this IQ range have difficulty reading, in understanding words, particularly complex words and abstract concepts, and have problems in learning new knowledge and adapting to different societies, cultures or different situations. The appellant was aware at the time of the sexual acts that it was wrong to force sex on someone who did not want sex or to have sex with someone who was so intellectually impaired they lacked the cognitive capacity to give consent. His mental retardation was a natural mental infirmity which made him unable to discern that the complainant was also mildly mentally retarded. This was the primary reason why he could not evaluate whether, what appeared to him in the absence of protest to be the complainant's consent, was given with cognitive capacity. Had someone taken the appellant aside and explained that she was intellectually handicapped he would not have had sex with her. Because of his natural mental infirmity and his language difficulties, he was unable to pick up the social cues to allow him to make a rational judgment as to whether she had the cognitive capacity to consent. He 'wasn't capable of understanding that this girl was a mentally retarded girl who could not give valid consent … he was not aware that she was mildly mentally retarded [and] he could not evaluate her consent as questionable or false'. At the time, he was deprived of the capacity to understand that he ought not to do the sexual acts without confirming that as an intellectually impaired person the complainant was capable of giving and gave true consent.

11 Dr van de Hoef's evidence was of largely similar effect. Had the appellant not been mentally retarded and been able to detect that the complainant was intellectually handicapped, he would not have committed the offence because he appreciated the wrongness of having sexual

intercourse with someone with an intellectual handicap. She did not think the appellant's mental retardation meant that he forever lacked the capacity to understand that he ought not have had sexual intercourse with the complainant if she did not have the capacity to give cognisant consent; rather the fact that both he and the complainant were similarly mentally handicapped combined with his lack of functional English, was an extraordinary constellation of circumstances which at the time of the sexual acts made him unable to detect social cues to make appropriate judgments.

12 In deciding whether this extraordinary constellation of circumstances raises the issue of the appellant's criminal responsibility under either or both s 24 or s 27 Criminal Code my conclusions differ from Holmes J.

Insanity under s 27 Criminal Code or mistake of fact under s 24 Criminal Code?

…

20 Despite the persuasive analysis of Holmes J, I am not convinced, in the absence of binding authority, that the evidence of the appellant's intellectual impairment constituting a natural mental infirmity under s 27 can be relevant to the issue of whether his honest mistaken belief as to the complainant's intellectual abilities and consent was also a reasonable belief under s 24(1) Criminal Code.

21 Unlike the element of *mens rea* required at common law, s 24 Criminal Code requires that a mistaken belief in the existence of any state of things be not only honest but also reasonable. This requires a consideration of whether there were reasonable grounds for the belief, not what a reasonable person would have believed: *R v Julian*.[4] The terms of s 24(1) require both a subjectively honest and an objectively reasonable mistaken belief. It is clear, for example, that self-induced intoxication cannot turn what would otherwise be an unreasonable belief into a reasonable one: *R v Graham*.[5] In any case, s 28 Criminal Code is intended to cover the field for criminal acts committed by someone whose capacity to apprehend is affected by intoxication: see *R v Kusu*[6] and *R v Miers*.[7]

22 Assistance on this difficult issue can be gleaned from the somewhat analogous cases considering the defence of provocation to the charge of murder, a concept which, like s 24(1) Criminal Code, involves elements of both subjectivity and objectivity. Provocation requires evidence of something objectively capable of causing an ordinary person to lose self-control and to act as the accused person has done and also that the provocation must actually and subjectively cause the accused person to lose self-control and commit the act whilst deprived of self-control before having had the opportunity to regain it. In *Masciantonio v The Queen*[8] Brennan, Deane, Dawson and Gaudron JJ stated:

> The test involving the hypothetical ordinary person is an objective test which lays down the minimum standard of self-control required by the law. Since it is an objective test, the characteristics of the ordinary person are merely those of a person with ordinary powers of self-control. They are not the characteristics of the accused, although when it is appropriate to do so because of the accused's immaturity, the ordinary person may be taken to be of the accused's age.
>
> However, the gravity of the conduct said to constitute the provocation must be assessed by reference to relevant characteristics of the accused. Conduct which might

> not be insulting or hurtful to one person might be extremely so to another because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history. The provocation must be put into context and it is only by having regard to the attributes or characteristics of the accused that this can be done. But having assessed the gravity of the provocation in this way, it is then necessary to ask the question whether provocation of that degree of gravity could cause an ordinary person to lose self-control and act in a manner which would encompass the accused's actions.[9]

23 These observations do not suggest that intellectual or mental characteristics amounting to a natural mental infirmity under s 27 Criminal Code should be taken into account in determining this objective test. Consistent with those observations and *Stingel v The Queen*,[10] applied in the Code State of Western Australia in *Hart v The Queen*,[11] the question whether an honest mistake of fact was held on reasonable grounds must be considered in the light of an accused person's immaturity and physical attributes such as deafness, blindness or, relevantly, language difficulties. That a person suffers from a syndrome such as battered wife syndrome, which I do not understand to constitute a mental disease or natural mental infirmity under s **27** Criminal Code, may also be considered in determining whether an honest mistake of fact was reasonably held: cf *Osland v The Queen*.[12] I am not, however, persuaded that an accused person's intellectual incapacity amounting as here to a 'natural mental infirmity' under s 27 Criminal Code, can be considered by a jury in determining whether there were reasonable grounds for an accused person's honest mistake of fact. The presumption of sanity under s 26 Criminal Code supports the conclusion that a consideration of the issue of whether an accused person's honest mistaken belief was also reasonable under s 24(1) Criminal Code must involve the standards of a person of sound mind.

24 Just as s 28 Criminal Code is intended to cover the field for criminal acts said to have been committed by those whose capacity to apprehend is affected by intoxication, so s 27 Criminal Code is intended to cover the field where the evidence is that a person is suffering from a natural mental infirmity, depriving the person of the capacity at the time of doing an act to know that they ought not so act. I think it is likely that this is why I have been able to find no example since the passing of the Criminal Code Act 1899 (Qld) where a person who makes an honest mistake of fact because of a natural mental infirmity causing the person to do an act which would otherwise constitute an offence has been able to avoid criminal responsibility based on the person's honest and reasonable mistake of fact under s 24 Criminal Code.

25 Whilst the result reached by Holmes J on the facts here is not unattractive, I fear that such an interpretation of s 24(1) may give rise to startling results. For example, a new mother may have a natural mental infirmity, namely a very low IQ, and honestly believe she can safely leave her newborn baby unsupported in a bathtub full of water. The mother would be able to rely on s 24(1) to avoid criminal responsibility: she honestly believed her newborn baby could have a bath without supervision or support; the jury in assessing the reasonableness of that belief would have to take into account her extremely low IQ and consider whether it was a reasonable belief for someone of that IQ. If a natural mental infirmity can be considered in determining the reasonableness of an accused person's honest mistaken belief, why not also a mental disease which affects a person's perception? For example, a mother suffering from a mental disease may kill her child by putting the newborn baby into a bath tub full of water honestly believing, because of her mental disease, that the baby is able to and wants to swim. The mother would be able to rely on s 24(1) to avoid criminal responsibility: she honestly believed

her newborn baby could and wanted to swim; she had that perception because of a mental disease; the jury in assessing the reasonableness of the belief would have to take into account her subjective perceptions as affected by her mental disease. The accused in both examples could be released into the community unsupervised by either the criminal justice system or the mental health system, an undesirable outcome and one unlikely to be intended by the legislature.

26 In my view, a natural mental infirmity under s 27 cannot be considered in determining whether, under s 24(1), an honest but mistaken belief is also a reasonable belief.

27 Returning then to the matters for a jury's consideration of the issues on the evidence as it is before this Court. In considering whether the prosecution had established beyond reasonable doubt that the appellant did not honestly and reasonably believe the complainant was consenting, the psychiatric evidence is not relevant as to whether the mistaken belief was reasonable, but only as to whether it was honestly held. The jury could consider as to reasonableness that the interaction between the appellant and the complainant took place over a relatively short period of time and that the appellant's English was extremely limited. If the jury were not satisfied the prosecution disproved honest and reasonable mistaken belief as to consent on either count they would acquit the appellant on that count.

…

Conclusion

33 The appeal should be allowed and a re-trial ordered because of the learned primary judge's error in directing the jury as to consent.

34 On the evidence before this Court, the issue of whether the appellant was criminally responsible, under s 27(1) Criminal Code, for the acts of sexual intercourse because at the time he was in a state of natural infirmity as to deprive him of the capacity to know that he ought not do those acts is raised as to the issues of whether the complainant had the cognitive capacity to give consent because of her intellectual impairment and whether he believed she was consenting on the rape counts and as to the alternative count to count 1 under s 216 Criminal Code as explained above. Section 27 Criminal Code is not raised on the issue of actual consent to the rape charges.

35 The psychiatric evidence before this Court is not relevant to the issue of whether an honest but mistaken belief was reasonable under s 24(1) Criminal Code. That issue is, however, raised on the evidence and the appellant's English language difficulties and the limited period of contact between the protagonists are relevant matters for a jury's determination as to whether the appellant acted under both an honest and also reasonable mistaken belief as to her consent.

36 The psychiatric evidence was not before the primary judge. Should the appellant be convicted and the sentencing judge accept the evidence of the appellant's low IQ, it would be an important mitigating factor on sentence. His intellectual disability would diminish the degree of culpability because it places him outside the more serious category of offenders deliberately taking advantage of young women with intellectual disability. Because there will probably be a re-trial, it is impossible for this Court to predict what evidence will be before the court at any re-trial and what evidence may be accepted or rejected, making it unnecessary and imprudent for this Court to further consider the application for leave to appeal against sentence.

Order:
The appeal is allowed, the conviction is set aside and a re-trial is ordered.

…

Holmes J: …
68 Parts of the direction are unexceptionable; but the introduction into it of the concept of intellectual impairment, and, more importantly, the equation of it with lack of cognitive capacity was an error. The former is much broader than the latter. Indeed, the definition of intellectual impairment in s 229F is so broadly expressed as to embrace many persons who would not by any stretch of the imagination be regarded as intellectually impaired as that term is ordinarily understood. One can be 'intellectually impaired' under the Code definition without in fact suffering any intellectual impairment or any diminution in the capacity to acquire knowledge; a neurological impairment affecting the power to communicate will suffice. As I observed in the course of argument, it seems to me that the definition is so wide as to include a cerebral palsy sufferer of genius IQ. The mischief in the direction was its implication that if the jury were to conclude (as it must have done on the breadth of that definition) that R was intellectually impaired, a conclusion of lack of cognitive capacity would follow.

…

70 … the introduction of intellectual impairment as defined in s 229F into the direction of cognitive capacity was itself an error of such significance as to warrant a new trial. However, because the further evidence as to the appellant's own intellectual impairment will be of significance in any new trial it is appropriate to consider that basis of appeal also.

The new psychological and psychiatric evidence
71 While the appellant was in custody commencing to serve his sentence, he was examined by a Bosnian-speaking psychiatrist to whom it became apparent that he suffered from cognitive deficits. Intelligence tests were carried out by a psychologist who was able to translate them into Bosnian. The conclusion was that the appellant had an IQ of 56 and a diagnosis of mild mental retardation. That evidence was not challenged as being new and fresh in the sense required to warrant its receipt on appeal.

72 Two other psychiatrists, Dr Fama and Dr van de Hoef, examined the appellant for the purposes of this appeal. Dr Fama expressed a view that because of a want of understanding about the proceedings the appellant was 'probably unfit for trial' while Dr van de Hoef thought that he was currently unfit for trial but with some assistance and explanation might become fit for trial. Although it was raised in his outline, Mr Devereaux did not press this point on the appeal, unsurprisingly I think, given what seems from the transcript of the trial to have been the appellant's ability to give instructions for the cross-examination of R, and to give evidence himself and be cross-examined without apparent difficulty in comprehension of what was going on.

Insanity
73 Both Dr Fama and Dr van de Hoef expressed the view that the appellant, because of his mild mental retardation, was in 'such a state of … natural mental infirmity as to deprive [him] of capacity … to know that [he] ought not to do the act[s]', in this case the rapes, and thus that he was not, by virtue of s 27(1) of the Criminal Code, criminally responsible. However

it emerged, both from the content of their reports and from cross-examination, that what they meant was that the appellant, because of his retardation combined with his language difficulty, was inhibited in his ability to pick up the cues which might have led another person to appreciate that R was intellectually impaired.

74 That is not, it seems to me, a state of affairs which falls within the compass of s 27. Indeed the appellant made it clear to the police and to both psychiatrists that he would not have had sex with R if he had appreciated that she suffered from an intellectual disability. He knew too that he ought not to force himself on a woman not giving consent. Quite clearly, as Dr Fama conceded, the appellant knew, in the abstract at least, that to have intercourse with someone who either did not or could not consent was wrong. It is, therefore, apparent that the appellant was quite capable of appreciating that he ought not commit the acts of rape as alleged by the Crown. The excuse of insanity was not available to him.

The assessment of reasonableness of mistake under s 24

75 What the psychiatrists were, in effect, saying was that the appellant's retardation had contributed to a mistaken belief that the appellant was capable of consenting, and was consenting, to intercourse. That raises the question of whether the evidence of his retardation could assist in excusing him from responsibility under s 24 (1), which provides:

> A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.
>
> It is to be noted that the excuse of honest and reasonable but mistaken belief under s 24 is not on all fours with the common law defence of honest and reasonable mistake of fact; the relevant belief is 'in the existence of [a] state of things' as opposed to fact. The former 'implies a concept somewhat wider and different from a mere mistaken belief of a fact or a fact exclusively'.[15]

76 Here there were actually two particular features of the appellant which might have contributed to any mistake: his inability to understand English and his mental retardation. And there were two respects in which mistake was relevant: whether the appellant had held an honest and reasonable but mistaken belief that R was consenting to intercourse, and whether he had held a similar belief that she had the capacity to consent to intercourse. Both issues were alive on the evidence; there were some aspects of compliance by R which might be capable of misinterpretation as competent consent.

77 Whether a mistake which is to some extent induced by intellectual impairment can be a reasonable one is a question of considerable difficulty, and one on which authority is surprisingly scant. Mr Copley, for the Crown, submitted that intellectual impairment could be relevant only to the element of honesty in the defence of honest and reasonable mistake. Reasonableness was objective, and the reasonable person by whose standard the assessment was to be made was not an intellectually impaired person. Mr Devereaux, for the appellant, argued to the contrary with diffidence, deterred somewhat by references in *Daniels v R*[16] to the 'reasonable man' as the arbiter of reasonableness in mistake. The Western Australian Court of Criminal Appeal in *Daniels* held that intoxication was relevant to whether an accused

person actually held the belief in question, as opposed to the reasonableness of that belief. 'A reasonable man', Kennedy J said, delivering the leading judgment, 'is a sober man'; thus an actual belief by an intoxicated person in the existence of a state of things would 'not avail him if a reasonable man would not have been mistaken'.[17]

78 Similarly, in *R v Pacino*[18] the Court of Criminal Appeal (in a judgment again written by Kennedy J) referred to the s 24 defence in terms of what 'a reasonable person might honestly have believed'.[19] In *Pacino*, the critical question on appeal was whether the defence was available at all where the charge was one of criminal negligence; how the relevant test was framed was, therefore, not crucial.

79 But the question here is whether the section provides an excuse from criminal responsibility where the mistaken belief is one which is honest and which would have been held by a reasonable person; or whether it applies where the mistake is honest and the belief is one held by the accused on reasonable grounds. It is clear that a requirement that a belief be on reasonable grounds does not equate to a requirement that a reasonable person would have held it.[20]

80 In *Jiminez v The Queen*,[21] the High Court, in considering the availability of the common law defence of honest and reasonable mistake to a charge of dangerous driving causing death, regarded the question as one of whether the driver 'might honestly have believed on reasonable grounds that it was safe for him to drive'.[22] The court addressed the question in that case in terms of the applicant's circumstances — the facts that he had had some sleep, had not consumed alcohol or drugs, had not been driving for an excessive period, and had experienced no drowsiness — which, it said, laid 'a foundation for [his belief that it was safe to drive] being an honest and reasonable belief'.[23]

81 In the Criminal Code context, a similar approach to the requirements of s 24, focussing on whether the accused's belief was held on reasonable grounds, better reflects the terms of the section. The section directs attention to the actual belief of the accused; nothing in its language invites reference to the reasonable man's putative belief. What must be considered, in my view, is the reasonableness of an accused's belief based on the circumstances as he perceived them to be. That approach is consistent with this observation by Burt CJ on the equivalent provision of the Western Australian Criminal Code:

> The belief 'under' which the act is done must be honest, which is to say no more than it be held in fact; it must be reasonable, which is to say that it must be based on his appreciation of primary objective fact which is in reason capable of sustaining the belief; it must be mistaken and it must be a positive belief because the extent of the criminal responsibility is not to be greater 'than if the real state of things had been such as he believed to exist'.[24]

Belief 'on reasonable grounds' in self-defence

82 Some assistance as to the framework in which the reasonableness of grounds for a belief is to be assessed can be derived from self-defence cases. Section 271(2) of the Criminal Code excuses from criminal responsibility an accused person assaulted in such a way as to cause 'reasonable apprehension of death or grievous bodily harm' who 'believes, on reasonable

grounds, that [he] cannot … preserve [himself] from death or grievous bodily harm' except by the use of force.

…

84 The Tasmanian Court of Criminal Appeal in *The Queen v McCullough*[29] accepted that there must be an aspect of the subjective in assessing the reasonableness of an accused's belief. One of the questions on appeal was whether the trial judge ought to have directed the jury in respect of s 46(2) of the Tasmanian Criminal Code, the equivalent of s 271(2), that intoxication was relevant to whether the appellant's apprehension and belief were reasonable or held on reasonable grounds. While concluding that intoxication was relevant to whether the applicant actually held the belief in question but not to its reasonableness,[30] the court said this:

> In our opinion the learned trial judge in these passages properly directed the jury that the test of reasonableness under s 46(2) is a subjective test, in the limited sense that the question to be considered by the jury was whether it was reasonable for the applicant in all his then circumstances to hold the relevant apprehension and to have the relevant belief.

85 The more difficult question for present purposes is the extent to which personal characteristics, such as intellectual impairment, psychiatric disorder or language difficulties, may be taken into account. Some Canadian cases on self defence lend assistance. Section 34(2) of the Canadian *Criminal Code* sets up self defence in terms virtually identical to those of s 271(2): an accused who causes death or grievous bodily harm is justified if he causes it 'under reasonable apprehension of [his own] death or grievous bodily harm' and 'he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm'. In *R v Lavallee*,[31] the landmark case on battered woman's syndrome, expert psychiatric evidence as to the psychological effects of an abusive relationship was admitted because it might explain why a woman who had been beaten did not simply leave the abuser. That expert evidence would thus assist the jury in assessing the reasonableness of the belief required by s 34(2); in that case, that killing the abuser was the only way for the accused to save her own life.

86 The proposition that 'expert evidence of heightened arousal or awareness of danger' in a 'battered woman' context could be relevant to self defence was specifically accepted by Gaudron and Gummow JJ in *Osland v R*,[32] and indeed by the other members of the court, with certain reservations as to how and when such evidence might be received, and the need for it to be adduced within the constraints of the existing law on self-defence and provocation.[33]

…

The relevance of the accused's personal characteristics in mistake

89 The circumstances of the present case point up the inevitability of reference to the characteristics of an accused in considering the reasonableness of mistake. It would be absurd here to introduce a fiction that the appellant had a full command of the language into the process of considering whether he laboured under a reasonable but mistaken

apprehension as to the existence of consent. But if one accepts, as Mr Copley seemed to, that a language handicap is a feature of the accused relevant to assessment of the reasonableness of his belief, it becomes difficult to assert that an intellectual handicap is not similarly such a feature.

90 It is not the handicap per se which bears on the excuse of mistake. It is the fact that the handicap results in the accused having to form his belief on a more limited set of information that is relevant, just as other external circumstances affecting the accused's opportunity to develop and test his perception are relevant. A jury cannot assess the rationality of a belief in isolation from the circumstances in which, and the information on which, it is formed.

91 And although it was suggested in the course of argument that a recognition of such personal characteristics might produce difficulties where the accused suffered from a psychiatric disorder producing delusions, that situation is independently catered for in the Code: s 27(2) makes this concession to an individual suffering from delusions but not a mental disease or infirmity with consequences such as to give rise to excuse under s 27(1):

> A person whose mind, at the time of the person's doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of subsection (1), is criminally responsible for the act or omission to the same extent as if the real state of things had been such as the person was induced by the delusions to believe to exist.

92 The new evidence of intellectual impairment was, it seems to me, relevant to possible excuse from criminal responsibility under s 24, as indeed was the evidence of the appellant's language difficulties. If the jury accepted that evidence, both those features had the potential to affect the appellant's appreciation of the situation in which he found himself, and more particularly to inhibit his capacity to recognise R's condition and to interpret her responses. In those circumstances, a jury might be prepared to accept that a belief which would not be reasonable if held by a native English speaker of normal IQ was honestly held by the appellant on reasonable grounds.

93 Mr Copley argued that the evidence would not have produced any different verdict, pointing to differences between the accounts of R and the appellant as to whether she had resisted, which, he said, could not be explained as a product of misunderstanding. Those differences, it seems to me, while clearly relevant on the issue of mistake, were essentially matters for a jury to consider; but one could not say that the result must have been the same had they been considered in the light of the evidence as to the appellant's intellectual deficits.

Conclusion

94 The appellant should, because of the erroneous direction on cognitive capacity and the effect of the fresh evidence on any s 24 excuse, have a new trial. I would allow the appeal, quash the convictions and order a re-trial.

[**Williams JA** disagreed with the other judges about whether there had been a misdirection in relation to the issue of consent. However, he agreed with **Holmes J** that a re-trial was required because of the fresh evidence of the appellant's intellectual handicap. **Williams JA** said:

53 The critical fact for a defence based on s 24 is the offender's belief. For the defence to arise the belief held by the offender must be both honest and reasonable. Whilst that means that the belief must be based on reasonable grounds it is nevertheless the belief of the offender which is critical. That must mean, in my view, that the critical focus is on the offender rather than a theoretical reasonable person. It is the information available to the offender which must determine whether the belief was honest and also was reasonable. That must mean that factors such as intellectual impairment, psychiatric problems and language difficulties are relevant considerations though none would be necessarily decisive.

54 Holmes J has in her reasons carefully analysed relevant authorities and it is sufficient for me to say that I agree with that analysis. I also agree with what her Honour has said as to the appropriate direction required in the light of the evidence now available.

55 Intoxication was not a factor in this case, but for completeness I would observe that in view of the provisions of s 28 of the Code, self-induced intoxication would not be a factor relevant in determining whether a belief was honest and reasonable for purposes of s 24 …]

Footnotes

1. See the definition of 'consent' in s 348 Criminal Code.

…

4. (1998) 100 A Crim R 430.
5. [1995] QCA 190; CA No 101 of 1995, 19 May 1995, pp 5–6; that is also the position at common law: see *R v O'Grady* [1987] QB 995.
6. [1981] Qd R 136.
7. [1985] 2 Qd R 138.
8. (1995) 183 CLR 58, 66–7.
9. At 66–7.
10. (1990) 171 CLR 312.
11. (2003) 27 WAR 441, 455–6, [53]–[54].
12. (1998) 197 CLR 316, Gaudron and Gummow JJ 335–8.

…

16. (1989) 1 WAR 435.
17. At 445.
18. (1998) 105 A Crim R 309.
19. At 320.
20. *R v Julian* (1998) 100 A Crim R 430.
21. (1992) 173 CLR 572.
22. At 584.
23. At 583.
24. *GJ Coles & Co Limited v Goldsworthy* [1985] WAR 183, 187–8.

…

29. [1982] Tas R 43.
30. At 53.
31. [1990] 1 SCR 852.
32. (1998) 197 CLR 316, 337.
33. At 339, 370–8, 407–08.

6.31C Aubertin v State of Western Australia

[2006] WASCA 229; (2006) 33 WAR 87
Western Australia Court of Appeal

McLure JA:

2 The appellant was convicted after trial of one count of sexual penetration of the complainant without her consent by engaging in cunnilingus and one count of indecently assaulting the complainant by touching her breasts. The offences occurred on 13 March 2004 at Northbridge.

3 The appellant relies on two grounds of appeal. He contends that the learned trial Judge erred:

1. in his directions to the jury as to honest and reasonable mistake by directing the jury that the reasonableness of the belief was to be assessed by reference to the ordinary person in the accused's position; ...

4 The background is as follows. The complainant and her boyfriend, R, had a brief acquaintanceship with the appellant prior to the date of the offences and had exchanged mobile telephone numbers. There had been a number of text messages and telephone conversations between the appellant and the complainant in the week prior to the offences. Arrangements were made to go out for drinks on Friday 12 March 2004. The appellant and his brother rented a hotel room at the Northbridge Hotel for the evening. The complainant and R believed they had been invited to spend the night as guests of the appellant but the appellant testified that this had not been discussed and he was surprised by their behaviour in immediately placing their bags in the bedroom where he had planned to sleep.

5 The State case was that the complainant and R arrived at the appellant's hotel room at approximately 7 pm on 12 March 2004 after having had drinks elsewhere. R went out to purchase alcohol. The complainant had two or three glasses of alcohol and tried on a number of outfits and asked the appellant and his brother's opinion. The complainant testified that there was nothing suggestive about the way she had tried on different outfits whereas the appellant testified that she had removed her top in front of him and 'paraded around a bit' wearing a top. He suggested she wear a bra with the outfit she ultimately selected and she said she did not need to.

6 On R's return, the appellant and the complainant went into the bathroom in the hotel room and used some cocaine. The complainant testified that the appellant offered her the cocaine and locked the bathroom door which she was not comfortable with so she unlocked it and reminded him that she had a boyfriend. The appellant testified that R had brought the cocaine back with him after the appellant paid for it but this was denied by the complainant and R. The appellant also testified that the complainant had kissed him on the mouth in the bathroom and said thank you after they had both used cocaine but she denied this happened.

7 Two female friends of the appellant and his brother arrived at the hotel room. The complainant testified that shortly before everyone left the hotel room, the appellant offered her some more cocaine, which she, the two female friends of the appellant and the appellant used. The appellant denied this happened. They all left and went to a night club in West Perth where the girls used amphetamines in the women's toilet. The amphetamines were provided by one of the female friends of the appellant. The complainant testified that the appellant also 'had a line of speed' in the toilet but the appellant denied it. Shortly after midnight the party went to another night club which was in Subiaco.

8 Whilst they were at the night club in Subiaco the complainant testified that the appellant tried to 'dirty dance' with her, rubbing himself up against her. She said she was uncomfortable with it and told him she had a boyfriend. She denied reciprocating. She testified that later at the night club he came up and tried to feel her groin area and she pushed him away. She testified that she did not tell R what had happened on either occasion. The appellant testified that he and the complainant engaged in erotic dancing together, with both touching each other. He denied trying to touch her groin.

9 At approximately 3 am the complainant and R went back to the appellant's hotel room and went to bed. The appellant and other members of the party tried to persuade them to get out of bed but they refused. Later, R got out of bed and into a spa bath in the bathroom. The complainant fell asleep.

10 The complainant testified that she was woken by someone performing oral sex upon her. She initially thought it was R. She testified that she was lying on her stomach. She leaned up, turned around and saw it was the appellant and mumbled 'go away' and moved away from him. The complainant said the appellant then left without saying anything. She rolled over and went to sleep as she did not want a confrontation.

11 The complainant testified that she went back to sleep but was woken again when the appellant re-entered her room and touched her on her back and the side of her breasts. She said that she again mumbled for him to go away and she rolled away from him. He left the room.

12 The appellant testified that the complainant was awake throughout both incidents. He said that he entered the bedroom to collect some clothes and she asked who it was. He identified himself. They started talking and kissing and he said the cunnilingus was consensual and she did not push him away. He said he left the bedroom because someone called out to him.

13 On the appellant's account he returned into the bedroom and the complainant was lying there wide awake. They spoke and he started rubbing her back and touching her breasts. They were both stressed that the complainant's boyfriend would enter the room.

14 The complainant gave evidence that she started crying and a matter of minutes later R returned to the bedroom. R's evidence was that he returned from the spa bath to the bedroom to find the complainant sobbing. The complainant told R what had happened following which they packed their bags and left the hotel room. On the way out of the room R confronted the appellant calling him a 'disgusting pig' and the appellant replied, 'What? What have I done?'. The complainant and R then left the hotel room. The incident was reported to police one week later.

15 At about 9 am on 13 March 2004 the appellant telephoned R and they had a long discussion. R testified that the appellant had said to him, 'It wasn't me. It must have been somebody else … It must have been Peter'.

16 The appellant confirmed that in his telephone conversation with R he denied sexually penetrating the complainant:

> Because I didn't really want to tell him anything. I didn't want to cause any problems. I didn't know what [the complainant] had told [R]. I should have, but I didn't … I didn't

> want to cause any problems between [R] and [the complainant] or our relationship that we had formed. I honestly didn't know what was going on. I was a bit confused.

17 The appellant denied there was any reference to Peter during the conversation with R.

18 On the night of 13 March 2004 the appellant telephoned the complainant and had a discussion with her. The complainant testified that the appellant told her that it wasn't him, 'It was Pete' and that the appellant would videotape Peter admitting it was him.

19 The appellant gave evidence that Peter had been raised by him as a friend who was going through the same thing. According to the appellant he said to her, 'Why didn't you just say it was Peter instead of saying it was me'.

20 The appellant's DNA was consistent with the DNA sample taken from the underwear the complainant was wearing on the night in question.

Ground 1 — mistake

21 The trial Judge directed the jury on the availability of the defence of honest and reasonable but mistaken belief that the complainant had consented to the conduct the subject of each charge on the indictment.

22 Section 24 of the Criminal Code (WA) ('Code') deals with mistake of fact. It materially provides:

> A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

23 The trial Judge directed the jury as follows:

> The law is that a person who does an act under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for the act to any greater extent than if the real state of things had been such as he believed it to be. So if [the appellant] honestly and reasonably but mistakenly believed that [the complainant] consented to an act of sexual penetration, then he would not be criminally responsible for his act in penetrating her. Now, like all issues in this case, ladies and gentlemen, the onus of proof lies on the State.
>
> …
>
> The State may discharge this onus by proving either that [the appellant] did not honestly believe that [the complainant] was consenting, or that his belief was in all the circumstances unreasonable …
>
> Turning to the question of the reasonableness of his belief if he held that belief, this is an objective factor to be judged by the standard of a reasonable person of the same age, background and level of intellectual functioning as the accused, in this case [the appellant], and who is familiar with all the circumstances that were known to the accused, [the appellant], at the relevant time.
>
> So the question you have to ask yourselves and the question of the reasonableness of the belief is whether the State has proved beyond reasonable doubt that an ordinary

person in the position of [the appellant] would not reasonably have believed that [the complainant] was a consenting party.

24 Senior counsel for the appellant contended that there are different lines of authority in this State as to the correct test of mistake under s 24 of the Code; that on the facts in this case there was a material difference in the application of the lines of authority; and that the trial Judge applied the wrong test.

25 According to the appellant, one line of authority is to the effect that reasonableness is to be adjudged by reference to the reasonable man (citing *Daniels v The Queen* (1989) 1 WAR 435 at 445 per Kennedy J; *BRK v The Queen* [2001] WASCA 161 at [34]–[40] per Murray J; *Truica v The Queen* [2001] WASCA 221 at [41] per Anderson J) and the other line of authority provides that the relevant question is whether there were reasonable grounds for the belief held by the accused (citing *G J Coles & Co Ltd v Goldsworthy* [1985] WAR 183 at 187–188 per Burt CJ; *Lane v Austar Enterprises Pty Ltd* [2000] WASCA 215 at [23] per Miller J). The appellant contends that on the second formulation regard must be had to the personal characteristics of the accused (age, gender, level of intellectual functioning etc) and other factors having the capacity to affect perception, including intoxication resulting from the use of alcohol and drugs.

26 Section 24 of the Code is in identical terms to the mistake provision (also s 24) of the Criminal Code 1899 of Queensland. *Daniels* was not followed by the Queensland Court of Appeal in *R v Mrzljak* [2005] 1 Qd R 308.

27 In *Daniels* the appellant was convicted of sexually penetrating the complainant without her consent. On appeal the appellant contended that the trial Judge erred in failing to direct the jury on the relevance of intoxication to a defence of honest and reasonable but mistaken belief. On that subject Kennedy J (Malcolm CJ and Seaman J agreeing) said (at 445):

> … [the trial Judge] gave the jury a full direction on the question of mistake and he indicated that whether it was a reasonable mistake depended on whether an ordinary and reasonable man would have made it in the circumstances which the jury found to have existed that night. He added: 'You must always remember that the reasonable man is sober. The accused has said he was intoxicated and intoxication is no defence.' In my opinion, that direction is clearly correct. Intoxication is, no doubt, relevant to the question of whether an accused person has an actual belief in the existence of a state of things in terms of s 24 of the Criminal Code; but, if he does have that belief by reason of his state of intoxication at the time, it does not avail him if a reasonable man would not have been mistaken.

28 Burt CJ in *G J Coles* had not approved the ordinary or reasonable man test. He said (at 187–88):

> Expressed without reference to the onus of proof, what s 24 of the Code requires, in my opinion, is simply what it says, namely that 'a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist'. The belief 'under' which the act is done must be honest, which is to say no more than it be held in fact; it must be reasonable, which is to say that it must be based on his appreciation of primary objective fact which is in reason capable of sustaining the belief …

29 The issue was again considered by the Full Court in *BRK*. The appellants had gang-raped the complainant. Mistake was relevant to some of the charges. The trial Judge had directed the jury as follows:

> If an accused honestly and reasonably but mistakenly believed that the complainant was consenting to an act of sexual penetration, he would not be criminally responsible for his act in penetrating her …
>
> …
>
> The reasonableness of the accused's belief is an objective factor to be judged by the standard of a reasonable person of the same age, background and level of intellectual functioning as the accused, and familiar with all the circumstances that were known to the accused at the relevant time.
>
> The question you have to ask yourselves is whether the Crown proves beyond reasonable doubt that an ordinary person, in the position of the accused whose case you are considering, would not reasonably have believed that the complainant was a consenting party.

30 There is no material difference between the direction given in this case and that considered in *BRK*…

…

41 A wholly objective test is what a hypothetical reasonable or ordinary person would have believed: *Stingel* [(1990) 171 CLR 312]. The Court in *Stingel* considered the statutory defence of provocation in the Tasmanian Code which referred to a wrongful act or insult of such a nature 'as to be sufficient to deprive an ordinary person of the power of self control …'. The High Court noted that the 'ordinary person', sometimes called the 'reasonable person', provided an objective standard and continued (at 327):

> Subject to a qualification in relation to age … the extent of the power of self-control of that hypothetical ordinary person is unaffected by the personal characteristics or attributes of the particular accused. It will, however, be affected by contemporary conditions and attitudes …

42 The wholly objective hypothetical ordinary or reasonable person test clearly has no application to s 24 of the Code. If that is the test approved in *Daniels*, in my respectful opinion *Daniels* is wrong in that respect. However, the trial Judge in this case, as in *BRK*, did not apply the hypothetical ordinary or reasonable person test. He applied a hybrid test. First some necessary preliminaries.

43 For there to be an operative mistake under s 24, an accused must have acted under an actual belief in the existence of a state of things (subjective element) and the accused's belief must be reasonable (mixed element). The focus in this case is on the mixed element. The mixed element is not wholly objective; reasonableness is not to be adjudged by the standard of the hypothetical ordinary or reasonable person. The mixed element is a combination of subjective and objective aspects. The requirement that the belief be reasonable imports an objective standard. The subjective aspect is that the reasonableness is to be judged by reference to the personal attributes and characteristics of the accused that are capable of affecting his or her appreciation or perception of the circumstances in which he or she

found himself or herself. However, the ambit of what constitutes the personal attributes and circumstances of a particular accused has not to my knowledge been identified or exhaustively enumerated. It covers matters over which an accused has no control such as age (maturity), gender, ethnicity, as well as physical, intellectual and other disabilities. This list does not purport to be exhaustive.

44 However, I am persuaded by the line of authorities that exclude intoxication, whether by reason of alcohol or drugs, as a relevant factor in supporting (rather than negativing) reasonableness under s 24 of the Code. There are obvious public policy considerations supporting that outcome. Moreover, the notions of reasonableness and alcohol or drug-induced impairment are in my view contradictory. There is oblique support for this view in *Jiminez v The Queen* (1992) 173 CLR 572. The applicant in that case was convicted of dangerous driving causing death. He had fallen asleep at the wheel. The High Court said it was open to the jury to find that the applicant honestly and reasonably believed that, in all the circumstances, it was safe to drive. The Court noted that there was little in the evidence to support a finding that the applicant had reason to believe he was tired. In that regard, the Court referred to the sleep he had had prior to the accident, the time he had been driving before the accident and the fact that '[t]here was no evidence before the jury that he consumed any alcohol or drugs'. The absence of alcohol or drugs was used as an indicator of the reasonableness of the applicant's actual belief. This approach accords with common sense. Self-induced impairment by alcohol or drugs can only be a negative or at best neutral factor in assessing whether the appellant's belief was reasonable. That is, reasonableness is not to be assessed by reference to the perception or appreciation of an alcohol or drug impaired accused. In view of this conclusion and the fact that neither party addressed the question whether s 28 of the Code covered the field in relation to intoxication, I do not propose to deal with that matter.

45 Even if, contrary to my view, reasonableness is assessed by reference to the standard of an intoxicated accused, there was little in the way of specific evidence of the quantities of alcohol and drugs consumed by the appellant and no evidence that his level of intoxication had any material impact on his perception or appreciation of the objective facts relevant to whether or not the complainant had given her consent. Accordingly, no specific direction would have been required.

46 Further, a person's values, whether they be informed by cultural, religious or other influences, are not part of a person's characteristics or attributes for the purpose of assessing the reasonableness of an accused's belief. For example, values resulting in extreme views as to the appropriate mode of dress for women, from which inferences about consent are purportedly drawn, cannot positively affect or inform the reasonableness of an accused's belief. Values do not impact on the capacity to perceive or appreciate primary objective facts or the capacity to process that information. In any event, reasonableness must be judged in the light of generally accepted community standards and attitudes.

47 What emerges from this discussion is that not everything about a particular accused is relevant in considering whether or not that accused's belief is reasonable. The reference to the reasonable and ordinary person in the formula used by the trial Judges in this case and *BRK* is in recognition of that fact. The formula purports to exhaustively identify the personal characteristics and attributes of an accused that are relevant and exclude other matters that by implication are irrelevant by resort to the reasonable or ordinary person. However, there is

a danger in that approach because it is not specifically adapted to the relevant facts of each case and may exclude relevant matters to which the jury ought to have regard or include irrelevant matters. The formula is falsely premised on the assumption that all potentially relevant personal characteristics or attributes are enumerated. Further, the references to the reasonable or ordinary man are unhelpful. The formula should not in my view be used. The direction on mistake should be appropriate and adapted to the facts of each case. Often there will be no need to give directions as to the way in which a jury should make a judgment about the reasonableness of an accused's belief.

48 However, the formula used by the trial Judge in this case is patently not the hypothetical ordinary or reasonable man the subject of the wholly objective test. In addition, it was not suggested the appellant had any relevant personal attributes or characteristics, other than those listed by the trial Judge, that affected his perception or appreciation of the objective circumstances in which he found himself. That is, the appellant had no particular characteristics or attributes which took him outside the standard of the reasonable man with the attributes expressly identified. Accordingly, there is no material error in the direction that would give rise to a miscarriage of justice. I would dismiss ground 1.

…

[The appeal was dismissed. **Roberts-Smith** and **Buss JJA** agreed with **McLure JA**.]

Property Offences

CHAPTER 7

THE STRUCTURE OF PROPERTY OFFENCES

7.1 The property offences in the Codes ss 390–534 (Qld)/ss 370–549 (WA), form a complex scheme for protection of property interests. One factor contributing to the complexity is that distinctions are drawn between the different ways that property interests can be violated. For example, one set of offences deals with misappropriation of property and another deals with destruction of or damage to property. Within offences of misappropriation, further distinctions are drawn between different forms of misappropriation. Offences of misappropriation are also differentiated by circumstances of aggravation such as the use of violence and the breaking and entering of buildings. Adding further complexity, distinctions are drawn between different kinds of property for the purpose of scaling penalties.

Only some of the main features of this scheme will be examined in this chapter. The focus will be on:

1. stealing — Codes ss 390–391, 396, 398 (Qld)/ss 370–371, 376, 378 (WA);
2. fraud — s 408C (Qld)/s 409 (WA);
3. robbery — ss 409–413 (Qld)/ss 391–393 (WA);
4. offences respecting premises — ss 418–419, 421, 425 (Qld)/ss 400–401, 407 (WA);
5. receiving illegally obtained property — ss 432–433 (Qld)/s 414 (WA);
6. destroying or damaging property — ss 458–462, 469 (Qld)/ss 441–444 (WA).

7.2 The major property offences under the Codes are 'indictable' offences which can be prosecuted in the superior courts. Some lesser, 'simple' offences have also been created.

- In Queensland, the Summary Offences Act 2005 (Qld) s 16 creates an offence of unlawfully possessing a thing that is reasonably suspected of having been stolen or unlawfully obtained. The Regulatory Offences Act 1985 (Qld) ss 5–7 create offences respecting shoplifting and fraud of food, drink or accommodation, where the value of the property is $150 or less, and of criminal damage, where the value is $250 or less. The general provisions of the Code (Qld) respecting criminal responsibility, except for ss 22(3), 29, 31, do not apply to offences under the Regulatory Offences Act: Code (Qld) s 36(2).
- In Western Australia, the Code (WA) s 428 creates an offence of unlawfully possessing a thing that is reasonably suspected of having been stolen or unlawfully obtained.

7.3 The rules relating to criminal responsibility for property offences are often different from those for offences against the person.

The general provisions on accident and mistake of fact in the Codes ss 23–24 effectively make objective negligence the threshold of liability for offences against the person. Subjective states of mind such as intention are relevant only if there is an express declaration in the offence description: Codes s 23(2) (Qld)/s 23(1) (WA). A few offences against the person, such as murder, do include express declarations of this kind. Most offences against the person, however, can be committed inadvertently: see **Chapters 3–6**.

In contrast, property offences typically include an express declaration that the offence must be committed intentionally or with some other advertent state of mind. As a result, the Codes are much closer to the common law in respect of property offences than of offences against the person: see **1.13**.

STEALING

Forms of stealing

7.4 The offence of stealing is created in the Codes s 398 (Qld)/s 378 (WA). The maximum penalty prescribed is 5 years' imprisonment in Queensland and 7 years in Western Australia. In both states increased penalties apply for specified types of stealing such as stealing from the person of another, stealing from locked receptacles, stealing by employees and stealing by agents.

The basic elements of the offence are the same in both states: Codes ss 390–391 (Qld)/ ss 370–371 (WA).

The focus of the law of stealing is upon permanently depriving someone of property. Unauthorised borrowing or use of another person's property is not generally stealing although money constitutes an important exception to this principle. Moreover, it is generally not stealing when the other person has agreed to part with the property, even if deception has been used to induce the transfer. The offence of fraud under Codes s 408C (Qld)/s 409 (WA) captures some forms of dishonest conduct that fall outside the offence of stealing.

At one time, prosecutions could fail because the wrong property offence had been charged for the particular kind of dishonesty in issue. Now, however, a person charged with one type of offence of dishonesty, such as stealing, can be convicted of another type, such as fraud, if that is what the evidence establishes: Codes s 581 (Qld)/ss 10A, 378 (WA).

7.5 Things capable of being stolen must be moveable or capable of being made moveable: Codes s 390 (Qld)/s 370 (WA). Consequently, neither real property nor intangible property is protected by the offence of stealing. The Code (WA) s 371(7) makes clear that documents relating to or evidencing rights in relation to such property can be stolen.

The impact of the restriction to moveable property has been reduced by the introduction of several supplementary offences into the Codes. For example, fraudulent appropriation of power, such as electricity, is an offence under s 390 (WA). In addition, there are general offences of fraud which apply to any form of property: Codes s 408C(1) (Qld)/s 409(1) (WA); see **7.21–7.30**.

7.6 Only things that are the property of a person can be stolen: Codes s 390 (Qld)/s 370 (WA). However, the identity of the person need not be known: see, for example, *R v McKiernan*

[2003] QCA 43; 2 Qd R 424. Thus, lost property can be stolen by a person who does not make reasonable efforts to discover the owner: Codes s 391(5) (Qld)/s 371(5) (WA).

Because information cannot be generally a subject of ownership, special offences have been created to cover the unauthorised use of a restricted-access computer, that is, one which is password protected: Codes s 408D (Qld)/s 440A (WA). Queensland also makes identity theft an offence: Code (Qld) s 408D.

7.7 Stealing is essentially an offence against possession rather than ownership as such. The Codes s 391(2)(a)–(b) (Qld)/s 371(2)(a)–(b) (WA) identify the persons from whom something may be stolen as not only 'the owner' but also 'any person who has any special property' in it.

- In Queensland, s 391(7) has incorporated an extended definition of 'owner' which covers not only a person having 'a special property' in the thing but also 'any person having possession or control' of it. Under this definition, it would be possible to steal from anyone who has actual possession of the thing, including a person whose possession is unlawful.
- There is no equivalent provision in Western Australia, but the same result has been achieved by holding that any person in possession of property has a form of proprietary right in it: *Vines and Williamson v R* (1993) 11 WAR 517.

It is even possible for the owner of a thing, or any person with a legal interest in it, to steal the thing from a person who is entitled to possession: Codes s 396 (Qld)/s 376 (WA).

7.8 Two different forms of stealing are identified in the Codes s 391(1) (Qld)/s 371(1) (WA): stealing by taking and stealing by converting. The difference between the two forms of stealing depends on whether a person stole when gaining possession of property or stole at some later time. Both forms of stealing require some movement of the property or some other physical dealing with it: Codes s 391(6) (Qld)/s 371(6) (WA). This is sometimes referred to as 'asportation'.

The offence of stealing by taking is completed when possession of the property is gained. Ordinarily, the offence of stealing by taking cannot be committed when property has been given to the recipient. However, the distinction between giving and taking may sometimes be a fine one. Making an unauthorised withdrawal from an automatic teller machine has been held to be a taking, although the issue has been the subject of debate: *Mujunen v R* [1994] 2 Qd R 647 at **7.50C**.

The offence of stealing by conversion is committed when possession of the property is gained lawfully but the property is stolen later, when the accused does an act inconsistent with the rights of the owner such as selling the property.

7.9 Conversion is a common law concept not defined in the Code. Conversion involves dealing with property in a way inconsistent with the rights of the owner: *Ilich v R* (1987) 162 CLR 110; 69 ALR 231 at **7.49C**. In this context, the phrase 'rights of the owner' seems to mean the owner's rights to dispose of property by, for example, transferring legal claims to it or destroying it. A person who converts property will often be a bailee who has been given possession by the owner for a specific purpose or for a limited period of time, and then sells the property or otherwise disposes of it. The finder of lost property who disposes of it without making reasonable efforts to discover the owner may also commit an act of conversion: Codes s 391(5) (Qld)/s 371(5) (WA).

Mere failure to return property does not amount to conversion even if the failure was deliberate. There must be some physical dealing: Codes s 391(6) (Qld)/s 371(6) (WA);

see *R v Angus* [2000] QCA 29 at 7.51C. Fraud could be an appropriate offence to charge in cases of refusal or deliberate failure to return property: Codes s 408C(1)(e) (Qld)/s 409(1)(d) (WA), discussed in 7.28.

It is also doubtful whether mere use of property amounts to converting it, even in the face of an owner's request for its return. Usage might be inconsistent with the owner's right of possession but it is not inconsistent with the owner's right to dispose of the property. Usage could, however, strengthen the argument that an offence of fraud has been committed, particularly if the use has caused a deterioration in the value of the property: Codes s 408C(1)(a), (d)–(e) (Qld)/s 409(1)(c)–(d) (WA), discussed in 7.28.

Requirement of 'fraudulently'

7.10 The taking or conversion must be done 'fraudulently': Codes s 391(1) (Qld)/s 371(1) (WA). 'Fraudulently' in this context has nothing to do with the separate offence of fraud under s 408C (Qld)/s 409 (WA). Moreover, it does not mean that there need be any secrecy or attempt at concealment: Codes s 391(3) (Qld)/s 371(3) (WA). 'Fraudulently' has a technical meaning in this context and is defined in s 391(2) (Qld)/s 371(2) (WA) as encompassing:

1. *Taking or converting property with the intent to permanently deprive the owner or possessor of it: Codes s 391(2)(a)–(b) (Qld)/s 371(2)(a)–(b) (WA)*. This is the basic form of stealing. The offence is committed at the time of the taking or conversion. The intent required is an intention to permanently deprive. Intention to borrow will not suffice for this form of the offence of stealing.
   The intention to permanently deprive is an ulterior intent, meaning that it is an intention with respect to something lying beyond the taking or conversion. Actual deprivation might not occur; it is the intention to deprive that founds criminal liability. Deprivation means the experience of loss. There is no deprivation if, for example, the property is recovered by the police before its loss is experienced. Yet the offence may still be committed.
2. *Taking or converting property with intent to use it in such a way that it cannot be returned in its original condition: Codes s 391(2)(e) (Qld)/s 371(2)(e) (WA)*. In this situation, there is an intention to permanently deprive the owner or possessor of a thing in a certain condition, even though the thing may be returned in some other form.
3. *Taking or converting property with intent to borrow it if the special conditions of paras (c)–(d) or (f) of Codes s 391(2) (Qld)/s 371(2) (WA) are met*:
   - intent to use someone's property as security for a loan is covered by para (c) (Qld/WA);
   - intent to part with someone's property on a condition which may be unable to be performed is covered by para (d) (Qld/WA); and
   - intent to use someone else's money for any purpose is covered by para (f) (Qld/WA).
   - These paragraphs cover situations in which it is unlikely that the person taking or converting the property will ever be able to return it. The person may hope to return it, but an expectation of doing so would frequently be unrealistic.

7.11 Special provisions have been enacted to deal with the taking of motor vehicles, where there is often no intent to deprive permanently:

- Queensland has created separate offences to deal with the problem. Under the Code (Qld) s 408A it is an offence to unlawfully use or possess a motor vehicle, aircraft or vessel without the consent of the person to whom it belongs. No particular intent need be proved for the offence of unlawfully using. Intent must be proved for the offence of possession, although the relevant state of mind is intent to deprive either temporarily or permanently. Similarly, under the Summary Offences Act 2005 (Qld) s 25, it is an offence to take or use a vehicle without the consent of the person in lawful possession. This is a lesser offence, with lower penalties, which applies to all kinds of vehicles, not just motor vehicles.
- Western Australia has tackled the problem by expanding the offence of stealing. Under the Code (WA) s 371A a stealing occurs whenever a vehicle is used, taken, driven or controlled without the consent of the owner or person in charge of it. No particular intent is specified.

7.12 In the standard cases where intention is required, the offence of stealing cannot be committed through inadvertent negligence; on the meaning of intention, see 4.19–4.12.

In the context of offences against the person, the Queensland Court of Appeal has sometimes interpreted 'intention' narrowly, to mean only 'purpose' or 'design'. However, there is authority for the proposition that a person intends a result when it is known or foreseen that it will be a virtually inevitable consequence of some action, even though the action may have a different purpose: see, for example, *Woollin* (4.43C) and the comments of McHugh J in *Peters* at 19.40C.

In the context of stealing, intention will usually take the form of knowledge rather than purpose. It is rare for one person to steal the property of another in order to deprive the other person of it. A person who steals the property of another will usually do so simply in order to gain the benefit of the property, but with the incidental knowledge that the other person will thereby be deprived.

7.13 Intention to deprive can be proved by inference as well as directly: see 4.15. Moreover, it is not necessary that there be direct evidence tying the accused to the taking or conversion. Possession of recently stolen property can be a sufficient basis to infer that the possessor took the property with one of the specified intents for stealing: see *Bruce v R* (1987) 74 ALR 219. This is sometimes called the doctrine or presumption of 'recent possession'.

7.14 A mistake of fact may be inconsistent with an intention to deprive. For example, a person who mistakes a mobile phone belonging to someone else for her or his own mobile phone does not intend to deprive the owner when it is taken. Moreover, intention to deprive is absent in such a case whether or not the mistake is reasonable. The objective requirements of the special defence of mistake of fact under the Codes s 24 do not apply to such a case. The person lacks the intention to deprive and therefore has no need to rely on s 24 with its restrictive conditions. See Chapter 12 on the defence of mistake of fact and also *Mathews v R* [2001] WASCA 264 as to how the requirements of s 24 do not apply to the offence of fraud.

7.15 A mistaken belief in legal entitlement to take or deal with property can afford a special defence of 'claim of right' under the Codes s 22(2) (Qld)/s 22 (WA). This is an exception to the general principle that ignorance of the law is no excuse: Codes s 22(1) (Qld)/s 22 (WA).

The mistake must relate to a legal claim to the property and not just a moral claim, although the defence is available whether or not the mistake was reasonable. See the general discussion of mistakes of law in Chapter 13.

7.16 In Queensland, when non-identifiable property, such as petrol, has been taken away without payment having been made, the Code (Qld) s 391(2A)–(2B) creates a rebuttable presumption that it has been taken fraudulently. This presumption may reverse just the evidentiary burden and not the persuasive burden: see Chapter 2 on the distinction between evidentiary and persuasive burdens.

Stealing and transfers of property

7.17 Ordinarily, the offence of stealing by taking cannot be committed when a person has agreed to part with possession of property or to transfer ownership or some other legal interest. In such cases, the property is given to, rather than taken by, the recipient.

When possession alone has been transferred, there can be a subsequent offence of stealing by conversion. Transfer of ownership, however, generally excludes the operation of the law of stealing. It is well established that there cannot be a conversion by a person who owns the property: *Ilich* at 7.49C. This is so even though ownership was obtained dishonestly, for example by a false pretence or promise. Where ownership has been obtained dishonestly, the relevant offence is not stealing but fraud: Codes s 408C (Qld)/s 409 (WA).

In Queensland, the Code (Qld) s 391(2A) creates an exception to the general law of stealing. It provides that non-identifiable things can be stolen when they are transported away without discharging any debts in respect of them, even though property in them has passed. This section is designed to meet the special needs of, for example, self-service petrol stations.

7.18 Whether ownership or mere possession is transferred ordinarily depends on the intention of the owner. Money, however, is an exception to this general proposition. Transfers of money are governed by special rules: see 7.19–7.20.

There can sometimes be an intention to transfer ownership even if the transfer was made under a mistake. This depends on the category of mistake.

A mistake of a 'fundamental' kind negatives an apparent agreement to transfer ownership, so that possession alone is transferred and there can be a subsequent act of conversion. In *Ilich* (7.49C), it was said that only three kinds of mistake can be regarded as fundamental: mistakes 'as to the identity of the transferee or as to the identity of the thing delivered or as to the quantity of the thing delivered'.

7.19 Mistakes that are not 'fundamental' do not prevent a transfer of ownership: *Ilich* at 7.49C. An example of a non-fundamental mistake would be a mistaken belief that there was an obligation to transfer the property. In such cases, stealing is not committed even if the recipient was or became aware of the mistake. There may be a civil action for recovery of the property but that is different and does not involve criminal responsibility. There may also be liability for fraud given the potentially broad scope of this offence under Codes s 408C(1)(d)–(e) (Qld)/ s 409(1)(c)–(d) (WA), discussed in 7.28. Money is an exceptional category of property subject to special rules. Whether property in money is transferred depends in large measure on the operation of a common law principle and certain statutory exceptions.

The law has emphasised the character of money as a medium of exchange. A common law principle therefore developed to the effect that when money 'passes into currency', through

a bona fide transaction, property in the money generally passes with its possession: *Ilich* at 7.49C. This principle applies even when there has been an overpayment that would otherwise constitute a 'fundamental' mistake. The reasoning in the case, including the doubts expressed about some old English precedents, should mean that the same principle applies to other categories of fundamental mistake. The result is to limit the scope for commission of an offence of stealing by conversion subsequently.

7.20 The Codes incorporate important exceptions to the general proposition that ownership of money passes when its possession is transferred in a bona fide transaction:

1. Money received under a direction respecting what is to be done with it is deemed to remain the property of the person transferring it until the direction has been complied with: Codes s 393(1) (Qld)/s 373 (WA); *Parker v R* (1997) 186 CLR 494. For the purposes of this rule, the direction can be oral or written. However, it must be in writing where the parties ordinarily deal with each other as debtor and creditor: Codes s 393(2) (Qld)/s 373 (WA).
2. When a person acts as an agent of another person in selling or otherwise disposing of property, the proceeds generally are deemed to belong to the other person: Codes s 394 (Qld)/s 374 (WA). This is subject to an exception where there are terms making the proceeds part of a debtor and creditor account.
3. When money is received on behalf of another person, it is generally deemed to be the property of the other person: Codes s 395 (Qld)/s 375 (WA). This covers, for example, the situation of employees of shops who receive payments intended for their employers. The general rule is subject to an exception where there are terms making the money part of a debtor and creditor account.

FRAUD

7.21 The offence of fraud under the Codes s 408C (Qld)/s 409 (WA) covers a variety of conduct. Most cases of fraud may involve dishonestly inducing the owner to part with property (whereas most cases of stealing involve dishonestly taking it). However, fraud can be committed in other ways; for example, through dishonestly gaining a benefit or causing a detriment.

The link between the different forms of fraud is perhaps best understood by reference to the limitations of the offence of stealing. The offence of fraud brings together various forms of dishonest conduct that fall outside the scope of stealing.

7.22 The offence of fraud requires dishonest conduct:

- The introduction to Code (Qld) s 408C(1) expressly refers to a person acting 'dishonestly'.
- The introduction to Code (WA) s 409(1) is more complex and refers to a person who acts 'with intent to defraud, by deceit or any fraudulent means'. These terms might be interpreted as being equivalent to the term 'dishonest' in the Code (Qld). It is sometimes said that to defraud ordinarily means to deprive a person dishonestly: see, for example, *Peters v R* (1998) 192 CLR 493; 151 ALR 51 at 7.52C. *Peters* involved a charge of conspiracy to defraud under Commonwealth law. In *Peters*, Kirby J went so far as to say (151 ALR 51 at 86): 'I believe that the nouns "fraud" and "dishonesty", and the corresponding adverbs "fraudulently" and "dishonestly', may be used interchangeably.'

The terms 'dishonestly' and 'defraud' have not been given statutory definitions, although Codes s 408C(3) (Qld)/s 409(3) (WA) deal with a few questions that may arise in the process of classification:

- s 408C(3)(b)(i)–(ii) (Qld) provides that conduct may be dishonest even though the person is willing to pay for the property or to restore it or make restitution for it;
- s 409(3) (WA) provides that it is immaterial that an accused person may have intended to give value for the property.

7.23 As to the general concept of dishonesty, it has been said that dishonest conduct is conduct that would be dishonest by the standards of 'ordinary, decent people': *Peters* at **7.52C**. The operational meaning of dishonesty can therefore vary across time and across communities. A determination of whether the standards of ordinary, decent people were breached is ultimately a question for a jury, although perhaps not one which a jury should be called upon to decide unless there is some real issue: see Toohey and Gaudron JJ in *Peters*, above. There was a split among the members of the High Court in *Peters* over who should make the determination in the special case of conspiracy to defraud. However, there was no difference of opinion over the proposition that the question for most offences is ultimately one for the jury.

In *Peters* (**7.52C**) at [33], examples were given of conduct which is ordinarily dishonest: asserting something as true knowing it to be false or not believing it to be true; doing something knowing there is no right to do so or not believing there is a right to do so; bringing about a situation which prejudices or imperils the existing legal rights or interests of others.

7.24 There has been some controversy whether, for a finding of dishonesty, the accused must have appreciated that there was no legal right to do what was done or, at least, must have been aware that other people would view the conduct as dishonest. In *Laurie v R* [1987] 2 Qd R 762, the Queensland Court of Criminal Appeal, following the English Court of Appeal in *R v Ghosh* [1982] QB 1053; 2 All ER 689, held that the accused would have to have realised that the conduct would be viewed as dishonest. In *Peters* (7.52C), however, Toohey and Gaudron JJ ruled against any such requirement as a general feature of dishonesty, although conceding that the term might have special meanings in particular cases. Their view was that, for dishonesty to be proved, the accused must have done the acts in question with the knowledge, belief or intent alleged to make those acts dishonest by the standards of ordinary, decent people. This conception of dishonesty still contains a subjective element. The offence of fraud would require that an accused have appreciated the nature and potential consequences of the conduct in question: the offence could not be committed inadvertently. Nevertheless, the question of dishonesty itself would be decided by way of objective characterisation of the conduct. Ignorance of the normative standards of ordinary, decent people would be no defence. The position of Toohey and Gaudron JJ was subsequently endorsed by all members of the High Court in *Macleod v R* [2003] HCA 24 at [37], [99] and [130]; (2003) 214 CLR 230; 197 ALR 333.

In *R v White* [2002] QCA 477 at [12], the Queensland Court of Appeal appeared to assume that *Laurie*, above, still expressed good law. However, no mention was made of *Peters*, which must now be regarded as the governing authority.

In *Mathews v R* [2001] WASCA 264, the Western Australia Court of Criminal Appeal applied the *Peters* approach to the concepts of 'intent to defraud' and 'fraudulent means' in Code (WA) s 409(1). The court ruled that, since s 409(1) contains its own subjective mental element, it is an error to import a requirement for a belief to be objectively reasonable from the defence of mistake of fact under the Codes s 24.

7.25 The concept of dishonesty is also used in the Regulatory Offences Act 1985 (Qld) s 5, which creates an offence of unauthorised dealing with shop goods to the value of $150 or less. The coverage of this section includes taking goods away without paying or otherwise discharging or attempting to discharge indebtedness for them. Under s 5(2), it is a defence to prove that the taking away was not dishonest. Thus, the burden of proof ordinarily on the prosecution has been relaxed. Presumably, dishonesty here means the same as it does in relation to the Code (Qld) s 408C: see **7.23–7.24**.

7.26 Most types of fraud covered by the Codes s 408C(1) (Qld)/s 409(1) (WA) are described in very similar terms. However, the Code (Qld) s 408C(1)(a) creates a special offence of misappropriation of property that has no direct equivalent in Western Australia. The central ingredient is the dishonest application of the property of another person to the use of oneself or some other person. The offence is broader than stealing:

1. The offence covers all forms of property, including real property and intangible property: see the definition of 'property' in the Code (Qld) s 1; and see also s 408C(3)(a).
2. The offence is designed to extend to cases of dishonest borrowing. It is expressly stated that the use of property may be dishonest even though it is intended afterwards to restore the property to the person to whom it belongs: s 408C(3)(b).

The other types of fraud covered in the Codes include gaining a benefit for or causing a detriment to any person: Codes s 408C(1)(d)–(e) (Qld)/s 409(1)(c)–(d) (WA). These types of fraud should include most instances of the misuse of another person's property, so that the absence of the latter as a specific type of fraud in the Code (WA) may not be significant.

7.27 Among the forms of fraud identified in the Codes are obtaining property from any person (Codes s 408C(1)(b) (Qld)/s 409(1)(a) (WA)) and inducing any person to deliver property to any person: Codes s 408C(1)(c) (Qld)/s 409(1)(b) (WA). The main thrust of these provisions is to make it an offence to use false pretences or promises to induce the transfer of property, either of its possession or its ownership. The use of deception to induce the transfer of property, either of its possession or its ownership, does not ordinarily amount to stealing (although subsequent disposition of the property may amount to stealing by conversion if all that was transferred was possession: see 7.8–7.9, 7.17–7.18). An exception is Code (Qld) s 391(2A), concerning non-identifiable property, where the offence of stealing may be committed despite the fact that ownership has been transferred. Ordinarily, however, deceiving another person into agreeing to part with possession or ownership does not amount to stealing but instead to fraud: Codes s 408C(1) (Qld)/ s 409(1) (WA).

Fraud by deception can be committed not only when an offender 'obtains property from any person' (Codes s 408C(1)(b) (Qld)/s 409(1)(a) (WA)) but also when an offender 'induces any person to deliver property to any person' (Code (Qld) s 408(1)(c)) or 'to another person': Code (WA) s 409(1)(b). The expression 'obtains property' applies when the accused has personally obtained the property; 'inducing delivery' applies when the property has been transferred to a third party. In either instance, it is immaterial whether ownership or simple possession has been transferred. Historically, the expression 'obtains property' has sometimes been given a more restricted interpretation, but there are now statutory provisions in the Codes making it clear that the expression covers obtaining possession as well as ownership: Code (Qld) s 408C(3)(f) and the definition of 'obtains' in Code (WA) s 1.

7.28 The Codes also include some forms of fraud expressed in very general terms.

Fraud can be committed by gaining a benefit for (Codes s 408C(1)(d) (Qld)/s 409(1)(c) (WA)), or causing a detriment to (Codes s 408C(1)(e) (Qld)/s 409(1)(d) (WA)), any person. These provisions cover instances where deception is used to obtain a service or a facility as well as property. Moreover, as noted already, they could be applied in Western Australia to cases where property is misused rather than transferred: see **7.26**.

Fraud can also be committed by inducing any person to do any act the person is lawfully entitled to abstain from doing (Codes s 408C(1)(f) (Qld)/s 409(1)(e) (WA)) or to abstain from doing any act the person is lawfully entitled to do: Codes s 408C(1)(g) (Qld)/ s 409(1)(f) (WA).

In *Bolitho v State of Western Australia* [2007] WASCA 102; (2007) 34 WAR 215, the court sought to confine the scope of these provisions to conduct affecting economic interests. The provision in issue was Code (WA) s 409(1)(e) but the reasoning was applicable to the whole of s 409(1). It was only a majority decision. Moreover, it was based on an interpretation of the phrase 'intent to defraud' in the Code (WA) but not the Code (Qld). Therefore, the precedent might not be followed in Queensland even if its authority survives in Western Australia.

In *Brown v Devereaux* [2008] WASC 299; 192 A Crim R 190 (**7.53C**), it was held at [94] that deception in obtaining property would affect economic interests even though the person 'intended to give value for the property obtained or delivered, or the benefit gained, or the detriment caused'.

7.29 The final paragraph of the Code (Qld) s 408C(1)(h) deals with a person who intentionally 'makes off' knowing that payment on the spot is required for some item or service. This provision has no direct equivalent in Western Australia. Its role is probably only to provide greater certainty, since anyone who falls within the terms of this provision is also likely to fall under the other provisions relating to obtaining a benefit or obtaining property: see **7.27–7.28**.

7.30 Queensland also has a lesser offence under the Regulatory Offences Act 1985 (Qld) s 6, which applies to a person who leaves a restaurant, hotel or like premises without paying, or attempting honestly to pay, or making arrangements to pay, for food, drink, accommodation or like goods and services to the value of $150 or less. This section also applies to purporting to pay for such goods or services with a dishonoured cheque or the unauthorised use of a credit card. It is a defence to prove a belief on reasonable grounds that the cheque would be honoured or the use of the card was authorised.

ROBBERY

7.31 Robbery is an offence punishable by up to 14 years' imprisonment in standard cases: Codes s 411 (Qld)/s 392 (WA).

- In Queensland, the penalty increases to life imprisonment if the offence is committed by two or more persons, or if violence is actually used.
- In Western Australia, the penalty increases to life imprisonment if the offender is or pretends to be armed with any dangerous or offensive weapon or instrument. The penalty increases to 20 years' imprisonment if it is committed in circumstances of aggravation. 'Circumstances of aggravation' are defined to mean commission of the offence in company, or with bodily harm

being caused, or with a threat to kill any person, or with violence being used or threatened against a person aged 60 or over: Code (WA) s 391.

7.32 The offence of robbery involves stealing coupled with the use or threat of violence, immediately beforehand or afterwards, in order to steal the property or to prevent or overcome resistance to its being stolen: Codes s 409 (Qld)/s 392 (WA). Each element has an intentional aspect. The first is an intention to permanently deprive the owner of property; this is required for stealing. The second is the use of violence in order to steal or to prevent or overcome resistance. The phrase 'in order to' suggests a purposive requirement. Presumably, the incidental use of violence would not constitute robbery. The violence will usually be against the victim but it can be directed to any person or even to property.

7.33 In cases where the stealing is intended but not effected, there are less serious offences:

- In Queensland, attempted robbery is a separate offence with its own penalties: Code (Qld) s 412. In addition, there is an offence of assault with intent to steal: s 413. The difference between attempted robbery and assault with intent to steal is unclear because an assault usually involves the use or threat of force: s 245.
- Western Australia has a lesser offence of assault with intent to commit robbery: Code (WA) s 393.

OFFENCES RESPECTING PREMISES

7.34 There are a series of offences relating to the commission or intended commission of offences in premises or places: Codes ss 418–19, 421 and 425 (Qld)/ss 400–401 and 407 (WA). Breaking and entering is a common feature but not an essential element of these offences: see **7.35**.

- The Code (Qld) applies to 'dwellings' and 'premises'. The offence committed or intended must be an indictable offence.
- The Code (WA) applies to 'places'. There is no limitation on the kind of offence committed or intended.

Most often the offence applicable is stealing, but the offence could be an offence against the person such as an assault.

The maximum penalties prescribed are substantial, ranging from 3 years to life imprisonment. The penalty regimes distinguish between offences committed in relation to dwellings and in relation to other premises or places, with higher penalties for the former. Several other aggravating circumstances which increase the penalties are specified: Codes s 419(3) (Qld)/ s 401 (WA).

7.35 The offences cover several types of connection with premises or places:

1. One group of offences focuses on entering or being in places with intent to commit an indictable offence. Like stealing, these are offences of ulterior intent, meaning that the commission of the offence lies beyond what has to be proved and need not have actually occurred.
   - In Queensland, entering or being in the dwelling of another person with intent to commit an indictable offence therein is an offence under the Code (Qld) s 419(1). There is a parallel offence relating to any other premises: s 421(1).

- 'Breaking' is an aggravating factor that increases the maximum penalty under s 419(1) and s 421(1). 'Breaking' is given a broad definition in s 418(1). It need not involve the causing of any damage or the use of any significant force. Breaking is effectively a synonym for opening, and includes unfastening anything that covers an opening. It can even include pushing or lifting a door or window, as long as it is not already ajar. In the latter case there must be an unfastening: see *Galea v R* (1989) 1 WAR 450. The scope of breaking is extended under s 418(3) to cover obtaining entry by threat, artifice or collusion with someone inside, and by way of a chimney or other aperture not intended to be used as a means of entrance.
- In Western Australia, one offence covers entering or being in any place of another person, without consent, with intent to commit an offence: Code (WA) s 401(1). If the place is ordinarily used for human habitation, the maximum penalty is increased: s 401(1)(b). 'Breaking' is not an element of the offence.

2. Another group of offences focuses directly on the commission of offences in premises or places. Unlike the offences discussed above, these are not offences of ulterior intent. The commission of an offence must be proved to have occurred. On the other hand, the entry need not have been made with any particular intent.
   - In Queensland, it is an offence to enter or be in a dwelling of another and to commit an indictable offence therein: Code (Qld) s 419(4). There is a parallel offence for other premises (s 421(2)) with an aggravating circumstance if entry has been effected by a breaking: s 421(3).
   - In Western Australia, the equivalent offence deals generally with the commission of offences in the places of other people when in those places without consent: Code (WA) s 401(2). It is an aggravating circumstance if the place is 'ordinarily used for human habitation': s 401(2)(b).
3. There are miscellaneous offences relating to premises such as being in possession of housebreaking instruments or having faces blackened with intent to commit certain offences: Codes s 425 (Qld)/s 407 (WA).

7.36 There is considerable overlap between, on the one hand, the offences relating to entering buildings and committing offences within them and, on the other hand, those relating to being in buildings with intent to commit offences within them. For example, a person who breaks into a dwelling in order to find somewhere to sleep, and later decides to steal, not only commits an offence under the Codes s 419(4) (Qld)/s 401(2) (WA) when the offence is committed but also commits an offence at the time when the intention to steal is formed: Codes s 419(1) (Qld)/s 401(1) (WA).

RECEIVING

7.37 When property obtained by stealing or some other indictable offence is passed on to another person, that person may commit the offence of receiving: Codes s 433 (Qld)/ s 414 (WA). The offence also extends to receiving property into which unlawfully obtained

property has been converted or has been mortgaged, pledged or exchanged: Codes s 432 (Qld)/s 414 (WA).

- In Queensland, such property is termed 'tainted property': s 432. A receiver must have had 'reason to believe' the property was tainted property: s 433(1). The reference to 'reason to believe' was introduced in 1997. Previously, the requirement was for actual knowledge that the property had been obtained by the commission of an indictable offence.
- In Western Australia, a receiver must have actually known that the property was obtained by the commission of an indictable offence. The High Court has ruled in the context of drugs offences that 'it is never the case that something less than knowledge can be treated as satisfying a requirement for actual knowledge': *Pereira v DPP* (1988) 82 ALR 217. Therefore, a person does not commit the offence of receiving in Western Australia merely because the person has a suspicion that the property may have been stolen.

7.38 At one time, the offence of receiving incorporated the doctrine of wilful blindness. Under this doctrine, a person who was suspicious of something, and chose not to make further inquiries in order to avoid learning an uncomfortable truth, was deemed to have knowledge of the matter: see *He Kaw Teh v R* (1985) 157 CLR 523; 60 ALR 449. In *Pereira v DPP* (1988) 82 ALR 217, however, the High Court ruled that although suspicious circumstances may provide a basis for inferring knowledge, wilful blindness cannot be substituted where knowledge is required but cannot be proved. The implications for the law of receiving were not discussed in *Pereira*, a case about drug offences. Nevertheless, its reasoning was subsequently applied to receiving. See, for example, *R v English* (1993) 10 WAR 355 at 19.34C.

The shift in Queensland from 'knowing' to 'reason to believe' counteracted this narrowing of the offence of receiving though it did not restore the traditional doctrine of wilful blindness with its element of subjective awareness of the risk that the property had been obtained unlawfully. Instead, the reference to 'reason to believe' introduces an objective test which makes it possible for the offence to be committed through inadvertent negligence.

7.39 Both states have a less serious offence of unlawfully possessing a thing that is reasonably suspected of having been stolen or unlawfully obtained: Summary Offences Act 2005 (Qld) s 16; Code (WA) s 428.

DESTRUCTION AND DAMAGE

The offences

7.40 The law relating to destruction of or damage to property has some similar features under each Code, although amendments to the Code (WA) have also created differences. In both states, there are a variety of offences relating to different kinds of property. Only the main offences will be discussed here:

- In Queensland, wilful and unlawful destruction of or damage to property is subject to penalties ranging from 5 years' to life imprisonment, depending upon the kind of property involved and whether the offence is committed during the day or at night: Code (Qld) s 469. There is also a minor offence, punishable by fine, for the destruction of or damage to property causing loss of $250 or less: Regulatory Offences Act 1985 (Qld) s 7.

- In Western Australia, wilful and unlawful destruction of or damage to property ordinarily creates liability to 3 years' imprisonment on summary conviction and 10 years' imprisonment on indictment: Code (WA) s 444. Unlawful destruction or damage without the element of wilfulness makes a person liable to 2 years' imprisonment: s 445.

7.41 Both states make special provision for destruction or damage by fire, with increased penalties:

- In Queensland, two separate offences are created. Section 461 is entitled 'arson' and covers setting fire to certain categories of property, including buildings and vehicles. The maximum penalty is life imprisonment. Section 462 is entitled 'Endangering particular property by fire'. It applies to setting fire to anything where the fire is likely to spread to any of the s 461 categories of property. The maximum penalty prescribed is 14 years' imprisonment.
- In Western Australia, the penalty for the general offence is increased to a maximum of life if the property is destroyed or damaged by fire: s 444(1)(a). Indictments for this offence can only be presented in the Supreme Court. Moreover, it is an offence punishable by 20 years' imprisonment to wilfully light or attempt to light a fire under such circumstances as to be likely to injure or damage a person or property: Bush Fires Act 1954 (WA) s 32.

7.42 The general duty-creating provisions of the Codes (ss 285–290 (Qld)/ss 262–267 (WA)) do not establish any liability for failing to prevent destruction of or damage to property. These provisions are concerned with the protection of persons and not property.

In Queensland, it seems that offences relating to destruction of or damage to property cannot be committed by omission. For example, arson is not committed by a person who fails to put out a fire.

7.43 In Western Australia the Code (WA) s 444A imposes a duty of care respecting property upon persons in charge or control of fires or sources of ignition. They are (1) under a duty to use reasonable care and to take reasonable precautions to avoid lighting a fire that destroys or may destroy or damage property when they are not entitled to do so and (2) to contain a fire so that it does not have these effects. Breach of the duty can create liability for damage caused. It also constitutes a separate offence under s 445. It is suggested that the prosecution must establish gross or criminal negligence. For each of the offences relating to destruction of or damage to property, the accused must have acted 'unlawfully'. 'Unlawfulness' in relation to these offences is defined: Codes ss 458–459 (Qld)/ss 441–442 (WA).

There are three basic conditions under s 458(1) (Qld)/ s 441(1) (WA):

1. Injury must be caused to the property of another person.
2. Injury must occur without the consent of the other person.
3. There must be no authorisation, justification or excuse.

There is an exception for those situations where the accused's conduct is reasonably necessary to defend or protect either persons or property from imminent injury: Codes s 458(3) (Qld)/s 441(3) (WA). The accused might also rely on the defences of compulsion or emergency: see **Chapter 16**.

7.44 It is immaterial that the person who does the injury to the property is in possession of it or has a partial interest in it or, in Queensland, an interest in it as joint or part owner or owner in common: Codes s 458(2) (Qld)/s 441(2) (WA). The offence can be committed by a lessee or by a person who has borrowed the property.

A person may even act 'unlawfully' in relation to their own property if the act is done with intent to defraud: Codes s 459 (Qld)/s 442 (WA). This section, for example, would cover a case where a person set fire to their own property in order to collect insurance money.

Requirement of 'wilfully'

7.45 Most of these offences under the Codes, as well as the offence under the Regulatory Offences Act 1985 (Qld) s 7, require the accused to have acted 'wilfully'.

7.46 The Code (WA) defines 'wilfully' but the Code (Qld) does not. The Code (WA) definition adopts the interpretation given to the word in *R v Lockwood; Ex parte Attorney-General* [1981] Qd 4 209 at 7.54C:

- In *Lockwood*, above, the court concluded that 'wilfully' encompasses both intentionally and recklessly in the sense of there being foresight that injury to property is likely to result.
- The Code (WA) s 443 follows *Lockwood* and provides that injury to property is wilful if it is done:

  (a) intending to destroy or damage property; or

  (b) knowing or believing that the act or omission is likely to result in the destruction of or damage to property.

  On the meaning of the word 'likely', see 4.19.

7.47 Common law principles of criminal responsibility were invoked in *Lockwood* to justify the interpretation given to the term 'wilfully'. It was said that 'wilfully' is an ambiguous word and therefore it is permissible to consider the common law on liability for recklessness in its interpretation: see 1.19–1.21 on general principles for the interpretation of the Codes.

It is a general principle of criminal responsibility at common law that the conduct must have been intentional or at least reckless: see *He Kaw Teh v R* (1985) 157 CLR 523; 60 ALR 449 and *Kural v R* (1987) 162 CLR 50; 70 ALR 658. However, it is questionable whether the concept of recklessness at common law is restricted to foresight of a probable risk. It is arguable that it extends to foresight of a possible risk. The definition of recklessness in the Criminal Code (Cth) s 5.4 uses the term 'substantial risk': see 9.10.

There were some inconclusive comments on the meaning of recklessness by the Queensland Court of Appeal in *T v R* [1997] 1 Qd R 623. All three members of the court appeared to accept *Lockwood* as authority for the proposition that the risk would have to be foreseen as a likely one. Beyond that, however, there was no common position. Pincus JA favoured equating a likely outcome with one in which there is a 'substantial chance': at 664. Fitzgerald P, at 660, thought that the threshold of criminal responsibility for a serious offence should be higher and the outcome should be foreseen as more probable than not. Mackenzie J declined to answer the question, since it was unnecessary to resolve the matter for the purposes of the case at hand.

7.48 In *R v Webb; Ex parte Attorney-General* [1990] 2 Qd R 275, the Queensland Court of Criminal Appeal examined the scope of the requirement for wilfulness in the Code (Qld) s 462 which creates the offence of wilfully and unlawfully setting fire to anything where the fire is likely to spread to any of the s 461 categories of property. The section contemplates two different items of property: the property which is set afire and the property which is put at risk. The question was whether there had to be foresight of the risk of the second fire as well

as the first. The text of s 462 does not suggest the requirement for wilfulness extends this far. Nevertheless, the broader interpretation of 'wilfully' was adopted on the ground that this is more appropriate for the scope of criminal liability. Macrossan CJ conceded that this interpretation might involve 'some notional reconstruction of the wording': at 282. In this respect, it is not easy to reconcile this case with the orthodox theory of code interpretation: see 1.19.

7.49C

Ilich v R

(1987) 162 CLR 110; 69 ALR 231
High Court of Australia

Wilson and Dawson JJ: This is an application for special leave to appeal against the judgment of the Western Australian Court of Criminal Appeal dismissing an appeal against a conviction for stealing. The applicant is a veterinary surgeon who was employed as a *locum tenens* by another veterinary surgeon named Brighton to carry on the latter's practice at Bridgetown and Manjimup in Western Australia while he, Brighton, went on an overseas holiday. Brighton had, apparently, intended to be away for some three weeks. He returned early.

Upon returning, Brighton went to Bridgetown where the applicant was occupying his house. He was dissatisfied with the condition of the house and the manner in which the applicant was running his practice and complained to him about it. Brighton told the applicant that he was to finish up as a locum on the following day.

Late on that following day a meeting took place at Brighton's clinic at Bridgetown for the purpose of settling financial matters between the two men. The applicant and Brighton gave different accounts of what happened at that meeting.

The rate of remuneration agreed upon had been $450 per week plus an allowance for mileage. According to Brighton, he and the applicant reached an agreement that the applicant should be paid $1,176. Brighton said that he handed the applicant a bundle of notes amounting to $1,176 which the applicant counted. He said that at about the same time he placed notes amounting to $600 in a green Telecom envelope and that these notes did not form any part of the moneys to be paid to the applicant. Brighton's evidence was that he placed this envelope on top of a pile of mail and other documents on the same table as the $1,176, but not in a position which would indicate that its contents were to form any part of the moneys which the applicant was to receive. Brighton said that he then left the room to answer the telephone. He said that by the time he returned, the applicant had walked to his car. According to Brighton, he went to the door to see the applicant off and when he returned to the room the green envelope was in a different position. He said that he looked inside the envelope and there was nothing there.

The applicant's evidence was that during the meeting Brighton was in an agitated state and was anxious to be rid of him. He said that one after another Brighton threw three amounts of money on the table in front of him. The first amount was said by the applicant to be in a green Telecom envelope. According to the applicant, Brighton told him that there was no need to count the money and asked him to sign a receipt for $1,176. The applicant said that he signed the receipt without counting the money. According to him, he was virtually ordered to leave; the telephone rang as he was leaving but he did not wait. He said it was not until later that evening that he counted the money and found that there was an excess of $530. According to the applicant he went back to the clinic the next morning and dropped through a broken window some mail and other items which he had mistakenly taken with

him. The applicant said that he did not leave the $530 or wait to see Brighton because he wanted to return home to Perth and thought it unlikely that Brighton would want to speak further with him. He said that he separated the $530 from the rest of the money, leaving it inside a slit on the side of a cooler which he kept in his motor car. He said that upon arrival in Perth at about 11.30 am he left the $530 in the car and took the other money into the house with him.

Police officers came to the applicant's home at about 1.30 pm on the same day and according to their evidence the applicant denied having any money other than the $1,176. The police searched the applicant's car and found the $530. They gave evidence that, when asked why he denied having this money, the applicant said that it was because he wanted to 'come out on top'. The applicant gave evidence that by this he meant that he expected a telephone call from Brighton and that if something had gone wrong 'it seemed better that at least I hadn't turned out to be the gullible one and that I would then be able to discuss it further with him'. The applicant also gave evidence that he did not regard the $530 as his own and said, 'What I planned to do with it was, in fact, what I had done with it, which was that I had had it in safe keeping and that was as far as I had got'.

In his summing up to the jury, the learned trial judge said:

> The Crown must establish the taking and I suggest that there is no doubt that an amount in excess of that to which the accused man was entitled, was taken by him, perhaps unwittingly in the first place. That is something which you may have to decide.
>
> It must have been taken, as we say, fraudulently. That is, with the intention of permanently depriving the owner of it, or in the case of money, of using it at his own will, when he took it or when he became aware of the excess. If you find, in accordance with the accused's evidence, that although, as he said, he suspected it was more than he was entitled to when he received it, if you find that he discovered the excess when he went out to his car immediately after receiving the money or discovered it at 11 o'clock, or late at any rate that night, it matters little. He was aware at the latest by 11 o'clock that night that he had been overpaid, to use his expression. If you can imagine yourself going into a shop and handing over a $20 bill in payment for something and being given the change from $50, if you simply put the excess in your pocket and walk away, obviously you are stealing the excess. I think that that would be perfectly obvious to any of you. In circumstances such as that of course you must immediately tell the cashier that you have been overpaid and hand the surplus back.

After they had retired the jury returned and asked the question:

> Could you please reclarify the point of law regarding the definition of stealing as it pertains to the overpayment of the money?

By this question, the jury clearly indicated that they had not rejected the applicant's version of events. The trial judge answered the question as follows:

> Members of the jury, stealing money is taking money to which one is not entitled with the intention of either depriving the owner of the money or else with the intention of using the money at one's own will, even if there is an intention to repay it at a later time. In the event of money being mistakenly overpaid by way of payment of a debt or in the instance which I gave you this morning of receiving change, if the person receiving that money to which he is not entitled, upon becoming aware of the excess payment decides,

'Well, that's bad luck for the owner of the money who did not intend to give it; I will keep it', that is stealing.

Those directions were, in our view, defective, but it is necessary to go to the relevant provisions of the Criminal Code (WA) (the Code) and to some of the cases dealing with larceny at common law in order to show why.

The charge against the applicant was laid under s 371 of the Code …

… The question whether a person could, under the Code, steal something already in his lawful possession, is answered by the express provision that a person may steal, not only by fraudulently taking something, but also by fraudulently converting it to his own use. Of course, a person may convert something which is in his possession, although he cannot convert something which he also owns. That is because conversion in the criminal law at least involves a dealing with the thing said to be converted in a manner inconsistent with the owner's right in the thing: *Caxton Publishing Co v Sutherland Publishing Co* [1939] AC 178 at 201–2 citing *Lancashire and Yorkshire Railway Co v McNicoll* (1918) 88 LJKB 601 at 605 per Atkin J.

With these differences between the common law and the Code in mind, it is possible to look at those cases dealing with mistake in relation to larceny to see what assistance might be gained from them. Mistake is relevant in this case because, upon one version of events, an overpayment was made by Brighton by mistake. Because of the differences between the Code and the common law the exercise can only be helpful in a general way and it is unnecessary to go into great detail. Moreover, we should say at the beginning that the decisions to which we are about to refer are far from having received universal approbation.

The cases fall into two categories. First there are those, of which *R v Middleton* (1873) LR 2 CCR 38 is the principal decision, in which the person handing over the thing said to be stolen did so under a mistake which was known at the time by the person to whom the thing was handed. Cases in the second category, of which *R v Ashwell* (1885) 16 QBD 190 is the leading authority, occur where the thing said to be stolen was handed over under a mistake which was unknown at the time by the person to whom the thing was handed and was learnt by him only subsequently.

In *Middleton* the accused was handed by a post office clerk by way of withdrawal from a savings account an amount which was more than was standing to the accused's credit in that account. At the time the clerk made the payment, he mistakenly referred to a letter which authorized the payment, but to another depositor. The accused was convicted upon trial, the case being reserved for the Court of Crown Cases Reserved where it was eventually heard by a Full Court of fifteen judges. By a majority of eleven to four the conviction was upheld.

In *Ashwell* the accused asked for a loan of a shilling and was handed by mistake, in the dark, a sovereign. The accused did not at first realize the mistake, but when he did some time later, he appropriated the sovereign. He was convicted upon trial but again a case was stated for the Court of Crown Cases Reserved. The fourteen judges (who included the trial judge) were equally divided and accordingly the conviction stood.

Many analyses of the judgments in these cases have been made, but it is sufficient for present purposes to observe that the decision in *Middleton* can only be explained upon the basis (somewhat of a fiction upon any view) that there was a taking against the consent of the owner at the time the accused received the money and that he acquired neither the right

to possession nor ownership of it. The apparent consent of the clerk who paid the money was vitiated by his mistake. It may also be observed that it was the whole of the money which was held to be stolen, not just the amount by which the payment exceeded the money which was in the accused's account.

The decision in *Ashwell* must, we think, rest upon the proposition (difficult to accept as it is) that the mistake on the part of the person handing over the coin and on the part of the accused, meant that the accused, although he obtained physical possession of the coin, did not obtain possession of the sovereign until he realized that the coin was a sovereign. At that point he formed an intention to keep it and was held to have taken it without consent.

The cases of *Middleton* and *Ashwell* have received a measure of acceptance in England, although they have been the subject of considerable criticism. In Australia they have never been confirmed or adopted …

In *R v Potisk* (1973) 6 SASR 389 the accused changed some travellers' cheques into Australian currency at a bank. The teller applied the wrong exchange rate and gave the accused too much. The accused did not realize this until he got home and counted the money. He then decided to keep it. In the Full Court of the Supreme Court of South Australia, Bray CJ, with whom Mitchell J agreed, found both *Middleton* and *Ashwell* distinguishable but would have declined to follow them in any event. The reasons which the Chief Justice gave for regarding both of those decisions as unsatisfactory are cogent and we should be inclined to agree with his view that they should not be followed. However, in this case, as in *Potisk*, there are important differences which make the English decisions clearly distinguishable and which render unnecessary any detailed discussion of the reasons in those cases.

Both *Middleton* and *Ashwell* have been treated, and in our view must be treated, as cases in which the mistake which was made was of a sufficiently fundamental kind to negate the apparent consent and to prevent ownership from passing. A mistake will be of that kind if it is as to the identity of the transferee or as to the identity of the thing delivered or as to the quantity of the thing delivered. See Glanville Williams, *Textbook of Criminal Law*, 1978, p 779; Williams and Weinberg, *Property Offences*, 2nd ed, 1986, p 44; *Russell on Crime*, vol 2, 12th ed, 1964, p 1553; J C Smith, *Criminal Law Review*, 1972, pp 586–8. In those circumstances, and perhaps only in those circumstances, can it be said that the mistake is such that the transferor never really intended to deliver the thing transferred and so never gave consent to the transfer. *Middleton* may be regarded as a case of mistake as to the identity of the transferee: the clerk thought that the accused was the person referred to in the letter authorizing the payment. Less plausibly, *Middleton* may be regarded as a case of mistake as to the identity of the deposit: see *Criminal Law Review*, 1972, p 587. *Ashwell* may be regarded as a case of mistake as to the identity of the thing delivered: both the lender and the accused thought it was a shilling whereas it was in fact a sovereign. The third category — mistake as to the quantity of the thing delivered — requires in our view some qualification where the thing is money but may be illustrated by *Russell v Smith* where eight sacks too many of pig meal were mistakenly delivered to the accused who appropriated them. He was convicted of theft.

Where there is a mistake which is not of a fundamental character it will not vitiate consent so that possession and ownership will pass in accordance with the apparent intention of the owner …

In the present case there was no mistake as to the identity of the person to whom the money was delivered. There was no mistake as to the identity of the thing delivered, which was

money. If there was any mistake it was as to the quantity of money delivered and it is therefore necessary to turn to the qualification of that category of fundamental mistake which we think must be made in the case of money.

In *Potisk* there was no mistake as to the quantity of money handed to the accused. The teller made a mistake in applying the wrong exchange rate but he intended to hand over the amount which he did. The case might have been decided simply upon the basis that there was no fundamental mistake to prevent possession and ownership passing, but Bray CJ at 401 adverts to the qualification which we have suggested saying that '… cases where ownership has been held not to pass, despite delivery, because of a mistake are cases relating to the title to specific chattels, and I doubt whether they can apply to delivery of money in circumstances like these'. And at p 404 he refers to the 'curious question' which would have arisen in *Potisk* if the accused had been guilty of larceny, namely, whether he stole the whole of the money delivered to him or only the amount which was in excess of the sum to which he was entitled in exchange for his travellers' cheques.

It is an error, as Lord Mansfield pointed out as long ago as 1758 in *Miller v Race* (1758) 1 Burr 452 at 457 (97 ER 398 at 401), to treat money in the form of cash in the same way as other goods. Money in most circumstances cannot be followed, which is to say that property, or ownership, generally passes with possession. 'It has been quaintly said, "that the reason why money can not be followed is, because it has no ear-mark": but this is not true. The true reason is, upon account of the currency of it: it can not be recovered after it has passed in currency': ibid. Money is, of course, capable of being stolen and if it is stolen, property in the notes or coins does not pass to the thief. But if the thief passes the money into currency, which he may do by making payment with it, ownership will pass with possession notwithstanding the thief's lack of title providing the transaction was bona fide and for valuable consideration: *Moss v Hancock* [1899] 2 QB 111; *Banque Belge v Hambrouck* [1921] 1 KB 321; *Clarke v Shee and Johnson* (1774) 1 Cowp 197 (98 ER 1041). That is because of the doctrine of negotiability — and negotiability was first attributed to chattels in the form of money — which constitutes an exception to the common law rule that a man who has no title himself cannot pass title to another *nemo potest dare quod non habet*: *Banque Belge v Hambrouck* at 329.

In the circumstances of this case this aspect of negotiability is of less importance — since Brighton had title in the money — than the rule that when money passes into currency property goes with possession. Whether money only passes in currency when it is negotiated, that is, when it is used for payment bona fide and for value, or whether money may pass in currency in other circumstances when it is not delivered *in specie*, is something which it is unnecessary to examine here. Definitions of currency tend to speak in terms of it being a medium of exchange, but this nevertheless imports the notion of payment. See *Moss v Hancock* at 116; Mann, *The Legal Aspect of Money*, 4th ed, 1982, p 8. Upon any view money passes into currency when it is negotiated and in this case, upon the applicant's version of the facts, the transaction in which the money changed hands was both bona fide and for value. He was unaware of the overpayment when it was made and consequently there was no reason to doubt the bona fide character of the transaction. Thus the notes or coins ceased to be the subject of specific title as chattels and passed as currency, that is to say, passed 'from hand to hand in point, not merely of possession, but of property': *Sinclair v Brougham* [1914] AC 398 at 418 per Viscount Haldane LC. We do not think that it is possible to say that only the correct amount was paid for valuable consideration and

that the amount of the overpayment passed hands for no consideration and hence as mere chattels rather than currency. Apart from the insuperable difficulty of identifying the notes or coins which constituted the overpayment, it is the transaction itself which characterizes the payment. The transaction between the applicant and Brighton was bona fide and for value. The payment, which was part of that transaction, was also of that character. It is not possible, in our view, to apportion the consideration to some of the chattels comprising the notes or coins transferred and not to others.

With goods other than currency, property does not pass with possession unless it is the owner's intention that it should and it has been held (not without some difficulty) that it is possible to conclude in cases of overdelivery that appropriation of the whole of the goods involves the theft of the excess goods without any need to identify them. See *R v Tideswell* [1905] 2 KB 273; *Pilgram v Rice-Smith* (1977) 1 WLR 671; (1977) 2 All ER 658. Cf *Lacis v Cashmarts* [[1969] 2 QB 400], at p 411. However where property passes with possession, as with currency, no such conclusion is possible in relation to an amount overpaid. There is, we should add, a civil action to recover money paid under a mistake of fact and equitable rights may arise. See *Chase Manhattan v Israel-British* [1981] Ch 105.

The result is that in this case, even without rejecting *Middleton* and *Ashwell*, there was no mistake of a fundamental kind which would have operated to prevent ownership in the money passing at the time at which, upon the applicant's evidence, it was handed by Brighton to the applicant. There was no mistake as to the identity of the transferee, there was no mistake as to the identity of the money and any overpayment, being in currency, did not prevent property in the whole amount being transferred to the applicant.

If in this case Brighton intentionally handed the money to the applicant, including the amount of the overpayment, and the applicant took the money without being aware of any mistake on the part of Brighton, property in the money passed with possession and there was neither a fraudulent taking within the meaning of s 371 of the Code nor a subsequent conversion when the applicant realized Brighton's mistake …

Clearly the directions given by the learned trial judge to the jury were defective. As we have said, the question asked by the jury after they had retired indicates that they had not rejected the applicant's version of events. The applicant was entitled to a direction that if the jury were satisfied — or if they were left with a reasonable doubt about it — that Brighton delivered the money to the applicant who took it unaware of any overpayment, then the applicant should be acquitted of stealing, notwithstanding that he subsequently realized Brighton's mistake and retained the money. No such direction was given.

It remains to consider whether the applicant should be exposed to a new trial. His story is not inherently improbable and, had the jury been adequately directed, it is likely that he would have been acquitted. It is not an invariable rule that a new trial should be ordered where there is evidence upon which a jury could have convicted on an adequate direction. See *Clemesha v R* [1978] WAR 193 at 201, per Wickham J. Justice having once miscarried in this case, we think that it would be better served in the end if there were no order for a retrial. We would grant special leave, allow the appeal, quash the conviction and direct a verdict and judgment of acquittal be entered … A verdict of acquittal is entered.

[Gibbs CJ, Deane and **Brennan JJ** delivered separate judgments quashing the conviction.]

7.50C

Mujunen v R

[1994] 2 Qd R 647
Queensland Court of Appeal

Fitzgerald P: On 25 September 1992, Lauri Juhani Mujunen was convicted in the District Court at Brisbane on one charge of uttering a false document and three charges of stealing. On the same day he was sentenced to imprisonment for six months on all four charges, the sentences to be served concurrently, admitted to probation for two years upon the completion of the sentences and ordered to make restitution to Westpac Banking Corporation in the sum of $1,300.00 within 18 months and, in default, sentenced to imprisonment for three months. Mujunen appealed against his convictions and applied for leave to appeal against sentence. However, when the matter came on for hearing, the appeal against the conviction on the count of uttering and the application for leave to appeal against all sentences were abandoned …

The case against the appellant was essentially that, on or about 24 September 1990, he deposited a cheque which he had forged to his account with Westpac Banking Corporation. The appellant's account with the bank was credited with the amount of the cheque subject to it being cleared, but the credit was shortly afterwards reversed when another bank declined to make payment on the cheque. Meanwhile, the appellant withdrew $1,300.00 from the bank (against the credit created in his account by the cheque) in three separate transactions, using automatic teller machines on two occasions and a counter withdrawal on the other. There was neither a request nor an approval for an overdraft facility with the bank and the appellant's contract with the bank did not permit the withdrawal of funds against a credit from a cheque which had not been cleared. However, the bank's system enabled withdrawals to be made from an automatic teller machine prior to a cheque being cleared.

The appellant's point 'in a nutshell' was that the appellant did not steal from the bank because, however he got the money from the bank, there was money in his account which he was entitled to withdraw. This seems plainly incorrect, but factually it is accurate to say that, although not entitled to do so, the appellant was able to withdraw the money.

…

The bank was the owner of the money, at least until it left the possession of the bank and came into the possession of the appellant. On the most favourable view of the matter for the appellant, the bank then ceased to be the owner and the appellant became the owner. On this hypothesis, the appellant could not have stolen the money by conversion: *Ilich* [(1987) 162 CLR 110].

It is convenient, therefore, to start with the question whether the appellant stole the money by fraudulently taking it, that is, by taking it with the intent to permanently deprive the bank of it or the intent to use it at the will of the appellant.

Both such intents are clearly established, so that the question is whether or not, on the different occasions, the appellant took the money within the meaning of s 391.

In the over the counter transaction, the bank teller mistakenly paid the money to the appellant. The matter is indistinguishable from *Ilich* save that, unlike that case, the appellant did not honestly share the teller's mistaken belief that the appellant was entitled to receive the amount paid. However, the mistake was not fundamental in the material sense. Nor is there anything in the distinction to suggest a taking of the money by the appellant: it was delivered to him. See generally, *Ilich*, eg (at 136ff; 252ff). (Further, although the mistake was induced by the appellant's fraud, the property in the money paid to him by the teller was intended to

and did pass to him by and on delivery and receipt so that his subsequent dealing with the money did not amount to a conversion: *Ilich*.)

The appellant's withdrawals from the automatic teller machines are materially different. He was not handed the money, but took it and, if it matters, the money was taken without the bank's consent and without any intention on the part of the bank to pass property in the money to the appellant …

… In this context, it is material to examine *Kennison v Daire* (1986) 160 CLR 129.

In that case, the appellant was convicted of larceny contrary to s 131 of the Criminal Law Consolidation Act 1935 (SA), as amended. He was the holder of a card which enabled him to use the automatic teller machine of a bank to withdraw money from his account with that bank. It was a condition of the use of the card that the customer's account could be drawn against to the extent of the funds available in that account. Before the date of the offence, the appellant had closed his account and withdrawn the balance, but had not returned the card. On the occasion of the offence, he used his card to withdraw money from a machine at a branch of the bank. He was able to do so because the machine was off-line and was programmed to allow the withdrawal of the amount in question by any person who placed the card in the machine and gave the corresponding personal identification number. When off-line, the machine was incapable of determining whether the card holder had any account which remained current and, if so, whether the account was in credit.

The High Court affirmed the decision of the Full Court of South Australia: *Kennison v Daire* (1985) 38 SASR 404; 16 A Crim R 338. It was not doubted that the appellant had taken the money or that he had acted fraudulently with intent permanently to deprive the bank of the amount in question. The only question was whether or not the bank had consented. At 131–2, the court in a joint judgment said:

> The appellant's submission is that the Bank consented to the taking. It is submitted that the Bank intended that the machine should operate within the terms of its programme, and that when it did so it gave effect to the intention of the Bank.
>
> In the course of an interesting argument, Mr Tilmouth pointed out that if a teller, having the general authority of the bank, pays out money on a cheque when the drawer's account is overdrawn, or on a forged order, the correct conclusion is that the bank intends that the property in the money should pass, and that the case is not one of larceny: see, eg *Chambers v Miller* (1862) 13 CB(NS) 125; 143 ER 50 and *Prince* (1868) LR 1 CCR 150. He submitted that, in effect, the machine was invested with a similar authority and that if, within the instructions in its programme, it handed over the money, it should be held that the property in the money passed to the cardholder with the consent of the bank.
>
> With all respect we find it impossible to accept these arguments. The fact that the bank programmed the machine in a way that facilitated the commission of a fraud by a person holding a card did not mean that the bank consented to the withdrawal of money by a person who had no account with the bank. It is not suggested that any person, having the authority of the bank to consent to the particular transaction, did so. The machine could not give the bank's consent in fact and there is no principle of law that requires it to be treated as though it were a person with authority to decide and consent. The proper inference to be drawn from the facts is that the Bank consented to the withdrawal of up to $200 by a cardholder who presented his card and supplied his personal identification number, only if the cardholder had an account which was current. It would be quite unreal to infer that the bank consented

> to the withdrawal by a cardholder whose account had been closed. The conditions of use of the card supplied by the bank to its customers support the conclusion that no such inference can be drawn. It is unnecessary to consider what the position might have been if the account had remained current but had insufficient funds to its credit. The decision in *R v Hands* is consistent with the view that no inference of consent can be drawn although, as Mr Tilmouth submitted, there are points of distinction between that case and this.

Similarly, the bank had no intention to pass the property in the money. In *Ilich*, Brennan J said (at 141; 255):

> If *Kennison v Daire* had been decided under the Code, the result would not have been different. The erstwhile customer of the bank would have been liable to conviction under the Code for fraudulently taking the Bank's money, for no intention to pass either possession or ownership in the money was attributed to the Bank.
>
> See also *Ilich* at 137; 253.

In my opinion, a similar conclusion should be reached here. The bank did not consent to the appellant taking the money from the automatic teller machine or intend to pass the property in that money to him. I do not think that such an intention should be attributed to the bank merely because its system enabled the appellant to withdraw money before his cheque was cleared, contrary to his contract with the bank …

However, the critical consideration is that the appellant took the money from the automatic teller machines with the requisite intent in circumstances in which no question is raised of absence of criminal responsibility under Chapter V of the Code. That is sufficient to make out the offences of stealing under s 391. The position is different from the over the counter transaction because there the teller delivered the money to the appellant …

The appeal against conviction in respect of count two should be allowed, but the appeal against conviction should otherwise be dismissed and the application for leave to appeal against sentence should be refused.

[**McPherson JA** delivered a separate judgment, reaching the same conclusion as **Fitzgerald P. Davies JA**, however, took the view that the bank had intended that property in withdrawn money should pass, even though a deposit had not been cleared. His view was that *Kennison v Daire* was distinguishable because of differences between the relevant contracts between the banks and their customers.]

7.51C R v Angus

[2000] QCA 29
Queensland Court of Appeal

Pincus JA:

11 This is an appeal against conviction, the appellant having been charged with and convicted of having stolen two Nintendo games and one Nintendo control pad on or about 16 June 1997. There was evidence to show that the appellant hired the chattels I have mentioned from a video shop at Coolum on 15 June 1997 on the basis that they would be returned on the

following day, 16 June 1997, and that he had never returned them. A contention was made before us that the evidence did not sufficiently prove the identity of the person who hired the chattels; it is unnecessary to determine that point. There was adduced some evidence of a phone call to the appellant's number, to ask that the chattels be returned, and of a further such call. As to the former, the person who called was unable to remember to whom she spoke and as to the latter, the evidence was that the caller was told that the appellant had moved to another address. Whether, if he in truth moved away, the chattels were taken to the appellant's new address did not appear, from the evidence.

12 No evidence was called by or on behalf of the appellant.

13 In the learned trial judge's succinct directions to the jury, his Honour told them that they had to be satisfied that the appellant either fraudulently took or fraudulently converted the property in question, intending at that time to permanently deprive the owner of the chattels. These directions were given under s 391(1) and s 391(2)(a) of the Code. The question now is whether it was reasonably open to the jury to be satisfied that there was a fraudulent taking or fraudulent conversion, with the requisite intention.

14 There was certainly evidence of a taking, in that the jury could have inferred from the evidence that it was the appellant who took the chattels away from the video shop when they were hired; but that taking was not shown to have been fraudulent. It could not safely be inferred that at the time the chattels were hired there was an intention to steal them. Counsel for the respondent attempted, before us, to support the conviction on the basis that by retaining possession of them the appellant converted them.

15 Section 391(6) of the Code says:

> The act of stealing is not complete until the person taking or converting the thing actually moves it or otherwise deals with it by some physical act.

A definition originating in a judgment of Atkin J in *Lancashire & Yorkshire Railway Co v McNicoll* (1918) 88 LJKB 601 at 605 has been applied in this country to allegations of conversion under the criminal law: *Hansford* (1974) 8 SASR 164 at 169, 170, 183 and 193; *Fitzgerald* (1980) 4 A Crim R 233 at 235:

> … dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right.

It does not appear to me that keeping possession of hired or borrowed goods beyond the agreed date for return can fit within this definition.

16 Looking at the case more broadly, it would need clear statutory language to establish that merely failing to return hired or borrowed goods on the agreed date is an offence, or prima facie evidence of an offence. The Crown would have it that if the goods are not only held beyond the agreed date, but not returned by the end of a long period of time, that shows an offence has been committed. The answer is that the Code requires not just passive possession, but an act of conversion; that must be or include a physical dealing with the goods and the dealing must in my opinion be such as to be inconsistent with the true

owner's rights. Leaving a borrowed book on a shelf is not an act of conversion, no matter how long the book stays there.

17 Here, it is possible the chattels were fraudulently converted, for example by being sold or given away, but the failure to return them could not satisfy any rational jury, beyond reasonable doubt, that there must have been a fraudulent conversion. The evidence supported the view that the appellant had behaved wrongly, from the point of view of the civil law, but was inadequate to prove the commission of an offence.

…

[**Pincus JA** ordered that the appeal be allowed, setting aside the conviction and entering a verdict of acquittal. **McMurdo P** agreed with the reasons of **Pincus J. McPherson JA** delivered a separate judgment, allowing the appeal on the ground that, although keeping the goods may have been an act of conversion, an intent to deprive the owner had not been proved.]

7.52C Peters v R

(1998) 192 CLR 493; 151 ALR 51
High Court of Australia

Toohey and Gaudron JJ:

1 The appellant, a solicitor, stood trial in the County Court of Victoria on charges of conspiracy to defraud the Commonwealth pursuant to ss 86(1)(e) and 86A of the Crimes Act 1914 (Cth) (the Act) and a charge of conspiracy to pervert the course of justice. He was acquitted of the latter charge but convicted of conspiracy to defraud. His appeal against conviction was dismissed by the Court of Appeal (Criminal Division) of the Supreme Court of Victoria. The appellant now appeals to this court.

The facts

2 In 1983, the appellant was retained by Mr Spong to act in certain transactions involving the purchase of five blocks of land at Essendon in Victoria. One block, which had a substantial residence on it, was purchased in the name of Jetoline Pty Limited ('Jetoline'). The appellant was a director of and a shareholder in Jetoline. The other director was 'Freeman', a name which the appellant knew to be an alias for Spong. It is unclear whether the other blocks were also purchased in the name of Jetoline. It is not in issue that Spong was involved in illegal drug trafficking and that he arranged to purchase and, in fact, purchased the Essendon properties with moneys obtained from his drug dealings. This notwithstanding, it follows from the appellant's acquittal on the charge of conspiracy to pervert the course of justice that it must be taken that he was ignorant of the source of those moneys …

3 Although Spong provided the whole of the purchase moneys for the Essendon properties, that fact was concealed by the execution of two sham mortgage documents. One was a memorandum of mortgage over the block of land on which was erected the residence earlier referred to. That 'mortgage' was in favour of a person named Rosenberg — another alias used by Spong. The other was a 'mortgage' over all five blocks of land in favour of Dial Financial Services Pty Ltd (Dial). The appellant acted for the purchaser/mortgagor in relation to that 'mortgage' and another solicitor acted for Dial. No money was advanced under either

'mortgage'. The solicitor acting for Dial was unable to register the 'mortgage' to that company and a caveat was lodged to protect its interests. Later, the blocks of land other than that on which the residence was erected were sold to genuine purchasers. On settlement, part or all of the proceeds of each sale were paid to Dial, with Dial executing a withdrawal of caveat to enable the registration of a transfer to the purchaser concerned. The moneys paid to Dial were then paid back to Spong.

The issues at trial

4 So far as concerns the charge of conspiracy to defraud the Commonwealth, the prosecution case was that the appellant was party to an agreement to conceal the true amount of Spong's income by sham mortgage transactions and that he and his fellow conspirators intended thereby to deprive the Commissioner of Taxation (the Commissioner) of tax payable on that income. The appellant gave evidence admitting that, at some stage, he was informed by Spong that no moneys had been advanced by Dial under the mortgage, and that the moneys paid to Dial, apparently in partial discharge of its mortgage, were in fact returned to Spong. However, he said he was not party to any agreement to conceal Spong's income by sham mortgage transactions or to deprive the Commissioner of tax payable on that income. He was, he said, merely acting as Spong's solicitor.

5 In his summing up to the jury, the trial judge outlined the prosecution and defence cases and explained the offence of conspiracy to defraud. As part of that explanation, the jury was instructed that it was necessary for the prosecution to prove that the appellant was dishonest. Directions were given in line with the decision of the English Court of Appeal in *R v Ghosh* [[1982] QB 1053], the jury being instructed that they had to be satisfied that what the appellant agreed to do was dishonest by the current standards of ordinary and reasonable honest people and, if it was, that the appellant must have realised it was dishonest by those standards.

The argument on appeal

6 The appellant contends in this court, as he did in the Court of Appeal, that the trial judge misdirected the jury as to the test of dishonesty. In this regard, it is put that the jury should have been instructed to apply a subjective test in accordance with the decision of the Full Court of the Supreme Court of Victoria in *R v Salvo* [[1980] VR 401] and not the test adopted in *Ghosh* [[1982] QB 1053]. More precisely, it is put that the jury should have been instructed that the prosecution had to prove 'an absence of belief [on the appellant's part] that he had a legal right to do what he did'. However, the appellant's belief in that regard was not in issue at the trial. His case was simply that he was not a party to the conspiracy alleged, rather than that he did not act 'dishonestly'.

…

The tests of dishonesty in Ghosh and in Salvo

9 The issue in *Ghosh* was the test of dishonesty for the offence of dishonest appropriation by deception contrary to s 1 of the Theft Act 1968 (UK) (the Theft Act). … The Court of Appeal declined to apply the subjective test which had been applied in some earlier cases under the Theft Act 1958 [see, for example, *R v Greenstein* [1975] 1 WLR 1353 and *R v Waterfall* [1970] 1 QB 148; see also *R v Royle* [1971] 1 WLR 1764] namely, whether the accused believed his or her actions to be honest, and adopted, instead, the test which formed the basis of the trial judge's direction in this case.

10 The test adopted in *Ghosh*, namely, whether the acts in question were dishonest according to current standards of ordinary decent people and, if so, whether the accused must have realised that they were dishonest by those standards [[1982] QB 1053 at 1064] has its origins in *R v Feely* [[1973] QB 530]. That, too, was a case of dishonest appropriation contrary to s 1 of the Theft Act. It was held in *Feely* that the question of dishonesty was for the jury and, as 'dishonesty' was a word in ordinary use, it was unnecessary for the trial judge to explain what it meant. Further, it was said that it was for the jury to decide whether the act involved was dishonest by application of 'the current standards of ordinary decent people' [[1973] QB 530 at 538].

11 The test of dishonesty adopted in *Salvo* [[1980] VR 401] was whether the accused believed he had a legal right to the property in question. In that case, the accused was charged with dishonestly obtaining a motor vehicle by deception contrary to s 81(1) of the Crimes Act (Vic) (the Crimes Act), one of a number of provisions in that Act based on the Theft Act. In his defence, the accused asserted his belief that he had a legal right to possession of the vehicle concerned.

12 In *Salvo*, Murphy J expressed the view that 'the word "dishonestly" is clearly used in a special sense in s 81(1) of the Crimes Act 1914' [[1980] VR 401 at 422] and that '*R v Feely* [[1973] QB 530] … ought not to be applied … if it means that the judge should not tell the jury anything about the word "dishonestly"' [[1980] VR 401 at 423]. Fullager J likewise thought that dishonesty was used in a special sense and expressed the view that it 'imports that the accused person must obtain the property [in question] … without any belief that he has in law the right to deprive the other of [it]' [[1980] VR 401 at 440]. His Honour also described the interpretation of 'dishonestly' in *R v Feely* as 'unworkable' [[1980] VR 401 at 439].

…

14 In the present case, the Court of Appeal held that, notwithstanding the decision of the New South Wales Court of Appeal in *Condon* [(1995) 83 A Crim R 335], the subjective test adopted in *R v Salvo* has no application to Commonwealth offences involving fraudulent conduct. …

Dishonesty

15 There is a degree of incongruity in the notion that dishonesty is to be determined by reference to the current standards of ordinary, honest persons and the requirement that it be determined by asking whether the act in question was dishonest by those standards and, if so, whether the accused must have known that that was so. That incongruity comes about because ordinary, honest persons determine whether a person's act is dishonest by reference to that person's knowledge or belief as to some fact relevant to the act in question or the intention with which the act was done. They do not ask whether he or she must be taken to have realised that the act was dishonest by the standards of ordinary, honest persons. Thus, for example, the ordinary person considers it dishonest to assert as true something that is known to be false. And the ordinary person does so simply because the person making the statement knows it to be false, not because he or she must be taken to have realised that it was dishonest by the current standards of ordinary, honest persons.

16 There are also practical difficulties involved in the *Ghosh* test. Those difficulties arise because, in most cases where honesty is in issue, the real question is whether an act was done with knowledge or belief of some specific thing or with some specific intent, not whether it is

properly characterised as dishonest. To take a simple example: there is ordinarily no question whether the making of a false statement with intent to deprive another of his property is dishonest. Rather, the question is usually whether the statement was made with knowledge of its falsity and with intent to deprive. Of course, there may be unusual cases in which there is a question whether an act done with knowledge of some matter or with some particular intention is dishonest. Thus, for example, there may be a real question whether it is dishonest, in the ordinary sense, for a person to make a false statement with intent to obtain stolen property from a thief and return it to its true owner.

17 The practical difficulties with the *Ghosh* test arise both in the ordinary case where the question is whether an act was done with knowledge or belief of some specific matter or with some specific intent and in the unusual case where the question is whether an act done with some particular knowledge, belief or intent is to be characterised as dishonest. In the ordinary case, the *Ghosh* test distracts from the true factual issue to be determined; in the unusual case, it conflates what really are two separate questions, namely, whether they are satisfied beyond reasonable doubt that the accused had the knowledge, belief or intention which the prosecution alleges and, if so, whether, on that account, the act is to be characterised as dishonest. In either case, the test is likely to confuse rather than assist in deciding whether an act was or was not done dishonestly.

18 In a case in which it is necessary for a jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest. Necessarily, the test to be applied in deciding whether the act done is properly characterised as dishonest will differ depending on whether the question is whether it was dishonest according to ordinary notions or dishonest in some special sense. If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people. However, if 'dishonest' is used in some special sense in legislation creating an offence, it will ordinarily be necessary for the jury to be told what is or, perhaps, more usually, what is not meant by that word. Certainly, it will be necessary for the jury to be instructed as to that special meaning if there is an issue whether the act in question is properly characterised as dishonest [as in *Salvo*].

19 The question whether any and, if so, what direction should have been given to the jury with respect to dishonesty in this case must be answered by reference to the elements of the offence of conspiracy to defraud and the issues which arose in the trial. However, it follows from what has been said that it was not appropriate for the jury to be instructed in accordance with the test adopted in *Ghosh* It also follows that it was not appropriate for it to be instructed in accordance with the test in *Salvo*, a case concerned with an offence against a statutory provision in which, as earlier noted, the word 'dishonest' was held to have been used in a special sense.

Dishonesty and the offence of conspiracy to defraud

20 There are difficulties in the path of an exhaustive statement as to what is involved in the offence of conspiracy to defraud — difficulties which are largely referable to '[h]uman ingenuity in devising dishonest schemes designed to produce an advantage to one person

at the expense of another or of the community at large' [*R v Kastratovic* (1985) 42 SASR 59 at 62 per King CJ]. Those difficulties have resulted in a 'great reluctance amongst lawyers to attempt to define fraud' [Stephen, *A History of the Criminal Law of England*, (1883), vol 2 at 121]. Even so, Buckley J attempted a definition in *Re London and Globe Finance Corp Ltd*, defining 'to defraud' by reference to 'deceit' in these terms [[1903] 1 Ch 728 at 732–3]:

> To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.

As will be seen, that definition is not exhaustive.

21 The deficiency in the definition attempted in *Re London and Globe Finance Corp Ltd* [[1903] 1 Ch 728] emerged in *R v Scott* [[1903] AC 819]. It was argued in that case that an agreement with persons employed by the owners of certain cinema theatres to temporarily remove cinematograph films from their possession so that unauthorised copies could be made of those films did not involve any deception of the cinema owners and, thus, did not constitute a conspiracy to defraud. The argument was rejected, it being said by Viscount Dilhorne that where the intended victim is a private individual or corporation, as distinct from a public official or public authority, '"to defraud" ordinarily means … to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled' [[1975] AC 819 at 839]. The clear focus of that statement is that, for an agreement to constitute a conspiracy to defraud, it must be an agreement to bring about a result by dishonest means — means which, as that case decides, do not necessarily involve deception.

[Their Honours examined the role of dishonesty in conspiracy to defraud and continued:]

33 As already explained, 'dishonesty' does not appear in the statute establishing the offence of conspiracy to defraud the Commonwealth. But when properly analysed, the offence of conspiracy to defraud involves dishonesty at two levels. First, it involves an agreement to use dishonest means. Ordinarily, the means will be dishonest if they assert as true something which is false and which is known to be false or not believed to be true or if they are means which the conspirators know they have no right to use or do not believe that they have any right to use the means in question. And quite apart from the use of dishonest means, the offence involves an agreement to bring about a situation prejudicing or imperilling existing legal rights or interests of others. That, too, is dishonest by ordinary standards. If those matters are properly explained to a jury, further direction that the accused must have acted dishonestly is superfluous. Conversely, if those matters are not properly explained, a direction that the jury must be satisfied that the conspirators were dishonest is unlikely to cure the defect.

34 It need hardly be said again that a statute establishing an offence may use the term 'dishonestly' in its ordinary meaning [as in *Ghosh*] or use it in a special sense [as in *Salvo*]. In either case it will ordinarily be necessary for the trial judge to explain precisely what the legislation requires. In the case of conspiracy to defraud, it will ordinarily be sufficient to instruct the jury as to the facts they must find if the agreed means are to be characterised as dishonest. Alternatively, it will be sufficient to instruct them that, if satisfied as to those

facts, they will be satisfied that the agreed means were dishonest. Only in the borderline case will it be necessary for the question whether the means are to be so characterised to be left to the jury. In this area, but only in this area, we differ from the approach taken by McHugh J and Gummow J.

No miscarriage of justice

35 In the present case, the jury was instructed that the prosecution had to establish that the appellant was dishonest in the sense that he knew the mortgage transactions were sham and also in the sense that he agreed to participate in those sham transactions to bring about a situation in which the Commissioner would or might not receive income tax payable on the moneys used by Spong to purchase the Essendon properties. In the circumstances, that direction was adequate even though there was no instruction that they should be satisfied that the appellant knew that he had no right to prejudice or imperil the Commissioner's right to receive that tax.

...

37 In the circumstances, the instruction to the jury that they had to be satisfied that the appellant's conduct was dishonest according to the standards of ordinary, honest people and that he knew it was dishonest by those standards afforded the appellant a forensic advantage to which he was not entitled. There was, thus, no miscarriage of justice by reason of that direction.

38 The appeal must be dismissed.

[Kirby J delivered a separate judgment, agreeing with the orders made by **Toohey** and **Gaudron JJ** in order to give clear guidance to trial courts, although expressing a personal preference for a very different approach to dishonesty in which a subjective consciousness of wrongdoing would be required. **McHugh J (Gummow J** concurring) agreed that the trial judge's directions were unduly favourable to the appellant. His Honour's analysis focused on the particular elements of conspiracy to defraud and did not question the correctness of using the *Ghosh* approach for offences of which dishonesty is a distinct element. Part of the judgment of **McHugh J**, dealing with conspiracy, is included at **19.33C**.]

7.53C

Brown v Deveroux

[2008] WASC 299; 192 A Crim R 190
Supreme Court of Western Australia

Hasluck J:

1 The appellant, Deborah Louise Brown, has obtained leave to appeal against an acquittal of the respondent after trial in the Magistrates Court at Perth.

2 The question raised by the appeal essentially concerns the meaning of the term 'intent to defraud' within the context of the statutory provision I will come to shortly.

...

The charge

4 The respondent was charged with two offences that were said to have arisen under s 409(1)(c) of the *Criminal Code* (WA).

5 The provision in question says in effect that any person who, with intent to defraud, by deceit or any fraudulent means gains a benefit, pecuniary or otherwise, for any person, is guilty of a crime and is liable to a prescribed penalty.

…

7 By prosecution notice 07/66962 the respondent was charged (after allowing for amendments made at the hearing) that on 18 August 2007 at Belmont she, with intent to defraud by fraudulent means, attempted to gain a benefit, namely, dispensation of the medication Stilnox (ie Zolpidem) and Tramal (ie Tramadol) contrary to s 409(1)(c) of the *Criminal Code*.

8 By prosecution notice 07/66963 (as amended at the hearing) she was charged that on 15 August 2007 at Belmont she, with intent to defraud by fraudulent means, attempted to gain a benefit, namely, dispensation of the medication Stilnox (ie Zolpidem) contrary to s 409(1)(c) of the *Criminal Code*.

…

Overview

18 It is apparent from the evidence adduced at the hearing that on the prosecution case the respondent's original prescription legitimately entitled her to one quantity of Stilnox SR (42 tablets) but the respondent altered the prescription by adding the handwritten notation '+2', fraudulently signifying that the prescribed doctor had ordered repeats of the prescription.

19 On 15 August 2007 she attended the subject pharmacy. Kiat Nee Kho, as the pharmacist on duty, established that the respondent had gone to another pharmacy four days before to have the original prescription dispensed. Due to her concerns about the respondent's request for a repeat of the drug within a short time span, the pharmacist refused to dispense the repeat medication to the respondent.

20 The pharmacist later telephoned Dr D'Cruz as the prescribing doctor who confirmed that she had written a prescription but had not ordered any repeats for the drug on the prescription.

21 On 18 August 2007 the respondent returned to the subject pharmacy and presented another prescription bearing an order for two repeats. The pharmacist consulted the prescribing doctor who confirmed that no repeats had been prescribed. The pharmacist did not dispense the drug and instead called the police.

22 On the prosecution case, the respondent had fraudulently altered the second prescription in the same manner as the first in order to obtain repeats of the medication to which she was not entitled.

23 It is apparent from the evidence that the respondent did not actually obtain the items of medication she was seeking to obtain from the subject pharmacy. For this reason, presumably, she was charged in respect of each incident with having 'attempted' to commit an offence contrary to s 409(1)(c) of the *Criminal Code*; that is, the offence described as 'fraud' in the heading to the provision in question.

…

25 As to each of the charges, the prosecution case was that the respondent attempted to commit the offence of gaining a benefit by fraud by adding a number to the prescription form with a view to obtaining a repeat of the drug, although a repeat had not in fact been authorised by the prescribing doctor. It was immaterial that a repeat of the subject drug was not actually paid for by the respondent or handed over by the pharmacist because the respondent's act in adding a number to the form could properly be characterised as something more than merely preparatory to commission of the fraud offence.

26 I note in passing also that in the course of the hearing before the learned magistrate counsel for the respondent drew the learned magistrate's attention to the element of intent to defraud and the leading Western Australian case of *Bolitho v The State of Western Australia* (2007) 34 WAR 215; [2007] WASCA 102.

…

Reasons for decision

30 The learned magistrate delivered brief reasons for decision on 19 June 2008. His Honour accepted the evidence of the prosecution witnesses and defined the contentious issue to be that of the phrase 'intent to defraud'.

31 His Honour found that the respondent did alter the prescriptions or cause it to be done by another with full knowledge. He found that the prosecution had satisfied all of the elements of the offences save for whether there had been an intent to defraud.

32 In essence, the learned magistrate held that on his reading of *Bolitho's* case, the matter before him did not involve an economic interest or a public duty and therefore the prosecution had not established the necessary element of intent to defraud.

33 The learned magistrate made these observations towards the end of his reasons for decision:

> As to the 'fraudulent means', the fraudulent means was the alteration of the scripts. I find that was certainly done by the accused; she was the one that had the vested interest in doing so. I find that she did do it. Even if she didn't do it, the only other person that had the opportunity to do it and perhaps may have done it would have been her friend Chris, but that would have been done at her request and knowingly with her full knowledge so the fraudulent means was brought about by her. The 'benefit' of course is the drugs to which she was not entitled. As I said earlier, there's no evidence from the accused to challenge the prosecution evidence, which I accept, but in all the circumstances when one reads the *Bolitho* case it's clearly the case that this matter before me does not involve economic interests and does not involve a public duty and therefore I find that the prosecution have not established the necessary elements of 'intent to defraud' and it must be given some meaning in the context of the statute and accordingly I find that the case has not been made out.

Leave to appeal

34 The appellant sought leave to appeal against the decision made by the learned magistrate; that is, that the accused was not guilty of two charges of attempting to gain a benefit by fraud and that the prosecution was to pay the respondent's costs in the amount of $2,500.

35 The grounds of appeal were expressed as follows:

1. The learned magistrate erred in law when he found that the essential element of intent to defraud in s 409 of the *Criminal Code* was not made out because the matter before him did not involve an economic interest …

37 Put shortly, counsel for the appellant contended that the circumstances of the present case ought to be distinguished from those of *Bolitho's* case in which the Court of Appeal found that there was no infringement of economic interest.

38 It was said that in the present case, even though there was no actual pecuniary detriment caused to the pharmacist, the drugs sought to be obtained by the respondent were property and did have a pecuniary value. The fact that there was no actual economic loss or detriment to the pharmacist was not determinative of an intent to defraud, nor was the fact that the respondent intended to pay the value of the drugs. There was an intent to deprive the pharmacist or pharmacy of property (which did have a particular economic value), rather than to inflict economic loss. The fact that no actual loss would have been sustained by the owner of the drugs was irrelevant.

39 The appellant sought orders that the decision of the learned magistrate be set aside with an order that the case be dealt with again by the Magistrates Court with suitable directions.

40 On the other hand, counsel for the respondent relied upon reasoning in the previously decided cases which suggested that to defraud is to deprive by deceit; that is, to induce a person by deceit to act to his injury. The element of injury was absent from the prosecution case in the present matter. *Bolitho's* case, counsel contended, shows that there must be an actual economic loss or detriment suffered by the complainant before an intention to defraud will arise.

41 Counsel for the respondent relied particularly upon certain observations in *Bolitho's* case made by McLure J at [152] as follows:

> Apart from the public duty category of cases, all the reported cases in which an intent to defraud is an element of an offence involve a situation where the victim has been deprived of something and that thing has actual or potential economic value. Based on the authorities, there will be an intent to defraud if the intent is that the victim (1) suffer economic loss; (2) suffer an economic detriment by being deprived of property, money, services or other things that have an economic value (even if the victim had no intention to exploit that value or received full consideration for the same); (3) be at risk of suffering an economic loss or detriment; (4) be deprived of an opportunity to make an economic gain; (5) be deprived of an opportunity to prevent an economic loss or detriment. At its broadest, the common law expression in this context would encompass actual or potential detriment relating to the economic interests of the victim.

42 … For ease of exposition, I will refer to the observations mentioned a moment ago as Justice McLure's observations …

Preliminary observations

49 It emerges from earlier discussion that in the circumstances of the present case the prosecution alleged that the respondent attempted to infringe s 409(1)(c) because she was

a person who, with intent to defraud, by deceit or any fraudulent means attempted to gain a benefit, pecuniary or otherwise, for a person.

50 The learned magistrate accepted the prosecution evidence but held that an essential element of intent to defraud had not been made out, namely, 'this matter before me does not involve economic interests and does not involve a public duty'. His Honour's reliance upon the reasoning in *Bolitho's* case suggests that in his view, first, the prosecution had failed to establish that the complainant had been deprived of something having an actual or economic value; second, the case did not fall within the public duty or exceptional category of cases mentioned in the observations of McLure J in *Bolitho's* case.

51 As to the first matter, I must note immediately, that the term 'intent to defraud' is not defined by the *Criminal Code*. Moreover, it is notoriously difficult to state exhaustively what is involved in the concept: *Peters v The Queen* (1998) 192 CLR 493 at [30] per Toohey and Gaudron JJ.

52 I will turn to the decided cases bearing upon the common law meaning of 'intent to defraud' shortly. However, before doing so, I note in passing that the evidence before the learned magistrate indicated that the respondent would have paid for any tablets handed to her by the pharmacist in response to the annotated prescription form. There was no evidence to the contrary. Thus, to my mind, it must be assumed in favour of the respondent that the goods would have been paid for if the transaction had been completed: *Balcombe v De Simoni* (1972) 126 CLR 576 at 591.

53 The case was argued on this basis before the magistrate and at the hearing of the appeal and I will proceed accordingly. This assumption obviously has a bearing on the question of whether the complainant pharmacist would have been deprived of something having an actual or potential economic value if the events giving rise to charges of attempting to commit offences against s 409(1)(c) had led to the tablets being handed over to the respondent upon payment of the retail price.

54 As to the second matter, it strikes me that the present case might arguably be brought within the public duty or exceptional category of cases in that a pharmacist is not at liberty to supply certain goods and medicines to a customer otherwise than in response to a prescription form. However, the fact is that such a contention was not relied upon by the prosecution at the hearing before the learned magistrate and was not raised as a ground of appeal. Indeed, at the hearing of the appeal, counsel made it quite clear that she did not wish to raise or rely upon this line of argument. Thus, I am of the view that this aspect of the matter is not in issue and I will say no more about it.

55 I must now return to the common law meaning of 'intent to defraud' and the meaning to be given to it in the statutory provision.

Intent to defraud

56 The expression 'intent to defraud' has invariably been taken by the decided cases to relate to interests in property or some right or advantage with respect to property or to the exercise of a public or private duty. Further, having regard to the wide range of offences involving dishonesty, and the need for precision in formulating charges related to statutory provisions, a fundamental distinction has been drawn between the phrases 'intent to deceive' and 'intent

to defraud'. Buckley J in *Re London & Globe Finance Corporation Ltd* (1903) 1 Ch 728 made these observations at [732]:

> To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.

57 In *Balcombe v De Simoni* mentioned earlier, the respondent was employed as a salesman to go from house to house in an endeavour to sell books for which his employer had the agency. He falsely represented to a householder that he was a student from another state in a contest for an overseas trip to represent the youth of Australia on a goodwill tour. He thereby induced the householder to agree to buy a book which she did not want and to pay the respondent $6.50 as the price of the book. He was convicted on a charge of obtaining the money by a false pretence with intent thereby to defraud, contrary to s 409(1) of the *Criminal Code* as it was then formulated.

58 At that time the provision was to this effect:

> Any person who by any false pretence or by any wilfully false promise or partly by a false pretence and partly by a wilfully false promise, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a crime.

59 The High Court held by a majority ruling that the only possible conclusion from the evidence was that the respondent made false pretences with the intention of inducing the householder to part with her money, that he had the intention of depriving her of her money by deceit and he therefore had an intention to defraud. Accordingly, he was rightly convicted.

60 Gibbs J (as a member of the majority) made these observations:

> Considering the matter on principle I am of opinion that it is not necessary that an accused person should have intended to use the property for purposes different from those for which the victim of his deceit understood he would use it before he can be held to have had an intent to defraud. What is essential is that he should have intended to obtain the property by means of a deception. To say this is not to fail to give proper weight to the words 'with intent to defraud'. If those words did not appear in the section it would be enough if the accused made a statement which was false to his knowledge and if the person to whom the statement was made was induced to part with property by reason of such false pretence, and it would be immaterial whether the statement was intended to have that effect. What the inclusion of the words 'with intent to defraud' makes necessary is that the accused should have made the false pretence with the intention of inducing another person to part with property. Therefore, if a beggar obtains money by pretending to be blind, and with the intention that the person to whom the pretence is made should be induced by that pretence to give him alms, the offence is committed notwithstanding that the money is used exactly as the person who gave

it intended that it should be used, for the relief of the beggar. Similarly, if a man, by pretending to hold a certain position, or to possess certain assets, intentionally induces another to lend him money which he would not otherwise have lent, the former has an intent to defraud, notwithstanding that he intends to use the money for the very purpose for which he says he wants to borrow it. (595)

61 In the South Australian case of *R v Kastratovic* (1985) 42 SASR 59; (1985) 19 A Crim R 28 the appellant had been convicted of having, with intent to defraud, demanded a sum from a co-director of a company by virtue of a forged guarantee, knowing it was forged. There was evidence that the appellant had a genuine belief that his co-director was indebted to him in the amount in question. He was charged under a provision which materially provided that any person who with intent to defraud, demands any chattel, money, security for money or other property under a forged instrument knowing it to be forged should be guilty of a felony.

62 King CJ made these observations:

The essential notion of defrauding is dishonestly depriving some person of money or property, or depriving him of, or prejudicially affecting him in relation to, some lawful right, interest, opportunity or advantage which he possesses. As Lord Radcliffe pointed out in *Welham v Director of Public Prosecutions*, 'although in the nature of things it is almost invariably associated with the obtaining of an advantage for the person who commits the fraud, it is the effect upon the person who is the object of the fraud that ultimately determines its meaning'. The detriment suffered by the person defrauded is usually economic but is not necessarily so. To defraud must involve something more than the mere inducing of a course of action by dishonest means: *Welham v Director of Public Prosecutions*, per Lord Radcliffe at p 127. In offences constituted by obtaining money or property with intent to defraud, that something more may be found in the mere parting by the victim of the fraud with money or property which he is entitled to retain and which he would not have parted with but for the use of the dishonest means: *Balcombe v De Simoni*. In other cases, the defrauding may consist of deceiving a person responsible for a public duty into doing something that he would not have done but for the deceit, or not doing something that but for it he would have done. In all cases, the element of intent to defraud connotes the intention to produce a consequence which is in some sense detrimental to a lawful right, interest, opportunity or advantage of the person to be defrauded, and is an intention distinct from and additional to the intention to use the forbidden means. (62)

Amendments to the statutory provision

…

64 The new s 409 enacted in 1990 replaced the former offences in s 409 (obtaining property or credit by false pretences), s 410 (obtaining the execution of a security by false pretences), s 411 (cheating) and s 413 (frauds on the sale or mortgage of property). All these former offences related to property in one form or another.

…

66 It was against this background that *Bolitho's* case fell to be decided. In that case, the appellant posed as a medical practitioner and in the course of doing so gave some injections to the complainant. The appellant was charged with two counts of fraud contrary to s 409(1)(e) of the *Criminal Code*. The prosecution case at trial was that the appellant intended to defraud the complainant by obtaining her consent to receive gratuitous medical treatment.

67 The appellant's conviction was set aside by the Court of Appeal on the basis that there are no cases where an intent to defraud relates to interference with the person or the gratuitous receipt of services by the victim. To the contrary, the meaning of intent to defraud at common law does not extend beyond matters relating to the economic interests, public duty and perhaps private reputation and personal status of the victim.

68 *Bolitho's* case raised various questions of statutory interpretation which led inevitably to a consideration of the structure of s 409 of the *Criminal Code*, having regard to the amendments mentioned earlier.

69 It is immediately obvious that the phrase 'intent to defraud' forms part of the prefatory words in s 409(1) of the *Criminal Code*. The phrase precedes and bears upon a number of more specific provisions which may give rise to discrete offences such as gaining a benefit, pecuniary or otherwise, for any person (s 409(1)(c)), or causing a detriment, pecuniary or otherwise, to any person (s 409(1)(d)), or (as in *Bolitho's* case) inducing a person to do any act that the person is lawfully entitled to abstain from doing (s 409(1)(e).

…

74 Justice McLure's observations in *Bolitho's* case were supplemented by these further observations concerning the relationship of the general concept to the more specific provisions:

> As to s 409(1) of the Criminal Code, the prosecution must prove one of the consequences listed in pars (a) to (f) and in addition that the appellant had an intent to defraud and that the consequence was brought about by deceit or fraudulent means. However, in view of the Parliamentary intention that the common law meaning of 'intent to defraud' shall apply, it cannot be contended that the width of the matters in pars (a) to (f) alter or enlarge the common law meaning of the expression. To the contrary, the mental element of intent to defraud has the effect of confining the scope of the offence in s 409. In particular, the expression intent to defraud in that section means something more than merely inducing a person to do (or abstain from doing) any act that the person is lawfully entitled to abstain from doing (or is lawfully entitled to do) by deceit or fraudulent means. The defendant must have the intention of inducing an act or omission relating to the victim's economic interests or public duty. [154]

75 Justice Buss made these observations in *Bolitho's* case:

> I agree with McLure JA that paras (a)–(f) of s 409(1) do not alter or enlarge the meaning of 'intent to defraud' at common law. Also, I agree with her Honour that the concept of 'intent to defraud' in s 409(1) confines the scope of the offence which the subsection creates. In other words, paras (a)–(f) of s 409(1) must be construed and applied in the context of the content and ambit of the common law meaning of 'intent to defraud'. [170]

76 The observations of McLure J and Buss J, as the majority in *Bolitho's* case, established that in s 409 of the *Criminal Code* the common law meaning of the expression 'intent to defraud' continues to apply. This has the effect of confining the scope of the more specific provisions with the result that the accused person must have the intention of inducing an act or omission relating to the victim's economic interests or public duty.

…

The issues

79 It is not entirely clear from the learned magistrate's reasons what he meant by his assertion in the course of acquitting the respondent 'that the matter before me does not involve economic interests and does not involve a public duty'.

…

83 However, as I have indicated in earlier discussion, his Honour seems to have been saying, in effect, that economic interests were not involved because even if the attempts to obtain the goods had succeeded and tablets were sold to the respondent pursuant to a false representation, an intent to defraud had not been established because the pharmacist's economic interests were not involved or affected; that is, having regard to Justice McLure's observations in *Bolitho's* case, in circumstances where the price was received (or likely to be received) the victim had not suffered an economic loss or detriment.

84 It was pursuant to this latter interpretation of his Honour's reasons that the matter was argued before me. It was upon this basis also that in the ground of appeal it is said that the learned magistrate erred when he found that the essential element of intent to defraud was not made out because the matter before him did not involve an economic interest.

85 For ease of reference, I will call this the 'economic detriment issue'.

The economic detriment issue

86 It is apparent from Justice McLure's observations that an intent to defraud can be found where the victim has been deprived of something and that thing has an actual or potential economic value. To my mind, tablets available for sale at a retail price, as in the present case, are property of that kind.

87 It might be said that the pharmacist has not suffered an economic loss if the price is paid (or would have been paid, being an assumed fact in the present case). However, her Honour goes on to say, more specifically (her second proposition) that there will be an intent to defraud if the intent is that the victim suffer an economic detriment by being deprived of property, money, services or other things that have an economic value (even if the victim had no intention to exploit that value or receive full consideration for the same).

88 Her Honour went on to note in her further observations that it is not enough merely to induce a person to do an act that the person is lawfully entitled to abstain from doing by deceit or fraudulent means. The accused person must have the intention of inducing an act relating to the victim's economic interests.

89 To my mind, this reasoning establishes that if the pharmacist is induced by deceit to do an act that he might not otherwise have done, namely, the handing over of tablets, being

property belonging to him, and the act involves property with an economic value then this can be characterised as an intent to defraud, even if full consideration for the property in question is received (or is likely to be received in the case of an attempt).

90 This conclusion is reinforced by the observations of King CJ in *Kastratovic's* case mentioned earlier where it was said that the essential nature of defrauding is dishonestly depriving some person of property. The defrauding may be found in the mere parting by the victim of the fraud with property which he is entitled to retain and which he would not have parted with but for the use of dishonest means.

91 These observations are applicable to the circumstances of the present case. The evidence permits an inference to be drawn that the pharmacist, who was not obliged to sell the tablets to a customer who asked for them, would simply not have sold them to the respondent, even in exchange for the correct price, if he found out or had reason to believe that she did not have an authorised prescription. The attempt, if successful, would have caused the pharmacist to part with property having an economic value that would otherwise have been retained.

92 Chief Justice King was of the view that it is the effect upon the person who is the object of the fraud that ultimately determines the meaning of the crucial concept. He supported his reasoning by reference to *Balcombe v De Simoni's* case. The reasoning of Gibbs J (as he then was) in that case is to much the same effect, namely, what is essential is that the accused person should have intended to obtain property by means of a deception; that is, to obtain property that would not otherwise have been obtained. His Honour went on to say that the accused person must have made the false representation with the intention of inducing another person to part with the subject property.

93 In the course of argument at the hearing I endeavoured to illustrate the nature of the reasoning in this way. An elderly man might have a vase that has been in the family for many years and is regarded as an heirloom. If a stranger arrives, and by falsely representing himself to be a long lost member of the family, induces the proprietor to sell the vase to him at whatever is determined by an arbitrator to be the fair market value of the item, his deception would surely be said to have involved an intent to defraud, even though he paid the price fairly determined (so that it might be said, on one view of the matter, that the original proprietor had not suffered any economic detriment). In my view, in such a case the intent to defraud arises from the fact that the proprietor has been induced to part with property that would not otherwise have been obtained but for the deception.

94 This view of the matter is confirmed by s 409(3) of the *Criminal Code*. By that provision it is immaterial that the accused person intended to give value for the property obtained or delivered, or the benefit gained, or the detriment caused.

Conclusion

95 It follows from these observations that, in my view, having regard to the reasoning in *Bolitho's* case and related cases, the learned magistrate erred in the manner described in the ground of appeal with the result that the appeal must be allowed.

7.54C R v Lockwood; Ex parte Attorney-General

[1981] Qd R 209
Queensland Court of Criminal Appeal

Lucas ACJ: This is a reference to the Court of Criminal Appeal by the Attorney-General under s 669A of the Criminal Code. The reference was heard by a specially convened court of five judges, as it appeared to involve consideration of the decision in *R v Burnell* [1966] Qd R 348. Lockwood was charged with an offence against s 469 of the Criminal Code in that he wilfully and unlawfully damaged a motor vehicle, the property of a named person. The facts as set out in the Attorney-General's reference, are as follows:

1. The abovenamed Respondent was acquitted on the Fourth day of December 1979 at the criminal sittings of the District Court at Bundaberg on a charge that on the Twenty-second day of September 1979 at Bundaberg in the state of Queensland he wilfully and unlawfully damaged a motor vehicle the property of NADENE FAE WINDOW.
2. The facts, as far as they are relevant to this Reference, are as follows:

On the Twenty-second day of September 1979 the Respondent had left a party in company of friends and followed the motor vehicle of the complainant NADENE FAE WINDOW who was also in the company of friends. The complainant stopped at a set of traffic lights and the vehicle carrying the Respondent pulled up alongside her vehicle. The complainant and a passenger in her vehicle, one MALCOLM CATLIN, stated that the Respondent alighted from the vehicle approached the complainant's vehicle and struck the front side passenger window. He tried to open the locked doors and then kicked at the rear passenger door as he was pulled back into the other car by another person. The traffic light then turned green and both cars drove away. On their account nothing of a provocative nature was done by the passengers to the complainant's vehicle.

The Respondent, on the other hand, claimed that indecent gestures were made by one Baisley, passenger in the complainant's vehicle. These gestures were directed at the occupants of the vehicle in which he was travelling. When the cars stopped at the traffic lights he alighted and tried to get into the complainant's vehicle to 'get at Baisley'. He tried the doors and punched at what he thought was an open passenger seat front window but struck the closed glass with his fists. He was 'just standing there' when the complainant's vehicle started to move off. He said 'Just that I couldn't get in to get to Baisley and then the car started moving and I just kicked at the car'.

During the trial the Respondent agreed that he had kicked the car out of anger. He denied having been dragged away from the vehicle and stated that he had not intended to damage the car …

In his summing up his Honour stated:

> That leaves the question of wilfulness. To do a thing wilfully means that you did it intending to do it. Wilfully and unlawfully damaging any property means that at the time when you delivered the blow you intended to damage the property … the Crown has to satisfy you — and satisfy you beyond reasonable doubt — that when the accused kicked that door on the night in question he intended to damage that door, and nothing less than that will suffice for there to be a conviction. Nothing less than that will suffice …

The immediate question for the court is as to the meaning of the word 'wilfully' in s 469 of the Code. *R v Burnell* was of course concerned with s 461, which describes the offence of arson, but that section also uses the word 'wilfully', and as the two sections are in the same chapter, in Division II 'injuries to property' it would be reasonable to think that the word has the same meaning in both sections.

It is accepted that the word 'wilfully' in ss 461 and 469 must bear more than the primary meaning ascribed to it in the *Shorter Oxford Dictionary*; 'Of one's own free will; of one's own accord; voluntarily'. If it meant no more than that it would be unnecessary, because of the provision of s 23 of the Code; 'a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will'. An attempt should, of course, be made to give meaning to every word in a statute.

Recognizing this difficulty, both Wanstall J (as he then was) and Gibbs J in *R v Burnell* decided that the word meant 'intentionally'. It does not appear in terms from the judgment of Wanstall J that he was necessarily restricting 'intentionally' to the meaning that the result which followed was actively intended by the wrongdoer, although it seems clear enough that that was his view of the matter. It is however certain that Gibbs J was restricting the meaning of 'intentionally' in that manner. After referring to *R v Cunningham* [1957] 2 QB 396 at 399 and *R v Whitehead* [1960] VR 12, that learned judge said, at 356:

> Under s 461, it is not enough that the accused did the act which resulted in setting fire to the building, foreseeing that his act might have that effect, but recklessly taking the risk; it is necessary that the accused did the act which resulted in setting fire to the building with the intention of bringing about that result.

The other member of the court, Douglas J, said, at 356:

> Without finally deciding the matter, I would like to state that it is my view that the word 'wilfully' when it is used in the Criminal Code of Queensland, connotes an element of intent in the offence of which it is descriptive.

It was argued for the Attorney-General in this case that the meaning to be attributed to the word 'wilfully' in s 469 is that which was specifically rejected by Gibbs J in relation to s 461 in the passage which I have quoted above. That is, that the word applies to a situation in which the wrongdoer did the act which caused the damage foreseeing that this act was likely to cause damage of that type but recklessly taking the risk.

The argument proceeded in this way. It being accepted, for the reason I have given, that the word must mean more than 'of one's own free will; voluntary', it is then necessary to determine what that extended meaning is. In the first place, it is said to be permissible to extend to this situation Windeyer J's 'expressive metaphor' in *Vallance v R* (1961) 108 CLR 56 at 76. That learned judge said, speaking of the Criminal Code of Tasmania:

> … it was enacted when it could be said of the criminal law that it was 'governed by established principles of criminal responsibility'. And for that reason we cannot interpret its general provisions concerning such basic principles as if they were written on a *tabula rasa*, with all that used to be there removed and forgotten. Rather is Ch IV of the Code written on a palimpsest, with the old writing still discernible behind.

It is true that ss 461 and 469 occur in a part of the Code which is not concerned with general principles of criminal responsibility, but the word 'wilfully' is used in so many sections in

Chapter 46, with regard to injuries to different kinds of property, that it would be unreal not to have some regard to what had gone before. As Stanley J said in *R v Knutsen* [1963] Qd R 157 at 171:

> … it is still proper to look at the pre-existing law on special grounds, eg where the provisions of the Code are of doubtful import or if words used in it had acquired a technical meaning.

…

In *R v Cunningham* [1957] 2 QB 396, a case under s 23 of the Offences Against the Person Act 1861, the Court of Criminal Appeal in England approved as a correct statement of the law a passage from Kenny's *Outlines of Criminal Law* which had appeared in every edition of the book from the first (1902) to the sixteenth (1952). The passage was as follows:

> In any statutory definition of a crime, malice must be taken not in the old, vague sense of wickedness in general but as requiring either (1) an actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (ie the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require any ill will towards the person injured …

There is thus a compelling body of authority for the proposition that the element of malice, in a statutory context such as that of the Malicious Injuries Act 1861, may be supplied not only by a direct intention to do the damage which was in fact done, but also by doing the act recklessly with foresight that damage of the type done was likely to result…

[After discussing *Vallance* (1961) 108 CLR 56, his Honour continued:]

Vallance v R, then, is authority for the proposition that in the context of s 13(1) of the Criminal Code of Tasmania, the word 'intentional' includes not only a case in which the result which follows from an act is positively desired, but also a case in which the doer of an act foresees that the act may lead to damage of the type which actually ensues, but nevertheless recklessly persists in doing the act. *R v Burnell* decided that 'wilfully' in s 461 means 'intentionally' but only in the sense that the result which ensues from an act is positively desired. No doubt the reason why *Vallance v R* was not cited in *R v Burnell* was because of the way in which the argument developed but although one must be careful not to push the argument too far, one cannot help wondering whether a study of the judgments in that case might not have had the result that the definition of 'intentionally' would have been formulated in wider terms.

Accepting that the word wilfully in s 461 and s 469 must mean something more than 'of one's own free will; voluntarily', and accepting also that the extended meaning is appropriately expressed by the word 'intentionally', I am of the opinion that the latter word should be construed to include a result not positively desired but foreseen as a likely consequence of the relevant act.

In the first place, it seems to me that the word 'wilfully' as used in Chapter 46 must be considered to be a word of doubtful import, having regard to the provisions of s 23 … Since the word is of doubtful import, it is permissible to look at the state of the law at the time when the Code was enacted. That was the law contained in the Injuries to Property Act of 1865, which made certain acts punishable if they were done 'unlawfully and maliciously'. As I pointed out earlier, the element of malice could be satisfied by the doing of an act

recklessly with foresight that damage of the type actually caused was likely to result. If a similar construction is not given to wilfully, meaning intentionally, the result is that the area of criminal responsibility for injuries to property was reduced upon the enactment of the Code, as was pointed out in argument.

Secondly, the High Court saw no difficulty in *Vallance v R* in construing 'intentionally' in a similar way, and, in my opinion, no such difficulty exists here.

Thirdly, if 'intentionally' is not for the purposes of the Chapter to be so construed the difficulty of definition of the offence described in subs (2) of s 462 as an 'attempt to commit arson' is apparent; but if 'wilfully' encompasses both 'with intent' and 'recklessly' the two subsections of s 462 are easily and logically understood. Subsection (1) by referring to 'attempts' introduces the element of 'intentionally' in the limited sense adopted by Gibbs J but subs (2) by reverting to the use of 'wilfully' extends the operation of the section to something which is done recklessly but without specific intent to cause the likely result. Read otherwise, s 462(2) may be descriptive of an offence but the draftsman of the Code made an astonishing error in describing it as an attempt to commit arson …

Finally, so to construe the word does not in my opinion involve any straining of its meaning; it often connotes a direction of the mind to the consequences of an action. For example, reference may be made to what Mack J said in *R v O'Halloran* [1967] Qd R 1, at 8, dealing with s 289 of the Criminal Code:

> There is nothing in the Code which suggests the sections dealing with negligent acts have no application if the acts are done deliberately or wilfully, with a full appreciation of the risk, but an intention to avoid it.

For all these reasons, I am of the opinion that the argument advanced for the Attorney-General in this case is correct, and this means that I am in respectful disagreement with the result reached in *R v Burnell*. As this court of five judges was specially convened to consider this matter, it seems to be that, within the principles discussed in *R v Gassman* [1961] Qd R 381, this court is entitled to say that *R v Burnell* should no longer be regarded as correctly expressing the law.

The questions asked in the reference are as follows:

(1) Whether when a person is charged with an offence against s 469 of the Criminal Code it is necessary for the Crown to prove beyond reasonable doubt as an element of the offence an intention to destroy or damage the property in question; and

(2) Whether when a person is charged with an offence against s 469 of the Criminal Code it is a correct direction of law that the Crown must prove beyond reasonable doubt that he did the act which resulted in the damage to the property with the intention of bringing about that result and that nothing less would suffice.

I would answer each question by saying no for the reason that it is enough under this section, for the Crown to prove that the accused, when he kicked at the door, was then aware that damage to the door was likely to result and yet reckless of the risk, he kicked at the door.

I am authorised by my brother Matthews J to say that he is also of that opinion and that he agrees with the reasons which I have published.

[Douglas J delivered a separate judgment with similar reasons for determining the reference. **D M Campbell J** delivered a short judgment agreeing with the orders of **Lucas ACJ**, **W B Campbell J** agreed with the reasons of **Lucas ACJ** and **Douglas J**.]

Drug Offences

CHAPTER 8

THE STRUCTURE OF DRUG OFFENCES

8.1 This chapter is concerned with offences relating to psychotropic drugs excluding alcohol. Both the states and the Commonwealth have legislated in this field.

Pursuant to their constitutional power over criminal law, Queensland and Western Australia have enacted a variety of offences relating to possessing drugs as well as to cultivating, manufacturing, selling and supplying drugs: Drugs Misuse Act 1986 (Qld); Misuse of Drugs Act 1981 (WA). Although these are different enactments, there are many common features.

The Commonwealth has also enacted a range of drugs offences: Criminal Code (Cth) ss 300.1–314.5. Previously, Commonwealth drug offences were found in the Customs Act (Cwth). The present scheme relies on the constitutional power of the Commonwealth (Constitution s 51 (xxix)) to give effect to Australia's international treaty obligations; in this instance, the United Nations Convention against Illicit Traffic in Narcotics and Psychotropic Substances (1988): Code (Cth) s 300.1(1). The scheme in the Criminal Code (Cth) extends the reach of Commonwealth offences for some drugs, plants and precursors so that liability is independent of their origin. In addition to importation-related offences, there are now offences relating to trafficking and manufacturing drugs and precursors, cultivating and selling plants, and possessing drugs and precursors.

8.2 The result is that, for some offences involving drugs, the Commonwealth has covered the whole field of criminal prohibition, including the part previously occupied exclusively by the states. The Commonwealth has expressly preserved the concurrent operation of state drugs offences: Criminal Code (Cth) s 300.4. Nevertheless, general rules respecting double jeopardy prevent multiple punishments for the same act or omission: Criminal Code (Qld) s 16 (Code (Qld)); Sentencing Act 1995 (WA) s 11; Crimes Act 1914 (Cth) s 4C.

8.3 The drugs to which this chapter relates are termed 'dangerous drugs' in Queensland, 'prohibited drugs' in Western Australia and 'controlled drugs' under Commonwealth legislation. Nothing turns on the particular label used. In each scheme, definition provisions identify the relevant drugs as those listed in schedules to the relevant legislation: Drugs Misuse Act 1986 (Qld) s 4 (definition of 'dangerous drug'); Misuse of Drugs Act 1981 (WA) ss 3, 4 (definitions of 'prohibited drug' and 'prohibited plant'); Criminal Code (Cth) ss 314.1–314.6 (definitions of 'controlled' and 'border controlled' drugs, plants and precursors).

Similar lists of prohibited substances including heroin, cocaine, morphine, opium and cannabis are found in each jurisdiction.

8.4 In Queensland and Western Australia, there are specific exemptions from liability where the possession or supply of drugs is necessary for medicinal or law enforcement purposes: Drugs Misuse Act 1986 (Qld) ss 124–125; Misuse of Drugs Act 1981 (WA) ss 6(3), 7(3). A person claiming an exemption carries the onus of proving entitlement.

The Commonwealth scheme gives recognition to state exemptions: Criminal Code (Cth) s 313.1. There are also exemptions under several Commonwealth statutes. Under Commonwealth law, a person claiming an exemption carries an evidential rather than a persuasive burden: Criminal Code (Cth) s 13.3(3).

Queensland offences

8.5 The Drugs Misuse Act 1986 (Qld) establishes a variety of offences relating to dangerous drugs. The major ones are:

- trafficking (s 5);
- supplying (s 6);
- receiving or possessing property obtained from trafficking or supplying (s 7);
- producing (s 8);
- publishing or possessing instructions for producing (s 8A);
- possessing (s 9);
- possessing things used or for use in connection with drugs offences, or being the proceeds of or having been acquired from the proceeds of a drugs offence (ss 10–10A); and
- permitting a place to be used for a drugs offence: s 11.

Although these are indictable offences, some can be dealt with summarily: s 13.

The penalties for some offences vary depending upon the different classes and quantities of drugs involved. The Drugs Misuse Regulation 1987 (Qld) Schs 1–2A divide drugs into three classes. The most serious drugs are listed in Sch 1 and include amphetamine, heroin, cocaine, lysergide, methylamphetamine and phencyclidine. Schedules 3–4 specify certain quantities of those drugs listed in Schs 1 and 2. The maximum penalties for offences of trafficking and supplying vary according to whether the drug is listed in Sch 1 or 2. For example, the maximum for trafficking is 25 years' imprisonment if the drug is listed in Sch 1 but 20 years if it is listed in Sch 2 and 5 years if it is listed in Sch 2A: s 5. For the offences of producing and possessing, a complicated scheme relates maximum penalties to the quantity of the drugs as well as their classification. For example, the maximum prescribed penalty for possessing a dangerous drug is 25 years' imprisonment if the drug is listed in Sch 1 and is of a quantity equal to or exceeding that specified in Sch 4: s 9(a). In contrast, the maximum penalty is reduced to 15 years if the drug is listed in Sch 1 or 2 but is of a quantity less than that specified in the Schedules: s 9(d).

8.6 The Drugs Misuse Act 1986 (Qld) s 129(1)(a) provides that it is not necessary to particularise the dangerous drug in respect of which the offence is alleged to have been committed. The particular identity of the drug need not be specified in the charge and need not be established. In addition, s 129(1)(b) expressly provides that a person can be convicted as charged even though the identity of the dangerous drug to which the charge relates is not

proved, provided the court is satisfied that at the material time it was a dangerous drug. This presumably applies even when the charge has specified a particular drug. There could be a question about the applicable penalty scale in a case where the particular identity of a drug has not been established. On general rules of sentencing, the applicable scale will be the lowest of the relevant scales.

Western Australia offences

8.7 The Western Australian scheme distinguishes between drugs and plants, with separate offences for each: the Misuse of Drugs Act 1981 (WA) s 3 (definitions) and ss 6–7. There are several offences but only the major ones are noted here.

Permitting premises to be used for purposes constituting an offence under the Act, possessing utensils used or for use in relation to certain offences under the Act, selling a thing which may be used in the cultivation of prohibited plants by hydroponic means, and being in a place used for the purpose of certain offences under the Act are all offences: s 5. It is an offence to sell an ice pipe to a child: s 19B. An ice pipe, or crack pipe, allows the user to inhale the heated fumes of certain drugs in crystal, powder or oil form. Section 6(1) covers selling or supplying a prohibited drug, possession for these purposes, and manufacturing or preparing a prohibited drug; s 7(1) covers the same conduct with respect to prohibited plants. Sections 6(2) and 7(2) cover simple possession and use of a prohibited drug or plant and, in the case of plants, cultivation thereof.

If a person has possession of a drug in excess of the amount in Sch V or plant material more than the amount specified in Sch VI, then, by s 11, the person is deemed to be in possession of the drug or plant with intent to sell or supply unless the contrary is proved. The person must discharge this evidentiary onus on the balance of probabilities: see **Chapter 2**. Section 11 has no application to the offences of attempt or conspiracy to possess prohibited drugs or plants: *Krakouer v R* (1998) 194 CLR 202; 155 ALR 586. The provisions of s 11 apply not only to principal offenders but to all offenders whose liability arises under the Code (WA) ss 7, 8: *Scarfetta v Western Australia* [2010] WASCA 209.

Offences under ss 6(1), 7(1) are indictable offences with maximum penalties of 25 years for drugs other than cannabis and either 10 or 4 years for cannabis, depending on the quantity: ss 9, 34. A number of Schedules divide prohibited drugs and plants into various classes: see Sch I listing prohibited drugs and Sch II listing prohibited plants. Schedules III and IV specify certain quantities of prohibited drugs and plants for the purpose of determining the applicable penalty under s 9. Schedules V and VI specify the amounts of prohibited drugs (Sch V) and prohibited plants (Sch VI) which give rise to a presumption of intention to sell or supply.

Offences under ss 5, 6(2), 7(2) are simple offences which in most instances carry a maximum penalty of 2 or 3 years' imprisonment: s 34 1981 (WA). Possession of minor quantities of cannabis or of drug paraphernalia is dealt with by infringement notice under the Cannabis Control Act 2003 (WA).

8.8 The Misuse of Drugs Act 1981 (WA) s 32A provides for a certain type of offender to be declared to be a 'drug trafficker', with consequences under the Criminal Property Confiscation Act 2000 (WA): see **Chapter 32**. The declaration of a person as a 'drug trafficker' is dependent upon the person being convicted of a serious drugs offence (defined under s 32A(3) to mean an indictable offence under s 6(1), s 7(1) or s 33(2)(a)) involving large quantities as specified in the schedules, or where the offender has also been convicted of two or more such offences

within 10 years of the latest offence (or equivalent offences under other state, territory or Commonwealth laws).

Commonwealth offences

8.9 The scheme of the Criminal Code (Cth) distinguishes between drugs, plants and precursors, with separate offences for each.

The Commonwealth scheme also distinguishes between 'controlled' and 'border controlled' items.

- Dealing in and possession of 'controlled' drugs, plants and precursors is prohibited in various ways regardless of their origin. The list of such drugs is relatively short and includes amphetamine, cannabis, cocaine, heroin, lysergide, methamphetamine and opium: ss 314.1–314.3.
- Dealing in and possession of 'border controlled' drugs, plants and precursors is prohibited only in connection with importation or exportation. This list of such drugs is much longer: ss 314.4–314.6.

For some activities, there are different offences and penalties for different quantities: 'commercial' quantities, 'marketable' quantities and other quantities.

8.10 Offences respecting 'controlled' drugs, plants and precursors comprise offences of dealing and possession. The offences of dealing include:

- trafficking drugs (ss 302.1–302.5);
- commercial cultivating of plants (ss 303.1–303.6);
- selling plants (ss 304.1–304.3);
- commercial manufacturing of drugs (ss 305.1–305.5); and
- pre-trafficking precursors (ss 306.1–306.4).

The offences of possession include:

- possessing drugs (s 308.1);
- possessing precursors (s 308.2);
- possessing material, equipment or instructions for commercial cultivation of plants (s 308.3); and
- possessing any substance, equipment or instructions for manufacturing drugs (s 308.4).

8.11 Offences respecting 'border controlled' drugs, plants and precursors include importing or exporting drugs or plants (ss 307.1–307.4), possessing unlawfully imported drugs or plants (ss 307.5–307.10), and importing or exporting precursors: ss 307.11–307.13.

POSSESSION

8.12 The central concept of possession is that of control. To possess a thing is to be in control of it, in the sense of being able to direct its usage. Therefore possession generally requires some act of control or at least the making of a claim to the drug: see *Lai v R* [1990] WAR 151. Knowledge of the existence of a prohibited drug is not, by itself, sufficient to establish possession.

8.13 Two forms of possession are recognised by the law: actual physical custody and constructive custody. 'Constructive custody' refers to a situation where the thing is physically separate from the person but the person is still in control of it.

- The Drugs Misuse Act 1986 (Qld) s 116 adopts the provisions of the Code (Qld). Under the Code (Qld) s 1, the term possession includes 'having under control in any place whatever, whether for the use or benefit of the person of whom the term is used or of another person, and although another person has the actual possession or custody of the thing in question'.
- The Misuse of Drugs Act 1981 (WA) s 3 states that 'to possess' includes 'to control or have dominion over, and to have the order or disposition of …'.

See *Davies v State of Western Australia* [2005] WASCA 47; 30 WAR 31 (8.35C) for discussion of the ideas of constructive and joint possession. See also *Buck v R* [1983] WAR 372, where it was held that constructive possession could not extend to drugs located inside the body of another person.

8.14 There is an exception to the general requirement for an act of control in the Drugs Misuse Act 1986 (Qld) s 129(1)(c), which concerns the occupier of a place in which a drug is found, or someone concerned in its management or control. 'Place' includes a vehicle: s 4. The paragraph deems such a person to be in possession of the drug unless the person 'shows that he or she then neither knew nor had reason to suspect that the drug was in or on that place'. The occupier who knows of, or has reason to suspect, the presence of the drug will be unable to rebut the presumption of possession, even though there was no act of control. Moreover, the use of the word 'show' suggests that an occupier must actually prove lack of knowledge and lack of reason for suspicion in order to rebut the presumption. Discharging only an evidentiary burden is probably insufficient: see Chapter 2 on the distinction between persuasive and evidentiary burdens. See also the discussion of the parallel phraseology in s 129(1)(d) at 8.33.

8.15 The concept of an occupier was examined in *Thow v Campbell* [1997] 2 Qd R 324. The court suggested that occupation requires 'control, in the sense of being able to exclude strangers': at 135. The court acknowledged the possibility of joint occupation but distinguished between being an occupier and merely sharing premises with the permission of the occupier. The particular case concerned someone in the latter category who had moved out before drugs were found by the police, although he still had some belongings in the premises. The court concluded that he was not an occupier at the time the drugs were found and perhaps never had been; the magistrate had, therefore, been wrong to invoke the presumption of possession.

8.16 In some cases, the quantity of the drug involved may be so minute that effective control cannot be exercised over it. For example, it may be a mere trace that cannot be seen by the naked eye and is detectable only by scientific means. The High Court has ruled that there is no possession in such cases. In *Williams v R* (1978) 140 CLR 591 at 600; 22 ALR 195 at 202, Gibbs and Mason JJ said that there must be:

> … possession of such a quantity as makes it reasonable to say as a matter of common sense and reality that it is the prohibited plant or drug if which the person is presently in possession.

This is so even if the person knew of the existence of the trace: see *R v Warneminde* [1982] Qd R 49. However, there is no specific requirement for a measurable or useable quantity. Indeed, although it was suggested in *Williams*, above, that the drug would have to be discernible to the naked eye, this is probably best regarded only as a rule of thumb. Control itself remains the

crucial issue. See also *Donnelly v Rose* [1995] 1 Qd R 148, where it was said that the visibility of a minute extract is not conclusive of possession.

In *Paul v Collins Jnr* [2003] WASCA 238, Johnson J presented a challenge to the continuing authority of *Williams*. *Williams* was concerned to prevent the possible unfairness in holding someone to be in possession of a minute quantity. It was, however, suggested by Johnson J that adequate protection against unfairness would be provided by the mental element in the concept of possession (see below). The mental element was not considered in *Williams* but has been affirmed in subsequent decisions.

8.17 In principle, it should make no difference that a drug is present in an admixture:

- In Queensland, the definition of a dangerous drug in the Drugs Misuse Act 1986 (Qld) s 4 expressly includes its presence in 'any preparation, solution or admixture'.
- In Western Australia, the combined effect of several statutory provisions has been interpreted to permit a finding of possession of the drug regardless of its proportion in the admixture: see the discussion in *Paul v Collins Jnr*, above.

The mental element in possession

8.18 There is a basic mental element to the concept of possession. To control something, the person must know of it: *Tabe v R* [2005] HCA 59; 225 CLR 51; 221 ALR 503 (**20.23C**) at [143]; *State of Western Australia v R* [2007] WASCA 42; 33 WAR 483 (**8.37C**) at [11]. Moreover, at least for possession without actual physical custody, there must be an intention to exercise control over it: see *State of Western Australia v R* (**8.37C**) at [26], [81].

8.19 There has been a division of opinion over the scope of the requirement for possession of a drug that the person must know of it. Different conclusions have been reached in Queensland and Western Australia:

- For the purposes of the Drugs Misuse Act 1986 (Qld), a person must know of the existence of the thing but need not know what it is: *Clare v R* [1994] 2 Qd R 619 (**8.36C**).
- For the purposes of the Misuse of Drugs Act 1981 (WA), a person must know that the thing is or is likely to be a drug: see *State of Western Australia v R* at **8.37C**.
- The position with respect to the drugs offences under the Criminal Code (Cth) has not yet been settled. In any event, the provisions of the Commonwealth Code on the fault elements of offences require proof of at least awareness of a risk of possessing a drug: see **8.30**.

The High Court addressed the issues in *Tabe* (**20.23C**) but there have been disagreements over the interpretation of what was decided in that case.

8.20 In *Clare* [1994] 2 Qd R 619 (**8.36C**), the Queensland Court of Appeal held that the mental element in possession extends to knowledge of the existence but not the character of the thing. The person must know that the thing is in his or her custody or otherwise within his or her control. However, this does not mean that there must be knowledge of what the thing is. A drug can be mistaken for something else. Where a mistake of fact has been made about the *character* of the thing possessed, the defence of mistake of fact under the Codes s 24 applies. Section 24 requires such a mistake to be reasonable if it is to afford a defence. Moreover, the Drugs Misuse Act 1986 (Qld) s 129(1)(d) puts the burden on the accused to prove that such a mistake was made.

The basic requirement for knowledge of the existence of the thing does not incorporate the objective test under s 24 because the requirement stems from the concept of possession itself and not from any statutory provision relating to criminal responsibility.

In *Tabe* (20.23C), a 3:2 majority of the High Court (Gleeson CJ, Callinan and Heydon JJ) interpreted the concept of possession in the Drugs Misuse Act 1986 (Qld) in the same way as the court had done in *Clare*. In *State of Western Australia v R* (8.37C), Steytler P took the view that this interpretation did not relate to the general meaning of possession but instead to a special meaning derived from the presence of the Drugs Misuse Act 1986 (Qld) s 129(1)(d). Hence, it was argued that the ruling did not apply to Western Australia. In contrast, Wheeler JA thought the interpretation was of wider application.

8.21 In *State of Western Australia v R* (8.37C), a 2:1 majority of the Court of Appeal held that the knowledge required is an awareness or belief in the likelihood (in the sense that there is a significant or real chance) that the item in question is a prohibited drug.

The majority ruling in *R* is important in two ways. It affirms that, in Western Australia, possession requires knowledge that the item is a prohibited drug; it also allows awareness of a likelihood to substitute for actual acknowledge.

Wheeler JA, dissenting in *R*, followed the approach taken in *Clare*. Wheeler JA contended that the majority position confused the general structure of criminal responsibility under the Codes with that at common law (where the doctrine of *mens rea* generally requires offences to have been committed intentionally or recklessly).

8.22 The meaning ascribed to 'possession' in *Clare* fits better with its meaning in ordinary language. As Pincus JA said in *Clare*:

> The present problem may be illustrated by imagining the appellant holding a bag which contains, let us say, talcum powder. He has been told, and believes, that the bag contains heroin. On the theory as to the meaning of the word 'possession' put forward on behalf of the appellant, the holder of the bag is not in possession of its contents, because the powder is talcum powder not heroin.
>
> Plainly, this is not the ordinary meaning of the word 'possession'; it would be a proper use of language to say: 'I have some white powder in my possession, but have no idea what it is'. The question then is whether in this context the word 'possession' has a special meaning and what that meaning is.

The majority in *R* gave a special meaning to possession. Perhaps the best justification for doing so is that the net of criminal liability might otherwise capture morally innocent persons. A limitation of the defence of reasonable mistake under the Codes s 24 is that it can only be available to a person who holds a positively mistaken belief: see the discussion in 12.11. Therefore, a person who innocently never turns his or her mind to the question of what is in a parcel, can have no defence under s 24 if the contents happen to be drugs: *R* at [23]–[24]. This is, of course, a general issue with s 24, not just a problem respecting liability for possession of drugs.

TRAFFICKING, SELLING AND SUPPLYING, IMPORTING

8.23 Under the Drugs Misuse Act 1986 (Qld), a distinction is drawn between the offence of carrying on the business of trafficking in a dangerous drug (s 5) and the less serious offence of supplying a dangerous drug: s 6. 'Supplying' is broadly defined in s 4 to mean 'give, distribute,

sell, administer, transport or supply' together with offering to do any of those acts or doing or offering to do anything preparatory to any of those acts. Preparatory acts presumably encompass taking possession for the purpose of selling or otherwise supplying the dangerous drug. 'Trafficking' is not defined in the Act. The term is usually taken to encompass the various acts identified within the definition of the term 'supply' when there is a commercial element to the acts: see *Quaile v R* [1988] 2 Qd R 103.

The major distinction between the scope of s 5 and that of s 6 lies not in the difference between the meaning of the terms 'trafficking' and 'supplying' but in the reference in s 5 to carrying on a business. This will usually involve some continuity of operations for commercial gain, although presumably the first of a planned series of acts could constitute carrying on a business. In *R v Dent* [2002] QCA 247; 132 A Crim R 151 at [6], Williams JA summarised the authorities in this way:

> [T]he gravamen of the offence is that of trading for profit in a drug or drugs. Whilst a single disposal of a quantity of a drug may constitute a trafficking provided the transaction is intended to be repeated, ordinarily it will be necessary to establish a degree of repetition or continuity for the offence to be established. The relevant conduct includes all acts which are part of such a business and that includes negotiations with respect to future transactions. Communications with prospective buyers, setting up lines of supply, negotiating prices and terms of supply, arranging for places and times of delivery and like activities can be the indicia of carrying on a business of the type in question.

8.24 The Misuse of Drugs Act 1981 (WA) ss 6(1) and 7(1) cover selling or supplying, offering to sell or supply, and possession with intent to sell or supply a prohibited drug or plant. The specification of supplying as an alternative to selling indicates that the transaction need not be a commercial one. No minimum quantity of drug or plant is specified for the offence, although the maximum penalty prescribed for cannabis offences varies with the quantity involved: ss 34(2), 9.

8.25 The Criminal Code (Cth) s 302.1 defines trafficking to include not only selling but also preparing, transporting, guarding or possessing a substance with the intention of selling any of it or believing that another person intends to sell any of it.

Importing is defined in s 300.2 simply as meaning 'bring into Australia'. It has been held that this covers arranging importation into Australia as well as physically bringing the drugs in: see *R v Handlen & Paddison* [2010] QCA 371; (2010) 247 FLR 261 at [47].

8.26 The concept of selling includes a basic mental element in the same way as does the concept of possessing: see **8.18–8.22**. A person cannot sell anything without intending to part with it, even though it may be possible to sell something without realising what the item is. Supplying is a more problematic concept but it is arguable that this also requires as a minimum an intention to part with the thing. The significance of such a requirement for supplying would be to exclude convictions based on the negligent distribution of a drug. In the absence of such a requirement, a person who unknowingly supplies drugs and is charged with a state offence could only rely on a defence of mistake of fact: the Codes s 24. The defence is only available for reasonable mistakes. Negligent mistakes are likely to be unreasonable mistakes.

8.27 In *He Kaw Teh v R* (1985) 157 CLR 523; 60 ALR 449, a majority of the High Court denied that there was any basic mental element in the offence of importing narcotics under the Customs Act 1901 (Cth). It was held that 'importing' simply means bringing things into Australia from abroad and this can be done without knowledge of their existence. Any requirement for

intention or knowledge in relation to importing will therefore depend on the applicable rules of criminal responsibility rather than the meaning of the word. There is an express requirement for at least recklessness for the new offences respecting importing under the Criminal Code (Cth) ss 307.1–307.4. See also the discussion of Commonwealth offences in Chapter 9.

MISTAKES OF FACT

8.28 Two main mistakes of fact can be made about drugs:

- a mistake about the drug's *existence* — a person may be ignorant of the fact that a substance or plant is on his or her person, or is in a location over which she or he has control, or is being given to another person; and
- a mistake about the drug's *character* — a person may know of the existence of the thing but be ignorant about what it is.

8.29 The significance of the first kind of mistake will depend in part on whether some basic mental element is considered to be part of the conduct elements of the offence. The mistake will mean that the person did not 'possess' or 'sell' drugs, and possibly that the person did not 'supply' drugs: see 8.18, 8.26. Where such terms as 'possess' or 'sell' are in issue, it is immaterial whether or not the mistake is reasonable. If, however, the conduct which describes the offence does not include a basic mental element, the significance of the mistake will depend upon the applicable rules of criminal responsibility relating to mistakes of fact.

8.30 For the second category of mistakes, where the error concerns the character of a thing rather than its existence, the significance of the mistake will differ between jurisdictions.

- In Queensland, the significance of a mistake about the character of the thing is determined by the applicable rules of criminal responsibility and not by the language used to describe the conduct element of an offence under the Drugs Misuse Act 1986 (Qld). A mistake is relevant only if the requirements of the Code (Qld) s 24 are met: see 8.20. By virtue of the Code (Qld) s 36, s 24 applies to the drugs offences. Moreover, the Drugs Misuse Act 1986 (Qld) s 116 provides that that Act is to be read together with the Code (Qld).
- In Western Australia, the significance of a mistake is determined initially by the language used to describe the conduct elements of the offence. Under the Misuse of Drugs Act 1981 (WA), the offence may use a concept, like possession, which requires proof of knowledge or awareness of the likelihood of character of the thing: see 8.21. If it does not, the rules of criminal responsibility will apply, bringing the Code (WA) s 24 into play.
- In relation to a charge under Commonwealth law, it makes little if any difference whether the problem is approached in terms of the language of the conduct elements or the rules of criminal responsibility. For Commonwealth drugs offences, 'recklessness' is generally specified as the fault element. Recklessness is defined in the Criminal Code (Cth) s 5.4 as being aware of a risk which it is unjustifiable to take, having regard to the known circumstances. Section 5.4(4) also provides that, if recklessness is a fault element, it can be satisfied by proof of intention or knowledge as well as recklessness itself. An honest mistake of fact can afford a defence whether or not it is reasonable and whether there was a mistaken positive belief or a mere oversight: s 9.1(1). The reasonableness of an alleged mistake is relevant in determining whether it was actually made (s 9.1(2)) but not otherwise.

8.31 In order to afford a defence under the Codes s 24, the mistake must be reasonable. For example, an unreasonable belief that some heroin was aspirin would be immaterial to criminal responsibility. The mistake would be relevant only to sentence. Moreover, s 24 requires some positive belief about the nature of the substance; mere inadvertence to the fact that it is a dangerous drug will not suffice, even if the inadvertence was reasonable: see **12.10**.

The Codes s 24 does not always provide a complete defence; it only provides that a person who makes an honest and reasonable mistake is not criminally responsible to any greater extent than if the real state of things had been such as they were believed to be. On this test, a reasonably mistaken belief that one drug was in fact another drug would be irrelevant if the two drugs were in the same legal category. Moreover, a mistaken belief that one drug was another drug in a category with lower penalties would simply mean that the offender is liable only to the lower penalties. See also *Dunn v R* (1986) 32 A Crim R 203 (WA CCA).

8.32 The Drugs Misuse Act 1986 (Qld) s 129 (1)(b) provides that, as long as the court is satisfied the substance in question was a dangerous drug, the person is liable to be convicted as charged even though the court is not satisfied as to the precise identity of the drug. The relationship of this provision to the Codes s 24 is unclear. The easiest way to reconcile the two provisions would be to read s 129(1)(b) as being subject to s 24 in cases where a mistake of fact has occurred. That would mean that an accused is entitled to any benefit in being judged as if the real state of things had been such as they were believed to be. Section 129 is headed 'Evidentiary Provisions'. It would be odd to interpret one of its provisions as changing the substantive law relating to mistakes of fact under the general provisions of the Code.

8.33 Ordinarily, the rules relating to burdens of proof require the prosecution to prove beyond reasonable doubt that no honest and reasonable mistake was made. However, there may be a persuasive burden on an accused under the Drugs Misuse Act 1986 (Qld) s 129(1)(d) which provides that in order to rely on the Code s 24 a person must 'show' an honest and reasonable belief. It is likely that this provision reverses the persuasive burden rather than just the evidentiary burden for mistakes of fact. A requirement to 'show' something would ordinarily suggest that it must be proved. The Drugs Misuse Act 1986 (Qld) s 129(1)(d) would add nothing unless it reverses the persuasive burden.

MISTAKES OF LAW

8.34 A person may possess, sell or supply a substance or plant knowing what it is but being ignorant of its classification as an illegal drug. Such a mistake is a mistake of law and not a mistake of fact. Ignorance of the law is generally immaterial to criminal responsibility: the Codes s 22; see **Chapter 13**. A mistake as to the legal classification of a drug is therefore immaterial to criminal responsibility. The position respecting mistakes of law is the same for Commonwealth offences: the Criminal Code (Cth) ss 9.3–9.4.

8.35C

Davies v State of Western Australia

[2005] WASCA 47; (2005) 30 WAR 31
Western Australia Court of Appeal

Steytler P: …

2 On 2 August 2002 the appellants were found to have in their home a very substantial quantity of cannabis, some 19 kilograms in all. A comparatively small part of that cannabis (amounting to around 300 grams) was found in plastic ice-cream containers under the bed in their bedroom. The rest had been secreted in containers of various kinds in what was described as a 'false ceiling' in their house. There was evidence at the trial that the male appellant, Mr David Davies, had built this 'false ceiling'. At the time of the search the appellants had in their possession a substantial cash sum amounting to $7000. This was underneath the driver's seat of their motorcar which was parked in their garage.

3 When asked for an explanation for what had been found, the appellants told police that the cannabis found in their bedroom was for the use of the female appellant, Mrs Florence Davies, in order to alleviate her back pain.

4 The appellants have a son, Tyssul Davies, who lives apart from them. He was arrested by police on the morning upon which his parents' home was searched. He was charged with possession of the cannabis with intent to sell or supply it to others. The charge related to the whole of the cannabis found at his parents' home. He pleaded guilty to that charge on 25 October 2002 and was convicted accordingly.

5 Notwithstanding Tyssul's conviction, two charges under the provisions of s 6(1)(a) of the Misuse of Drugs Act 1981 ('the Act') were brought against each of the appellants in respect of the cannabis. The first, being one of possession of cannabis with intent to supply it to another, related to the cannabis found in the false ceiling. The second charge, one of possession of cannabis with intent to sell or supply it to another, related to the cannabis found in their bedroom.

6 The prosecution case at the trial centred around the proposition that the cannabis (or at least that the subject of the first count) had been stored by the appellants in their house with the intention of allowing their son to retrieve it at a later date, and that he had been given a key to the house for that purpose. Both appellants denied any knowledge of the cannabis. They said that they had lied to police officers at the time of the search in a misguided attempt to protect their son. They admitted that Tyssul had a key to their house but said that this was because they had been planning to go away on holiday. The jury convicted both of them.

7 There is, after amendment, only one ground of appeal. It is that the verdicts were unreasonable or cannot be supported by the evidence because it was not open to the jury to conclude that the appellants possessed the cannabis with intent to supply it to their son Tyssul in circumstances in which he was, at the time of the alleged offence, already in possession of it.

8 In my opinion there is, firstly, no reason why all three family members should not have been found to have been in possession of the drug for the purposes of s 6(1)(a) of the Act. The words 'to possess' are defined by s 3 of the Act to include 'to control or have dominion over, and to have the order or disposition of …'. Each of the appellants and their son Tyssul fell within that definition, so far as the cannabis was concerned. Given that it was in their house (and the jury must have found that they knew that it was there), the appellants could control what was done with it. For so long as he had a key to the house, and was free to come and go

whenever he wished for the purpose of obtaining the cannabis, Tyssul Davies, too, exercised a degree of control or dominion over it.

9 That leaves the question whether the appellants could, in the circumstances posited, be found to have been in possession of the cannabis with an intent to supply it to Tyssul. The words 'to supply' are widely defined by s 3 of the Act. The definition reads as follows:

> 'to supply' includes to deliver, dispense, distribute, forward, furnish, make available, provide, return or send, and it does not matter that something is supplied on behalf of another or on whose behalf it is supplied.

10 The jury must have accepted (even putting to one side the provisions of s 11(a) of the Act) that the control which the appellants exercised over the cannabis was exercised by them for the purpose of making it available to their son, when he considered it opportune to remove it from their house. Consequently, their possession of the drug was exercised with intent to supply it to their son for the purposes of s 6(1)(a): see *Urbano v The Queen* (1983) 9 A Crim R 170 at 184 and *R v Buckley* (1979) 69 Cr App Rep 371. This was so notwithstanding that, for the purposes of that section, Tyssul Davies already had a form of possession of the cannabis. The form of possession which he had was different to that proposed to be given to him, being possession as a result of the physical transfer of the drug to him.

11 It was consequently open to the jury to convict the appellants on the charges brought against them.

Roberts Smith JA: …

25 The appellants' contention is that they could not in law be guilty of possessing the cannabis with intent to supply it to Tyssul because at the time of their possession he was already in possession of the same drugs.

26 In *Manisco v The Queen* (1995) 14 WAR 303, the Court of Criminal Appeal of this State held that where an accused was in possession of a prohibited drug as a bailee for the person who had given it to him or her, and had it in their possession for no other purpose than to return it to the person who had given it to them, their intention did not fall within the meaning of the word 'supply' as then used in s 6(1) of the Misuse of Drugs Act. The decision was followed in *Pelham v The Queen* (1995) 82 A Crim R 455.

27 As a consequence, in 1998 (by the Misuse of Drugs Amendment Act, No 3 of 1998) Parliament inserted in s 3 of the Misuse of Drugs Act a definition of the words 'to supply', specifically to cover a situation in which a person is re-delivering drugs under a bailment, that is, where an accused claims to be holding the drugs on behalf of the owner, and for return to the owner as required.

28 That definition, which applies to this case, is that:

> 'to supply' includes to deliver, dispense, distribute, forward, furnish, make available, provide, return or send, and it does not matter that something is supplied on behalf of another or on whose behalf it is supplied;

29 It may be accepted that because he had a key to the house, Tyssul had access to the cannabis whenever he wished. It may further be accepted that the appellants had no intention

of doing anything physically with the cannabis; their intention and expectation was that Tyssul would remove it.

…

34 Notwithstanding this specific purpose for which s 3 of the Misuse of Drugs Act was amended, being to cover the bailee situation, the definition is much wider than that. The wording of the definition is extremely wide. Even so, it is expressed to include the words adumbrated — that is, it is not confined to them.

35 'To possess' is defined in s 3 of the Misuse of Drugs Act as including to control or have dominion over, and to have the order or disposition of, and inflections and derivatives of the verb 'to possess' have correlative meanings.

36 As the author of 'Criminal Law Western Australia' points out (at [20,010.1]), the definition is inclusive, not exhaustive; the effect of it is to enlarge upon a more basic dictionary definition. Thus, while possession may be actual physical custody, it includes control or dominion over the item.

37 Possession need not be exclusive, either as a matter of fact or law. Several persons can have joint possession as against the rest of the world (*Cumming v The Queen* (1995) 86 A Crim R 156).

38 Possession can therefore be had in a wide variety of ways and exclusively by one person or jointly (in different ways) by several (*Davis v The Queen* (1990) 5 WAR 269; *Atholwood v The Queen* (2000) 110 A Crim R 417). So in this case, both the appellants and Tyssul had control and dominion over the cannabis while it was in the appellants' house. The appellants knew it was there (*He Kaw Teh v The Queen* (1985) 157 CLR 523), had permitted Tyssul to store it there in exchange for cash and allowed him access to it. That was sufficient exercise of control or dominion (*Lai v The Queen* [1990] WAR 151).

39 Where several people have joint possession of a prohibited drug they may each have a different intention with respect to it. That was the situation here. Tyssul's intention (as was accepted at his sentencing) was to sell or supply the cannabis to others. The appellants' intention was to allow Tyssul to remove it as and when required for his own purposes. The factual nature or basis of their possession was different.

40 The appellants intended and expected Tyssul to take the cannabis from the house and in so doing, remove it from their possession. The State characterised that as a relinquishing of the joint possession of the two of them to the sole possession of Tyssul. Whether that be an accurate characterisation or not (and in my view it is) that situation clearly involved the appellants 'making available' the cannabis, or 'returning' it, to Tyssul. That would involve the appellants ceasing to be in (joint) possession of the cannabis and changing the nature of Tyssul's possession of it from joint to sole possession. The appellants would no longer have possession of the cannabis at all; Tyssul would have exclusive possession — something he would not have had otherwise. It therefore falls within the scope of the definition of 'to supply' in s 3 of the Misuse of Drugs Act. Thus, the fact that Tyssul already had joint possession with them does not detract from this conclusion.

41 The appeal must be dismissed.

[**McLure J** in a separate judgment agreed the appeal should be dismissed.]

8.36C

R v Clare

[1994] 2 Qd R 619
Court of Appeal, Queensland

Pincus JA:…

The charge was one of unlawful possession of a dangerous drug, namely heroin. The appellant had possession of heroin, but said in Court that he believed it was perfume base. Counsel submitted on his behalf that the prosecution had to prove that the appellant knew the substance in question was a dangerous drug; counsel complained that the judge had summed-up on the basis that it was enough for the prosecution to show 'wilful blindness' on the part of the appellant. The question whether the Crown had to prove the appellant knew he had possession of the relevant *object* does not arise here.

…

The present problem may be illustrated by imagining the appellant holding a bag which contains, let us say, talcum powder. He has been told, and believes, that the bag contains heroin. On the theory as to the meaning of the word 'possession' put forward on behalf of the appellant, the holder of the bag is not in possession of its contents, because the powder is talcum powder not heroin.

Plainly, this is not the ordinary meaning of the word 'possession'; it would be a proper use of language to say: 'I have some white powder in my possession, but have no idea what it is'. The question then is whether in this context the word 'possession' has a special meaning and what that meaning is. The immediate context is that of the statute under which the appellant was charged and the larger context is the statute law of Queensland, in particular the Criminal Code.

Some account must be given of the way in which the issue arose. The appellant was interviewed by the police in January 1993 when he admitted that he had placed two bags containing a white powder in his jacket and put the jacket in the boot of his wife's car. The white powder was in fact heroin, but the appellant said to the police 'I don't know what it is, I haven't opened it'. When asked to explain the circumstances the appellant told the police that a man he had known slightly for some time asked him to take a parcel to Sydney …

According to the appellant's version given to the police, the man asked him to take the parcel down and said that a mate of his would give the appellant a ring the following week and pick it up. The appellant said he put it in his pocket and thought no more about it. When the police asked what he believed the substance was, he said he did not know and told a story to the effect that he had sexual problems and that: '… if I drop this down this bloke could give me a foil of tablets which are supposed to enhance sexual erections and activity'.

The appellant said that he knew the person who had given him the substance by his first name, Barry or Bazza. Discussing what happened when he was handed the substance, the appellant had the following conversation:

> Police: Could you see what was in the plastic bag?
> Appellant: All I can see is, is it was white, and I said, I said, 'Oh shit what's this?'
> Police: And what did you think it was?
> Appellant: He said 'It's nothing to worry about'. I wasn't sure. Um …
> Police: What did you suspect it was Bill?
> Appellant: Well I thought it might have been, you know, something. Er a chemical that they were using er to do something with. Er why would he want me to take it to Sydney.
> Police: Do you agree that you were a er policeman in New South Wales?
> Appellant: Yes. Er can I clarify that. A probationary constable.

The police asked the appellant where he was supposed to deliver the material in Sydney and he said that he was told he would be contacted. He later explained that he had two funny phone calls asking when he was coming down and he said 'Mate look I'm not coming down …'.

This improbable story could not have been made to seem more likely when, at the trial, the appellant explained that he had recently recalled that a man called Curry had asked him to take the substance to Sydney, that a friend of Curry's in the perfume business wanted that done, that the purpose of taking it to Sydney was to get it analysed and that the substance was perfume base.

Part II of the *Drugs Misuse Act 1986* creates a number of statutory offences relating to dangerous drugs: trafficking, supply, production, possession and other offences. In respect of charges under Part II the evidentiary provisions of s 57 of the Act apply and the most relevant provisions of that section are paras (c) and (d):

> (c) proof that a dangerous drug was at the material time in or on a place of which that person was the occupier or concerned in the management or control of is conclusive evidence that the drug was then in his possession unless he shows that he then neither knew nor had reason to suspect that the drug was in or on that place;
> (d) the operation of section 24 of the Criminal Code is excluded unless that person shows his honest and reasonable belief in the existence of any state of things material to the charge;

It will be noted that para (c) includes the word 'possession' and may be thought to throw some light on the meaning of the word in the statute. The bags in question containing white powder were, as has been explained, put in a jacket belonging to the appellant and then placed by him in his wife's car. An unusual result appears to ensue if one reads 'possession' as requiring knowledge of the nature of the thing possessed: if the appellant was concerned in the management or control of the car then it would not be enough for him to show that he did not know the drug was in the boot; he would have to show that he did not have reason to suspect that. On the other hand, if he were not so concerned, then on the view put forward on behalf of the appellant the Crown would have to show that the appellant knew the heroin was there.

Prima facie, under s 36 of the *Criminal Code* the criminal responsibility provisions of the Code apply to the offence in question; para (d) of s 57 modifies their operation. If possession has its ordinary meaning, as not importing knowledge of the *nature* of the thing possessed, then the Crown will not succeed if it is shown that the accused honestly and reasonably believed that the substance of which he had possession was, as he swore at his trial, perfume base. It should be noted also that s 23 of the Code covers the circumstances in which someone slips into an innocent person's pocket, or suitcase, a dangerous drug.

…

It was said by the principal draftsman of the Code that '… under the criminal law of Queensland, as defined in the Criminal Code, it is never necessary to have recourse to the old doctrine of mens rea …' — *Widgee Shire Council v Bonney* (1907) 4 CLR 977 at 981, a view acted upon by Cooper C J and Lukin J in *Thomas v McEather* (1920) St R Qd 166 at 174;

by Philp J in *Anderson v Nystrom* (1941) St R Qd 56 at 69 and applied daily in Queensland courts. A clear provision is required to exclude the criminal responsibility sections of the Code: *Hunt v Maloney ex parte Hunt* [1959] Qd R 164 at 183. There is no such provision here and one should read the *Drugs Misuse Act* as if the criminal responsibility provisions were part of it, except insofar as the latter specifically modifies the former. Courts have emphasised the need to apply the text of the Code: eg *Brennan* (1936) 55 CLR 253 at 263, *Stuart* (1974) 134 CLR 426 at 437. The suggestion presented to us appeared to be that one should read the relevant provisions of the *Drugs Misuse Act* as if the Code's criminal responsibility scheme were replaced by the principles laid down by the High Court in the cases concerning the interpretation of the *Customs Act* provisions.

That would not appear to be an orthodox course. The first sentence of s 24 of the Code reads:

> A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

Thus, if the accused has heroin in his pocket, but believes that what is in his pocket is some innocuous substance, then prima facie his guilt depends on whether the Crown can exclude the operation of s 24 by showing that his belief was either not honest or not reasonable; but as has been pointed out para (d) modifies the operation of the section, in favour of the Crown. The application of this regime sits awkwardly with one under which, in a case of alleged mistake as to the identity of the substance, one has to ask whether the Crown has proved as the necessary mental element that the allegedly mistaken accused knew the true fact — ie was not mistaken, any question of the reasonableness of his state of mind being irrelevant.

...

It follows, in my respectful opinion, that insofar as the trial judge placed any onus on the Crown of proving knowledge that the substance was a narcotic, he erred in favour of the appellant. In the present case, as in *He Kaw Teh*, there is no question but that the appellant knowingly had possession of the powder; the only issue was as to his knowledge of the nature of the powder and that issue was to be resolved by reference to the provisions of the *Criminal Code* and in particular by that dealing with mistake. Given the directions of the judge, the verdict of the jury is inconsistent with their being satisfied that the appellant honestly believed that the packet contained, as he said at the trial, perfume base. Further, I think that to be satisfied of that, the jury would have had to act perversely.

In my opinion there was no miscarriage of justice and the appeal should be dismissed. I agree that the application for leave to appeal against sentence should also be dismissed.

[**Fitzgerald P** and **Davies JA** delivered separate judgments agreeing that the appeal should be dismissed.]

8.37C State of Western Australia v R

[2007] WASCA 42; 33 WAR 483
Western Australia Court of Appeal

Steytler P:

1 This is a reference under s 47(2) of the Criminal Appeals Act 2004 (WA) ….

How the reference arose

2 The respondent, to whom I shall refer as 'R' … was charged, under s 6(1) of the Misuse of Drugs Act 1981 (WA) ('WA Act'), with possession of a prohibited drug, namely cannabis, with intent to supply it to another. He was acquitted after a trial by jury in the District Court.

3 R was a truck driver. On 4 April 2004 he drove a truck from South Australia into Western Australia with 1.8 kilograms of cannabis located in a sealed cardboard box in the rear of his truck. His evidence at the trial was that he believed that the contents of the box were shoes or clothing. His counsel contended that he could not be said to have been in possession of a prohibited drug as he had been unaware of its existence.

4 During the course of an interview with police officers on 4 April 2004, R had made a number of statements from which it could be inferred that he knew that there were prohibited drugs in the box in his truck. He told the police that he had been asked whether or not he would 'take a box across'. He said that he was not told what was in the box. He was told that if he agreed to take the box, there would be 'an envelope there with $200 in it'. He said that he was also told that he could 'just walk away from it' when he got 'in the yard'. A little later in the course of the interview, it was put to him that the box had contained cannabis and that it would not have been too hard to work out what was in it. R acknowledged that he knew 'it had to be something that … wasn't right'. He said that he had probably suspected that it was cannabis, although he 'never really gave it much thought', and that he had 'just wanted the money sort of thing'. When asked whether he had been shocked when the police located the cannabis, he responded by saying 'That's what I sort of half expected, I suppose'. Also, when asked whether he would have 'continued' if the police had not stopped him, he said:

> I don't think so. Today I was in a bit of a sweat coming across … I was just nerves all the bloody way, eh. Worrying about that box in the back.

He said that the normal cost of delivering a box of that size would be around $40 to $50 and that he was to be paid a total of $200 for delivering it.

5 The prosecutor invited the jury to infer from these statements that R had known that there were prohibited drugs in the box in his truck.

6 The trial Judge, after some discussion with counsel as regards the appropriate direction, told the jury, in the course of his summing up, that in order to establish 'possession' for the purposes of s 6(1)(a) of the WA Act the prosecutor must prove that R had knowledge of the prohibited drug. He said (transcript 173–174):

> I will now explain to you this concept of having possession of a prohibited drug. A person has possession of a prohibited drug when they have control or dominion over it and an intention to possess it. There are two requirements of this element of possession. First, the accused must know of the existence of the drug. Second, the accused must have control over the drug. Control and intention to exercise control must be exercised at the same

time. As a matter of law, you can't have possession of a prohibited drug unless you know that what you possess is a prohibited drug. It is not sufficient for the state to prove that … [R] had suspicions that he had in his possession a prohibited drug.

To prove this element the state must prove beyond reasonable doubt that … [R] had control or dominion over the cannabis and that he knew what he had in his possession was a prohibited drug. The state does not have to prove that … [R] actually saw the cannabis. The state does not have to prove that … [R] was told by somebody, 'There is cannabis in this box,' and it is not necessary to establish that … [R] knew that it was a prohibited drug of the kind charged. The state needs to prove that … [R] knew that what he had in his possession was a prohibited drug. The state does not need to prove that he knew the prohibited drug was cannabis.

7 After the trial Judge had completed his summing up and the jury had retired, the jury passed a note to the trial Judge asking whether, if R knew that the contents of the box were illegal, but did not know whether it contained drugs or some other illegal item, he should be taken to have had 'knowledge that the contents were prohibited drugs and therefore he was in possession'. The trial Judge answered this by saying:

The state needs to prove that … [R] knew that what he had in that box was a prohibited drug. The state does not need to prove that he knew that it was cannabis, but the state does need to prove that … [he] knew that the contents of the box was a prohibited drug. That's the law on that point.

The question referred

8 The question of law that has been referred to this Court reads as follows:

On a charge of possession of a prohibited drug contrary to the Misuse of Drugs Act 1981 what degree of knowledge is required, inter alia, to establish 'possession'? Specifically, is actual knowledge required, or is it sufficient to establish an awareness or a belief in the likelihood — in the sense that there is a significant or real chance — that the item in question is a prohibited drug?

The relevant statutory provisions

9 The question is one of statutory construction. It is consequently necessary to consider the meaning of the word 'possession' in its statutory context: *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 at 288, 299, 304; and *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 549, 576. The relevant provisions are s 6(1)(a) of the WA Act and the definition, in s 3(1) of that Act, of the words 'to possess'. Section 6(1)(a) reads as follows:

(1) Subject to subsection (3), a person who
(a) with intent to sell or supply it to another, has in his possession; ….
a prohibited drug commits a crime …

The meaning of the words 'to possess' is defined, in s 3(1), as including:

… to control or have dominion over, and to have the order or disposition of, and inflections and derivatives of the verb 'to possess' have correlative meanings.

…

Nature of the requisite mental element

11 It is established that the notion of possession, in its ordinary meaning, involves a mental element: *Warner* at 281 per Lord Reid; *He Kaw Teh* at 537 per Gibbs CJ (and see also the cases there cited), at 585 per Brennan J and at 598 per Dawson J; and *Tabe v The Queen* (2005) 79 ALJR 1890 at [102] per Hayne J. However, there has been a good deal of discussion as regards the nature of that mental element. The preponderance of authority is that it comprehends some degree of knowledge of the thing possessed …

…

13 In *He Kaw Teh* at 537 Gibbs CJ (with whom Mason J agreed) said, in the course of considering s 233B(1)(c) of the Customs Act 1901 (Cth):

> The words used in s 233B(1)(c) — 'has in his possession' — in their ordinary sense connote a state of mind, in particular some awareness of the existence of the thing that was in fact in the possessor's physical control. In *Director of Public Prosecutions v Brooks* [1974] AC 862, at p 866, Lord Diplock said:
>
> > In the ordinary use of the word 'possession', one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control.
>
> In Reg v Boyesen [1982] AC 768, at pp 773–774, Lord Scarman said:
>
> > Possession is a deceptively simple concept. It denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control. You may possess a thing without knowing or comprehending its nature: but you do not possess it unless you know you have it.
>
> In Williams v The Queen (1978) 140 CLR 591, at p 610, Aickin J said:
>
> > It is necessary to bear in mind that in possession there is a necessary mental element of intention, involving a sufficient knowledge of the presence of the drug by the accused. No doubt in many cases custody of an object may supply sufficient evidence of possession, including the necessary mental element, but that is because the inference of knowledge may often be properly drawn from surrounding circumstances.
>
> See also Reg v Woodrow (1846) 15 M & W 404, at pp 415, 418 [153 ER 907, at pp 912, 913]; Reg v Warner [1969] 2 AC 256, at pp 282, 307–308, 310–311.

(See also Brennan J at 586, 589 and Dawson J at 599, 600.)

14 In this State, in *Dunn* (1986) 32 A Crim R 203 at 205, Burt CJ (speaking in the context of s 6(1)(a) of the WA Act) said that it could be taken to be established that the idea of 'possession' connotes knowledge of the thing possessed. Malcolm CJ (in a similar context) said much the same in *Davis v The Queen* (1990) 5 WAR 269 at 273 and 279 …

15 While it is established by the Western Australian cases to which I have referred that the word 'possession' in s 6(1)(a) of the WA Act connotes knowledge of the thing possessed (different meanings have been ascribed to that word in other contexts in other cases), the analysis in this regard has, in some respects, been problematic.

…

22 There is an attractive simplicity in the proposition that all that is required in order to prove possession for the purposes of s 6(1)(a) of the WA Act, read with the definition of the words 'to possess' in s 3(1), is proof of physical possession or control or dominion over

the item in question and that a mental element arises only out of the requirement that the prosecution must negative each of s 23 and s 24 of the Code, usually (but not necessarily) by proving knowledge on the part of the accused of the thing possessed: *cp Clare* at 638–639 per Fitzgerald P, at 643–644 per Pincus JA and at 645 per Davies JA (these judgments are discussed more fully below). Moreover, the question of the interaction between s 23 and s 24 of the Code, on the one hand, and s 6(1)(a) of the WA Act, on the other, appears to have been given no overt consideration in *Dunn* or in *Davis* (other than by Pidgeon J).

23 However, when considering this issue, it is important to bear in mind that, as Brennan J pointed out in *He Kaw Teh* (at 575):

> An absence of an honest and reasonable but mistaken belief is not the equivalent of knowledge of the facts which make the act criminal: in the first place, an absence of a mistaken belief is something less than knowledge. Thus inadvertence to a fact does not amount to knowledge of that fact, but it is consistent with the absence of a mistaken belief about it. In the second place, the reasonableness of an exculpatory belief is an objective matter.

(See, also *Tabe* at [20] per Gleeson CJ and at [148] per Callinan and Heydon JJ.) It might consequently be thought to be unlikely that the legislature, in enacting s 6(1)(a) of the WA Act, intended to displace what had, by then, already become a widely accepted notion of the ordinary meaning of 'possession' as comprehending some degree, at least, of knowledge of the thing possessed. Were the position otherwise, a person who had received from another in good faith a package for the purpose of passing it on to a third person, not knowing what was in it and, innocently, not ever turning his or her mind to that question, would be liable under the section if the package turned out to contain a prohibited drug. There would, in that event, at least arguably be no mistake for the purposes of s 24 (see *He Kaw Teh* at 575 and *G J Coles & Coy Ltd v Goldsworthy* [1985] WAR 183 at 188, where Burt CJ, with whom Smith J was relevantly in agreement, said that mistake requires evidence of a positive belief and *cp Tabe* at [20]). Also, as Brennan J pointed out in the extract from his judgment in *He Kaw Teh* quoted above, there is an objective element to the notion of reasonableness of an exculpatory belief and, in circumstances in which, for example, the recipient of a package honestly believed that it did not contain a drug, that belief may or may not have been objectively reasonable. Moreover, having accepted a package without any enquiry as to its contents, the taking of possession of the package, and hence of its contents (whatever they might be), could not be said to have been an act which occurred independently of the possessor's will.

24 I can see no reason why the purpose or object underlying the Misuse of Drugs Act (as to which see s 18 of the Interpretation Act 1984 (WA)) would be promoted by a construction that leads to consequences of this kind. A construction which preserves what has been accepted as the ordinary meaning of the word 'possession', at least in this context, is unlikely to result, and in my opinion has not so far resulted, in a noticeable decrease in the number of those who are (rightly) convicted of dealings with prohibited drugs. It seems to me that, in the vast majority of cases concerning possession of a prohibited drug for the purpose of sale or supply, the circumstances in which possession of a package is obtained, or retained, will point strongly in the direction of knowledge of its contents: see *Warner* at 307 per Lord Pearce and also what was said by others in that case respectively at 279 per Lord Reid, 289 per Lord Morris and 312 per Lord Wilberforce; *He Kaw Teh* at 536 per Gibbs CJ; *Kural v The Queen* (1987) 162 CLR 502 at 504–505, 507 per Mason CJ, Deane and Dawson JJ and 511–512 per

Toohey and Gaudron JJ; *Saad v The Queen* (1987) 61 ALJR 243 at 244 per Mason CJ, Deane and Dawson JJ; *Pereira v Director of Public Prosecutions* (1988) 63 ALJR 1 at 3 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; and *Tabe* at [9]–[10] per Gleeson CJ and [143] per Callinan and Heydon JJ. I will return to this below, when dealing with the question of what amounts to knowledge for the purposes of s 6(1)(a). Also, as I have mentioned, there is already an onus upon the State to negative a defence under each of s 23 and s 24 of the Code and this is ordinarily done by proving knowledge on the part of the accused.

…

26 In all of these circumstances there is, in my opinion, no sufficient basis for overturning long established authority in this State (even if we had been invited to do so) that the word 'possession' in s 6(1)(a) of the Act connotes knowledge of the thing possessed. There is also no sufficient basis (as to which see *Re Calder; Ex parte Cable Sands (WA) Pty Ltd* (1998) 20 WAR 343 at 354) for departing from the proposition, at least for the purposes of the extended definition in s 3(1), that intention 'to control' or 'have dominion' is a requirement.

Knowledge of what?

27 However, that leaves the question of what degree of knowledge is required. That question has attracted some controversy.

…

[His Honour discussed a range of cases including *Clare v R* [1994] 2 Qd R 619, where the Queensland Court of Appeal had held that the concept of possession does not include knowledge of the nature of the thing possessed. He continued:]

41 In *Clare* [[1994] 2 Qd R 619], the Court of Appeal in Queensland was concerned with s 9 of the Drugs Misuse Act 1986 (Qld) ('Queensland Act') which, relevantly, provided that a person who unlawfully had possession of a dangerous drug was guilty of a crime. The appellant had been found in possession of white powder which, he said, he had agreed to take to Sydney for a business associate. The powder was heroin but the appellant said that he had believed that it was a perfume base. He consequently knew of the existence of the powder but not, he said, of its nature. Sections 57(c) and (d) of the Drugs Misuse Act contained evidentiary provisions as follows:

(c) proof that a dangerous drug was at the material time in or on a place of which [the person charged with having committed an offence] was the occupier or concerned in the management or control of [sic] is conclusive evidence that the drug was then in his possession unless he shows that he then neither knew nor had reason to suspect that the drug was in or on that place;

(d) the operation of section 24 of the Criminal Code is excluded unless that person shows an honest and reasonable belief in the existence of any state of things material to the charge.

I have mentioned that s 24 of the Criminal Code (Qld) is in terms similar to s 24 of the Code in this State. The Queensland section forms part of a chapter dealing with criminal responsibility which, as in Western Australia, excludes the common law concept of *mens rea*. The Queensland Code also contained provisions similar to s 23 and s 36 of the Western Australian Code.

42 Fitzgerald P, after considering these provisions and referring to *He Kaw Teh*, *Kural* and *Pereira*, said (at 636) that he read *He Kaw Teh* as establishing that knowledge was required, not as an aspect of *mens rea*, but as an element of the legal concept of possession.

He accepted that knowledge is an element of possession according to its ordinary connotation. He went on to say (at 638–639):

> Neither party suggested that there is anything in the history of the Drugs Misuse Act which bears upon the scope and extent of the knowledge which is required to establish possession under that Act.
>
> Further, while all are consistent with a requirement of knowledge as an element of possession for the purpose of the Drugs Misuse Act, neither the material provisions of that Act, nor those in Chapter V of the Criminal Code, depend for their effective or reasonable operation upon either a wide or a narrow view of the scope and extent of the knowledge which is required to establish possession.
>
> The principal practical difference between the wide and narrow views lies in the effect which the respective views have upon the onus of proof, particularly having regard to the evidentiary provisions in s 57 of the Drugs Misuse Act. In these circumstances, it might be legitimate to interpret the Act, which is a penal statute, in the manner which is most favourable to an accused person; that is to say, to determine that possession requires proof of knowledge not only of the existence of the thing or substance but of its nature and even its quality. On the other hand, the clear tenor of the evidentiary provisions in s 57 of the Act is to reverse the onus to oblige an accused person who is proved to knowingly have the custody or control of a thing or substance which is a dangerous drug to prove that his or her 'possession' is innocent. The narrow view therefore gives better effect to the legislative intent.
>
> Not without some hesitation, I have concluded that this is the correct approach and that, subject to s 23 of the Code, all that the prosecution needs to show to establish possession is that an accused person has and knows that he or she has a thing or substance which is in fact a dangerous drug.

43 Pincus JA considered (at 639) that there is nothing in the ordinary meaning of the word 'possession' that requires knowledge of the nature of the thing possessed. He said (at 642) that it was unclear whether *He Kaw Teh* established the proposition that s 233B(1) of the Customs Act requires proof that the accused knew the nature of what was possessed by him or her. However, he considered that, if it was authority for that proposition, it could not be said that, absent the doctrine of *mens rea*, the result arrived at by the majority would have ensued. He considered (at 643–644) that the issue of knowledge of the nature of the powder was to be resolved by reference to the provisions of the Criminal Code and, in particular, that dealing with mistake.

44 Davies JA reached a similar conclusion. He said (at 645):

> Mens rea has no relevance to an offence against s 9 of the Drugs Misuse Act. Section 44 of that Act provides that the Criminal Code shall, with all necessary adaptations, be read and construed with that Act; and Chapter V of the Criminal Code provides an exclusive code with respect to criminal responsibility. See also Criminal Code, s 36. Sections 23 and 24 of the Code, the latter as modified by s 57(d) of the Drugs Misuse Act, have particular application to an offence under s 9.
>
> Freed of the necessity to consider the effect of mens rea on the concept of possession, I do not think that the element of knowledge, which undoubtedly exists in that concept in its ordinary meaning, extends beyond knowledge, by the accused, of the existence and

> presence within his physical control of the object; it does not extend to knowledge of the nature of that object. There is nothing in the construction of the Drugs Misuse Act which would suggest that 'possession' is being used in other than its ordinary meaning.

…

46 In *Tabe*, the High Court was concerned with the provisions of s 9 and s 57(d) of the Queensland Act. Gleeson CJ (at [10]–[11]) posed the question of what must be known for the purposes of those provisions. He said that one possibility was that, to be in possession of a drug of a particular kind, a person must know that he or she is in possession of the substance and that the substance is a dangerous drug, without necessarily knowing what kind of dangerous drug. He raised as another possibility that the person must know that he or she is in possession of a substance (which is in fact a dangerous drug) but that knowledge that the substance is a dangerous drug is not required to be shown. After considering *Clare* he said (at [20]) that, depending upon context, 'possession' is undoubtedly capable of bearing the meaning given to it in that case. He added that the Court of Appeal's conclusion that the word had that meaning in s 9 of the Queensland Act was 'influenced powerfully by the presence in the Act of s 57'. He concluded (at [24]) that, while he had not found the task of construction easy, he, like Fitzgerald P in *Clare*, would conclude that the clear tenor of the evidentiary provisions provided for by s 57 was to reverse the onus to oblige an accused person who was proved knowingly to have the custody or control of a thing or substance which is a dangerous drug to prove that his or her possession was innocent.

47 Callinan and Heydon JJ (who, with Gleeson CJ, comprised the majority) arrived at a similar conclusion (at [145] and [151]). However, they also said (at [143]) that it can be accepted, on the basis of statements in *Williams* (their Honours appear to rely on what was said in that case by Aickin J at 610 and 613) and *He Kaw Teh*, that the concept of 'possession' in the criminal law, in the absence of statutory indications to the contrary, involved, as an element, awareness, or at least constructive knowledge in the sense that there would be awareness 'of the thing possessed' (which, in its context, I take to mean the nature of the thing possessed) but for an abstention from enquiry or the suspension of such tendencies as suspicion and curiosity.

48 Hayne J, in dissent, adopted a different approach. He said (at [102]–[105]):

> 'Possession' in s 9 should be understood as bearing its ordinary meaning, thus importing a mental element. And that mental element is to be related to the subject of possession — a dangerous drug. That is, the accused must be shown to know that the substance in possession is or is likely to be a dangerous drug.

…

His judgment in that respect was agreed with by McHugh J at [57] (and see also McHugh J at [29]).

…

50 This review of the cases (it is not intended to be comprehensive) illustrates the difficulty that has been experienced in considering, in different jurisdictions and under different statutory regimes, what it is that must be known. However, it seems clear enough that in Western Australia, on the current state of authority, the knowledge required under s 9 of the WA Act is knowledge by the accused person that he or she had possession of a prohibited

drug of some kind, even though that person did not know what prohibited drug he or she possessed. As I have earlier said, I can see no reason of policy why the legislature should be taken to have intended otherwise. Moreover, this construction seems to me to be supported by what was said in *Tabe* by Callinan and Heydon JJ. I have mentioned that they said at [143] that it can be accepted that the concept of 'possession' in the criminal law, in the absence of statutory indications to the contrary, involved, as an element, awareness, or at least constructive knowledge, 'of the [nature of the] thing possessed'. Importantly, they went on to say at [146] that s 57(c) of the Queensland Act relieves the prosecution of the burden of proving knowledge and at [151] that s 57 manifested an intention to alter the common law with respect to knowledge as a necessary component of possession. It might readily be inferred from this that, if it were not for the existence of s 57 (and there is no equivalent in the WA Act) they would have found, notwithstanding the presence of s 23 and s 24, that knowledge in the sense described by them was required to be proved as a necessary component of possession. This construction seems to me also plainly to be supported by what was said in that case by Hayne J (and hence by McHugh J) in the passage at [102]–[105] quoted above. It is unclear what conclusion would have been arrived at by Gleeson CJ were it not for the provisions of s 57. However, as I have mentioned, he did not find the task of construction to be easy, even given the existence of s 57.

51 In these circumstances it seems to me, once again, that, even if either party to the reference had invited us to do so, there is no sufficient basis for overturning the existing line of authority in this State, which, as I have said, seems to me to be supported by the authority of a majority of the High Court in *Tabe*. In my opinion, the reasoning of the majority in that case is as applicable to the provisions of s 6(1)(a) of the WA Act as it is to s 9 of the Queensland Act, given that there were in that State provisions equivalent to s 23, s 24 and s 36 of the Western Australian Criminal Code.

What amounts to knowledge of possession of a prohibited drug?

52 That leaves the question posed by the reference, being, as I have said, whether 'actual knowledge' (by which I take the drafter of the reference to mean certain knowledge) is required for the purposes of s 6(1)(a) of the WA Act, or whether it is sufficient for the State to establish an awareness or belief that there is a significant or real chance that the item in question is a prohibited drug.

…

55 In *He Kaw Teh* at 536 Gibbs CJ said of s 233B(1)(b) of the Customs Act that:

> On any view of the effect of the section, if the suspicions of an incoming traveller are aroused, and he deliberately refrains from making any inquiries for fear that he may learn the truth, his wilful blindness may be treated as equivalent to knowledge. If he is given a bag or parcel to carry into Australia in suspicious circumstances, or if there is something suspicious about the appearance, feel or weight of his own baggage, and he deliberately fails to inquire further, the jury may well be satisfied that he wilfully shut his eyes to the probability that he was carrying narcotics and for that reason should be treated as having the necessary guilty knowledge.

Brennan J did not directly consider this issue in that case. However, he said (at 585) that the knowledge needed in order to establish intention to import a prohibited substance when in a

container was knowledge 'that it contained or was likely to contain narcotic goods, or that it contained or was likely to contain an object that was or was likely to be narcotic goods'.

…

60 The High Court again returned to the issue in *Pereira*. There, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ said (at 3):

> In *Bahri Kural v The Queen* (1987) 162 CLR 502 it was emphasised (at 505 and 511–12) that in this area it is important not to transform matters of fact into propositions of law. That case was concerned not with what constituted 'knowledge' as a distinct element of an offence but with the unspecified requirement that the accused had acted with mens rea or a guilty mind. It was pointed out in the joint judgment of Mason CJ, Deane and Dawson JJ (at 504) that, depending upon the nature of the particular offence, 'the requirement of a guilty mind may involve intention, foresight, knowledge or awareness with respect to some act, circumstance or consequence'. Their Honours concluded (at 504–505) that actual knowledge or awareness of the presence of the particular substance was not an essential element in the guilty mind required for the commission of the offence involved in that case, namely, the offence of importing a prohibited import.
>
> Even where, as with the present charges, actual knowledge is either a specified element of the offence charged or a necessary element of the guilty mind required for the offence, it may be established as a matter of inference from the circumstances surrounding the commission of the alleged offence. However, three matters should be noted. First, in such cases the question remains one of actual knowledge: *Giorgianni v The Queen* (1985) 156 CLR 473 at 504–507; *He Kaw Teh*, at 570. It is never the case that something less than knowledge may be treated as satisfying a requirement of actual knowledge. Secondly, the question is that of the knowledge of the accused and not that which might be postulated of a hypothetical person in the position of the accused, although, of course, that may not be an irrelevant consideration. Finally, where knowledge is inferred from the circumstances surrounding the commission of the alleged offence, knowledge must be the only rational inference available. All that having been said, the fact remains that a combination of suspicious circumstances and failure to make inquiry may sustain an inference of knowledge of the actual or likely existence of the relevant matter. In a case where a jury is invited to draw such an inference, a failure to make inquiry may sometimes, as a matter of lawyer's shorthand, be referred to as wilful blindness. Where that expression is used, care should be taken to ensure that a jury is not distracted by it from a consideration of the matter in issue as a matter of fact to be proved beyond reasonable doubt.

…

66 In *Tabe* at [10], Gleeson CJ, after referring to what had been said by Gibbs CJ in *He Kaw Teh* to the effect that, where a statute makes it an offence to have possession of particular goods, knowledge by the accused that those goods are in his custody will, in the absence of a sufficient indication of contrary intention, be a necessary ingredient of the offence, went on to say:

> The fact in issue, knowledge, is not limited to knowledge gained from personal observation, or certainty based upon belief in information obtained from a third party, although those states of mind would suffice. The word 'awareness' is sometimes used as a synonym.

> A belief in the likelihood, 'in the sense that there was a significant or real chance', of the fact to be known, will suffice …

I have earlier mentioned that Callinan and Heydon JJ (at [143]) said in that case that the concept of 'possession', in the absence of statutory indications to the contrary, involves as an element awareness 'in the sense that there would be an awareness, but for an abstention from inquiry, or the suspension of other human tendencies such as suspicion and ordinary curiosity, of the thing possessed'.

67 Returning to s 6(1)(a) of the WA Act, having regard for what has been said in the cases to which I have referred (which are of assistance in this respect, even though many of them arose in a different statutory context), it seems to me that knowledge (which might be equated with awareness, in this context) is established if there is proof of a belief by the accused in the likelihood (in the sense that there was a significant or real chance) that he or she had a prohibited drug in his or her physical possession or otherwise in his or her control or under his or her dominion. Whether the accused had such a belief is, of course, a question of fact, and whether or not it existed will ordinarily be a matter of inference from the circumstances surrounding the commission of the alleged offence, often a combination of suspicious circumstances and a failure to make enquiry. Whether or not that inference should be drawn in the circumstances of a particular case is a question for the jury, but, if the inference is to be drawn, it must be the only rational inference available.

68 I would answer the question posed accordingly.

[**Pullin JA** agreed with **Steytler P** in a separate judgment. **Wheeler JA** dissented, arguing in favour of the position taken by the Queensland Court of Appeal in *Clare* and concluding at [198]: 'It is necessary only for the prosecution to prove that the accused knows he or she has possession of a substance and to prove that the substance is in fact a prohibited drug. Actual knowledge must be proved. It is not necessary to prove that the accused knows that the substance is or is likely to be a prohibited drug.']

Commonwealth Offences

CHAPTER 9

9.1 The Commonwealth can create criminal offences to enforce regulatory schemes in areas over which it has specific constitutional jurisdiction and to give effect to its obligations under international treaties. It can also legislate on matters where the states have referred their powers to the Commonwealth, for example trading corporations.

When there is a collision between words in a state Code and the Code (Cth) in relation to an offence against the Commonwealth, the Code (Cth) is likely to prevail as a result of the Constitution s 109: see *Dickson v The Queen* [2010] HCA 30; 270 ALR 1 (9.15C).

9.2 The Commonwealth Criminal Code follows the legislative pattern of Queensland and Western Australia with a short covering Act, the Criminal Code Act (1995), followed by the Criminal Code as a Schedule to the Act. In common with the concept of a code and the position under the state Codes, the only offences against the laws of the Commonwealth are those offences created by or under the authority of the Code or another Commonwealth statute: Criminal Code (Cth) s 1.1. There are now no federal common law offences.

The Criminal Code (Cth) covers a range of matters including:

- offences against Commonwealth property or personnel;
- offences committed by or against Australians overseas;
- treason and espionage;
- people smuggling;
- slavery and sexual servitude;
- terrorism;
- genocide;
- crimes against humanity and war crimes; and
- drugs: see Chapter 8.

The Crimes Act 1914 (Cth) deals mainly with investigative powers and criminal procedure but also enacts some serious offences, sometimes in terms similar to the Criminal Code (Cth). Compare, for example, treason under the Criminal Code (Cth) s 80.1 and treachery under the Crimes Act (Cth) s 24AA. Other serious offences are contained

in Commonwealth legislation such as the Taxation Administration Act 1953 (Cth), Corporations Act 2001 and the Competition and Consumer Act 2010.

9.3 The Criminal Code (Cth) includes general provisions relating to the physical and fault elements of offences. This scheme applies to all Commonwealth offences: s 2.2. The treatment of basal criminal responsibility differs from that in the state Codes. Instead of adopting the elegant Griffith solution exemplified in Codes s 23 (Qld)/ss 23–23B (WA), the Criminal Code (Cth) has codified the sometimes confusing common law rules of *mens rea* — a 'guilty mind' — and the concepts of strict liability and absolute liability.

The Criminal Code (Cth) was the product of an intergovernmental working group that sought to draft a uniform criminal code for all Australian jurisdictions; so far only the Commonwealth, the Australian Capital Territory and the Northern Territory have adopted it. It is unlikely that Queensland or Western Australia will overcome their antipathy to the manner of codification of criminal responsibility in the Criminal Code (Cth).

This chapter deals only with the scheme of criminal responsibility established by the Criminal Code (Cth) and, in particular, the general provisions relating to the physical and fault elements of offences. The provisions relating to defences are analysed in later chapters dealing with defences in both state and Commonwealth law.

9.4 The Commonwealth Code draws its inspiration from common law principles, not from the state Codes. For general discussions of these principles, see *He Kaw Teh v R* (1985) 157 CLR 523; 60 ALR 449. The centrepiece of the common law principles of criminal responsibility is the doctrine of *mens rea* — the 'guilty mind'. Under common law principles, serious offences impliedly require a culpable state of mind, usually a subjective state of mind such as intention or recklessness. Whereas the Queensland and Western Australia Codes require such states of mind only when there is an express provision to this effect, common law principles presume that at least recklessness is required, in the absence of some indication to the contrary.

In addition to offences of subjective *mens rea*, the common law recognises certain other categories of offence:

1. offences for which the *mens rea* is objective negligence rather than intention or recklessness;
2. offences of 'strict liability' that do not include a fault element but do admit a defence of reasonable mistake of fact (see **Chapter 12**) in addition to other exculpatory defences;
3. offences of 'absolute liability' which neither include a fault element nor permit any defence of mistake of fact, although again other exculpatory defences are available.

Strict and absolute liability generally attach to minor offences where lower levels of fault are justified by lower penalties.

9.5 The Criminal Code (Cth) s 4.2 follows the common law in requiring conduct to be voluntary as a condition of criminal responsibility for all categories of offence. The concept of voluntariness in criminal law is examined in **Chapter 11**.

9.6 Section 4.3 prescribes the circumstances when a person can be criminally liable for an omission: either when the offence expressly so provides or when the offence impliedly allows for its commission by breach of a duty to act. The Criminal Code (Cth) does not specify the categories of duty to act. For an analysis of criminal liability for omissions at common law and under the Queensland and Western Australia Codes, see **3.7–3.13**.

9.7 For offences that do not specify a fault element, the Criminal Code (Cth) establishes a presumption either of intention or recklessness. Intention is presumed for conduct elements consisting of physical conduct alone: s 5.6(1). Recklessness is presumed for conduct elements consisting of circumstances or results: s 5.6(2). These general presumptions operate in the absence of particular fault elements being prescribed in offence descriptions. The particular fault elements which can be prescribed include knowledge and negligence as well as intention and recklessness: s 5.1. The definitions of these terms are examined at **9.9–9.14**.

Where recklessness is prescribed as a fault element it operates as a minimum level of required fault, so that proof of intention or knowledge will also establish the offence: s 5.4(4).

9.8 'Strict liability' or 'absolute liability' can attach to an offence or an element of an offence by way of a provision to this effect: ss 6.1–6.2.

'Strict liability' means that there is no fault element but that a defence of reasonable mistake of fact under s 9.2 is available: s 6.1. See the discussion in **12.15** on mistake of fact in relation to Commonwealth offences.

'Absolute liability' means that not only is there no fault element but also there is no defence of mistake of fact: s 6.2.

The existence of strict or absolute liability does not make any other defence unavailable: s 6.1(3). For example, it does not exclude a defence of lack of voluntariness under s 4.2 (see **9.5**) or a defence of sudden or extraordinary emergency under s 10.2: see **16.30** on the latter defence.

9.9 The Criminal Code (Cth) defines 'intention' separately for conduct, circumstances and results. A person intends conduct if he or she means to engage in it: s 5.2(1). A person intends a circumstance if he or she believes that it exists or will exist: s 5.2(2). A person intends a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events: s 5.2(3).

A distinction is sometimes drawn between two forms of intention: direct or 'purpose' intention and oblique or 'knowledge' intention: see **4.11** on this distinction. In the Commonwealth scheme, the references to 'means' appear directed to intention in the form of purpose; the references to 'belief' and 'awareness' appear directed to intention in the form of knowledge.

9.10 'Knowledge' is given a single definition, encompassing both circumstances and results. A person has knowledge of a circumstance or result if he or she is aware that it exists or will exist in the ordinary course of events: s 5.3.

9.11 'Recklessness' is given separate definitions for circumstances and results. A person is reckless with respect to a circumstance if he or she is aware of a substantial risk that it does or will exist and it is unjustifiable to take that risk: s 5.4(1). A person is reckless with respect to a result if he or she is aware of a substantial risk that it will occur and it is unjustifiable to take that risk: s 5.4(2). Unjustifiability is an objective matter: it is immaterial that the person may have thought that taking the risk was justifiable. Nevertheless, the assessment of justifiability is made having regard to the circumstances actually known to the person: s 5.4(1)(b). The Criminal Code (Cth) therefore adopts an essentially subjective conception of recklessness — mistakes of fact about matters affecting the risk or its justifiability will provide defences whether or not they were reasonable; only the assessment of justifiability is objective.

9.12 Unjustifiability is part of the definition of recklessness because an element of risk-taking is necessary for the conduct of everyday life and indeed may sometimes be valued. Thus, in *R v Crabbe* (1985) 156 CLR 464 at 470; 58 ALR 417, where the role of the concept of recklessness in the common law of murder was under analysis, the court observed: 'A surgeon who competently performs a hazardous but necessary operation is not criminally liable if the patient dies, even if the surgeon foresaw that his death was probable.' Conversely, in *Leary v R* (1977) 74 DLR (3d) 103 at 116–17 (SCC), Dickson J noted that justifiability is not a practical issue in relation to reckless rape because: 'The harm to be anticipated from acting upon the mistaken belief that the woman is consenting is very great whereas that which may be lost in failing to act is slight.'

Whether or not it was justifiable to take a risk will depend on the interaction of several variables:

- the degree of risk;
- the magnitude of the harm if the risk materialises;
- the social value of the end for which the risk is taken; and
- the costs of avoiding or minimising the risk.

9.13 'Negligence' respecting a physical element of an offence is defined in s 5.5 of the Code as conduct involving:

(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.

This adopts the common law standard of criminal negligence: see **4.33**. Negligence sufficient for civil liability in the law of torts may not be sufficient for criminal liability. For criminal liability, the negligence must be 'gross'; there must be a wide departure from the standard of care that would be exercised by the reasonable person.

9.14 It is curious that the definition of negligence in s 5.5 includes a separate reference to a high risk that the physical element exists or will exist. The degree of risk is one of the factors to be considered in relation to the other part of the Code's test for negligence: that is, in determining the deviation from the standard of care of the reasonable person. The factors to be taken into account in assessing a person's standard of care with respect to negligence are the same as those to be taken into account in assessing justifiability with respect to recklessness: see **9.12**. In both contexts, account must be taken of the degree of risk, the magnitude of the harm if the risk materialises, the social value of the end for which the risk is taken, and the costs of avoiding or minimising the risk.

9.15C

Dickson v The Queen

[2010] HCA 30; 241 CLR 491; 270 ALR 1
High Court of Australia

French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ:

1 On 21 February 2008 the appellant was convicted at a trial in the County Court of Victoria upon a presentment by the Director of Public Prosecutions of Victoria ('the Director'), who prosecuted on behalf of the Crown in right of Victoria.[1] The presentment stated the offence as conspiracy to steal contrary to s 321(1) of the *Crimes Act* 1958 (Vic) ('the Victorian Crimes Act'). Section 321(1) states:

> Subject to this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which will involve the commission of an offence by one or more of the parties to the agreement, he is guilty of the indictable offence of conspiracy to commit that offence.

2 A jury of 15 had been empanelled on 30 January 2008 but a jury of 12 had retired to consider their verdict, two jurors having been balloted off and one discharged for reason of illness. The *Juries Act* 2000 (Vic) ('the Juries Act') provides for the continuation of criminal trials with a reduced jury of no less than 10 jurors (s 44). It also provides in certain circumstances for a majority verdict where there has been failure to reach a unanimous verdict (s 46). In the events that happened, there was no occasion to invoke the provisions of s 46 at the trial of the appellant. But, as will appear, they have a significance for the issues on this appeal, given the unanimity required by s 80 of the Constitution in respect of trials upon indictment for offences against Commonwealth law.[2]

3 The appellant had been a member of the Australian Federal Police and had worked as an excise officer in the Australian Taxation Office. The particulars of the offence stated that at Melbourne and divers other places in Victoria between 22 December 2003 and 20 January 2004 the appellant had conspired with three named persons 'and/or' a person or persons unknown to the Director, and that they had agreed to pursue a course of conduct which would involve the commission by them of an offence, 'namely to steal a quantity of cigarettes belonging to the Dominion Group (Vic.) Proprietary Limited'. Section 72 of the Victorian Crimes Act contains what the heading describes as the 'Basic definition of theft'. The section states:

> (1) A person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.
> (2) A person who steals is guilty of theft; and 'thief' shall be construed accordingly.

The term 'property' includes money and all other real or personal property including things in action and other intangible property (s 71(1)). The phrase 'belonging to' in s 72(1) is to be read with s 71(2), which stipulates that:

> property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).

A person guilty of theft is liable to a maximum of 10 years imprisonment (s 74(1)).[3] This also is the maximum penalty upon conviction for a conspiracy to commit theft (s 321C(1)(a)). On

17 April 2008 the appellant was sentenced to imprisonment for five years and six months with a non-parole period of four years and six months.

4 The relevant and unchallenged evidence at the trial included the following. The Australian Customs Service was defined in s 4(1) of the *Customs Act* 1901 (Cth) ('the Customs Act')[4] as 'Customs'. It had a storage facility in Port Melbourne within the warehouse of Dominion Group (Vic) Pty Ltd ('Dominion'). The storage area was 'leased by Customs', which paid storage fees. The storage area was padlocked and was not shared by Customs with anyone else. The keys were held in safekeeping at the investigations branch of Customs at other premises. The personnel of Dominion went into the storage area only with the authorisation of officers of Customs and to assist them. The warehouse itself was locked at night by a security gate accessible by a security company and certain Dominion personnel. If Customs wished to have access out of hours it was necessary to pre-arrange a time with the personnel of Dominion.

5 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. Section 204 of the Customs Act required that as soon as practicable the goods be taken to a place approved by a Collector of Customs as a place for storage of goods of that kind. After seizure the goods were transferred to the Dominion storage facility. Dominion issued a receipt dated 30 December 2003 for the receipt of 40 pallets in storage. On the morning of 20 January 2004 the cigarettes were removed from the storage area by cutting the padlock which secured it.

6 The trial judge directed the jury that they could assume that the cigarettes had been under the control of and thus belonged to Dominion. Importantly, the count upon which the appellant was convicted was not particularised in terms referring to property belonging to the Commonwealth. The respondent accepts that the prosecution was not conducted on any basis that there had been an offence against a law of the Commonwealth rather than, or as well as, the law of Victoria.

7 On 18 December 2008 the appellant's application for leave to appeal against his conviction and sentence was refused by the Court of Appeal of the Supreme Court of Victoria. In this Court, the appellant sought special leave to appeal upon the ground that the Court of Appeal erred in refusing him leave to appeal against the conviction and sentence. On 23 April 2010 the application, as to several of the proposed grounds, was dismissed by Gummow, Hayne and Crennan JJ. However, the remaining grounds were referred for further consideration by an enlarged Bench of this Court. Upon these grounds coming on for hearing, the appellant sought and obtained special leave to appeal on a ground based upon the operation of s 109 of the Constitution. The appeal was fully argued in advance of any further consideration of the balance of the special leave application. The balance of the special leave application must be dismissed if the appeal upon the constitutional point is successful.

8 Shortly expressed, the appeal to this Court is brought on the ground that conspiracy to steal the cigarettes was not an offence against the law of Victoria so that the presentment preferred against the appellant should have been quashed. This conclusion is said to follow because (a) the 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')[5] applied, in respect of which the conspiracy provision in s 11.5 attached; and (b) by

operation of s 109 of the Constitution, the relevant provisions of the Victorian Crimes Act were *pro tanto* invalid in the sense of 'suspended, inoperative and ineffective'.[6] This issue was not raised at trial or in the Court of Appeal but, it being a constitutional point going to whether the appellant was charged with an offence known to law, no party or intervener suggested that it could not be taken for the first time on appeal to this Court.[7]

9 Submissions in support of the respondent, asserting the lack of inconsistency, were presented by the Attorneys-General of the Commonwealth and for South Australia upon their interventions under s 78A of the *Judiciary Act* 1903 (Cth).

10 For the reasons which follow the submissions as to 'direct inconsistency' which were made by the appellant should be accepted and the appeal allowed.

11 Chapter 2 of the Commonwealth Criminal Code, which includes s 11.5, is headed 'General principles of criminal responsibility'. Chapter 7, which includes s 131.1, is headed 'The proper administration of Government'. For the offence of theft, the maximum penalty is imprisonment for 10 years (s 131.1(1)). The property in question must be property which 'belongs to' a 'Commonwealth entity' (s 131.1(1)(b)), an expression which is defined in the Dictionary as including the Commonwealth itself and bodies established by a law of the Commonwealth, Customs being one such body.[8] The cigarettes in question in this prosecution belonged to the Commonwealth if, on 20 January 2004, they were in the 'possession' of Customs (s 130.2(1)(a)). In this Court, the respondent accepts that to have been the case. Further, for the purposes of the theft provisions in the Victorian Crimes Act, property is regarded as 'belonging to' any person having 'possession' of it (s 71(2)). Thus, if the Victorian provisions had a relevant valid operation, for those purposes the Commonwealth also had possession of the cigarettes on 20 January 2004.

12 The effect of s 11.5 of the Commonwealth Criminal Code is that the offence of conspiracy is committed by a person who conspires with another person to commit the offence under s 131.1, and the conspiracy offence is punishable as if the offence to which the conspiracy relates had been committed. Section 4G of the *Crimes Act* 1914 (Cth) ('the Commonwealth Crimes Act')[9] so operates that the offence of conspiracy in such a case is an indictable offence, to the trial of which s 80 of the Constitution attaches.

13 The statement of principle respecting s 109 of the Constitution which had been made by Dixon J in *Victoria v The Commonwealth*[10] was taken up in the joint reasons of the whole Court in *Telstra Corporation Ltd v Worthing*[11] as follows:

> In *Victoria v The Commonwealth*,[12] Dixon J stated two propositions which are presently material. The first was:
>
> > When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid.
>
> The second, which followed immediately in the same passage, was:
>
> > Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent.

> The second proposition may apply in a given case where the first does not, yet, contrary to the approach taken in the Court of Appeal, if the first proposition applies, then s 109 of the Constitution operates even if, and without the occasion to consider whether, the second proposition applies.

14 The first proposition is often associated with the description 'direct inconsistency', and the second with the expressions 'covering the field' and 'indirect inconsistency'. The primary submission of the appellant is that the first proposition applies to the interaction in the present case between the State and Commonwealth conspiracy laws so that this is an instance of 'direct inconsistency'.

15 The passage in *Telstra* which is set out above was introduced by a discussion of earlier authorities which included the following:[13]

> Further, there will be what Barwick CJ identified as 'direct collision' where the State law, if allowed to operate, would impose an obligation greater than that for which the federal law has provided.[14] Thus, in *Australian Mutual Provident Society v Goulden*,[15] in a joint judgment, the Court determined the issue before it by stating that the provision of the State law in question 'would qualify, impair and, in a significant respect, negate the essential legislative scheme of the *Life Insurance Act* 1945 (Cth)'. A different result obtains if the Commonwealth law operates within the setting of other laws so that it is supplementary to or cumulative upon the State law in question.[16] But that is not this case.

16 It was held in *Telstra* that because the compensation payable to an injured worker under State legislation differed in a number of respects from that payable to the worker under federal law, the State law had the effect of qualifying, impairing and, in some respects, negating the effect of the federal law and that s 109 of the Constitution operated to the extent of that inconsistency.

17 In *Blackley v Devondale Cream (Vic) Pty Ltd*,[17] where Barwick CJ referred to 'direct collision', it may be noted that the litigation had been instituted by way of a charge upon information laid by Blackley, an inspector, that the employer had failed to pay an employee at the appropriate rates under the *Labour and Industry Act* 1958 (Vic); the issue in the High Court turned upon the effect to be given by s 109 to an award made under the *Conciliation and Arbitration Act* 1904 (Cth) which imposed lesser obligations on the employer and made these enforceable both civilly and criminally under Pt VI of the federal statute.[18]

18 Three further points should be made at this stage.

19 The first is the importance, stressed by Gaudron, McHugh and Gummow JJ in *Croome v Tasmania*,[19] and earlier by Gibbs CJ and Deane J in *University of Wollongong v Metwally*,[20] of s 109 not only for the adjustment of the relations between the legislatures of the Commonwealth and States, but also for the citizen upon whom concurrent and cumulative duties and liabilities may be imposed by laws made by those bodies.

20 The second point is that, as Isaacs J indicated in *Hume v Palmer*,[21] the case for inconsistency between the two conspiracy provisions with which this appeal is concerned is strengthened by the differing methods of trial the legislation stipulates for the federal and State offences, particularly because s 80 of the Constitution would be brought into operation. In the present case, the jury trial provided by the law of Victoria under s 46 of the Juries Act did not require the unanimity which, because s 4G of the Commonwealth Crimes Act would have stipulated

an indictment for the federal conspiracy offence, s 80 then would have mandated at a trial of the appellant.

21 The third point concerns the significance of s 4C(2) of the Commonwealth Crimes Act. This provision provides that where an act or omission constitutes an offence under both a law of the Commonwealth and that of a State, and the offender has been punished for that offence under the State law, the offender shall not be liable to be punished for the Commonwealth offence. Of such a provision, Mason J (with the concurrence of Barwick CJ and Jacobs J) observed in *R v Loewenthal; Ex parte Blacklock*[22] that it:

> plainly speaks to a situation in which the State law is not inoperative under s 109, as for example when there is an absence of conflict between the provisions of the two laws and the Commonwealth law is not intended to be exclusive and exhaustive.

22 The direct inconsistency in the present case is presented by the circumstance that s 321 of the Victorian Crimes Act renders criminal conduct not caught by, and indeed deliberately excluded from, the conduct rendered criminal by s 11.5 of the Commonwealth Criminal Code. In the absence of the operation of s 109 of the Constitution, the Victorian Crimes Act will alter, impair or detract from the operation of the federal law by proscribing conduct of the appellant which is left untouched by the federal law. The State legislation, in its application to the presentment upon which the appellant was convicted, would undermine and, to a significant extent, negate the criteria for the existence and adjudication of criminal liability adopted by the federal law. No room is left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury. To adapt remarks of Barwick CJ in *Devondale Cream*,[23] the case is one of 'direct collision' because the State law, if allowed to operate, would impose upon the appellant obligations greater than those provided by the federal law.

23 To explain why this is so it is necessary to say something more respecting certain aspects of the common law crime of conspiracy which are picked up without alteration by s 321 of the Victorian Crimes Act. In *R v Caldwell*[24] Weinberg JA said:

> The criminal law is ordinarily concerned with conduct, usually prohibited acts, but sometimes the failure to perform required acts. At common law, conspiracy differs in that the prohibited act is the entry into an unlawful agreement, which need never be implemented.[25] Nothing need be done in pursuit of the agreement. The offence of conspiracy is complete the moment that the offenders have entered into the agreement. Repentance, lack of opportunity and failure are all immaterial, and withdrawal goes to mitigation only.[26]
>
> Accordingly, an overt act performed in implementing that agreement is not an ingredient, or element, of the offence itself. Evidence of overt acts is admissible to prove the existence of the conspiracy, and sometimes to assist in the identification of the participants. However, it must always be borne in mind that particulars of overt acts, and indeed particulars in general, are not elements of the offence.[27]

24 Section 11.5 of the Commonwealth Criminal Code received detailed consideration by this Court in *R v LK*.[28] The extrinsic material considered in *R v LK*[29] indicated that the narrower scope of s 11.5 reflects a deliberate legislative choice influenced by the work of what in *R v LK* were identified as the Gibbs Committee and the Model Criminal Code Officers Committee.

25 What is immediately important is the exclusion by the federal law of significant aspects of conduct to which the State offence attaches. There are significant 'areas of liberty designedly left [and which] should not be closed up', to adapt remarks of Dixon J in *Wenn v Attorney-General (Vict)*.[30]

26 First, the effect of s 11.5(1) is that the Commonwealth conspiracy provision applies only where there is a primary offence which is punishable by imprisonment for more than 12 months or by a fine of 200 penalty units or more,[31] whereas s 321 of the Victorian Crimes Act applies to agreements which will involve 'the commission of an offence'.

27 Secondly, in accordance with the settled principles explained by Weinberg JA in *Caldwell*, the offence under s 321 is complete upon the making of the agreement without proof of overt acts, whereas par (c) of s 11.5(2) requires that for the person to be guilty that person, or at least one other party to the agreement, must have committed an overt act pursuant to the agreement.

28 Thirdly, a person cannot be found guilty of conspiracy under s 11.5 if, before the commission of an overt act pursuant to the agreement, that person has withdrawn from the agreement and taken all reasonable steps to prevent the commission of the primary offence (s 11.5(5)). There is no such provision in s 321. Further, sub-s (7) of s 11.5 states:

> Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

There is no equivalent provision in Victoria.

29 The situation in the present case may be contrasted to that presented in *McWaters v Day*.[32] The Queensland legislation, s 16 of the *Traffic Act* 1949 (Q), created an offence of driving a motor vehicle while under the influence of liquor. Section 40(2) of the *Defence Force Discipline Act* 1982 (Cth) required for liability that the defence member drive a vehicle on service land whilst under the influence of intoxicating liquor 'to such an extent as to be incapable of having proper control of the vehicle'. It was, as emphasised by the Attorney-General for New South Wales in the course of his intervention in support of Queensland,[33] difficult to construe s 40(2) as conferring a liberty on a drunken defence member to drive a vehicle on service land provided he or she was still capable of controlling the vehicle. Hence, perhaps, the emphasis in argument by the defence member, in the event unsuccessful,[34] upon establishing that the defence discipline legislation was exclusive of, rather than supplementary to, the ordinary criminal law respecting traffic offences.

30 The result in the present case is that in its concurrent field of operation in respect of conduct, s 321 of the Victorian Crimes Act attaches criminal liability to conduct which falls outside s 11.5 of the Commonwealth Criminal Code and in that sense alters, impairs or detracts from the operation of the federal legislation and so directly collides with it.

…

36 In the Commonwealth Criminal Code, Ch 4 (ss 70.6, 71.19, 72.5), Ch 7 (s 261.1), Ch 8 (ss 268.120, 270.12), Ch 9 (s 360.4), and Ch 10 (ss 400.16, 472.1, 475.1, 476.4),[44] contained provisions so expressed as to deny for the Chapter in question, or particular portions of it, an 'inten[tion] to exclude or limit' the operation of any other Commonwealth law, and also of any law of a State or Territory.[45]

37 However, s 11.5 appeared in Ch 2, which did not contain any such statement. Those opposed to the appellant sought to rely upon the presence of such a provision (s 261.1) in Ch 7. The theft provision (s 131.1) appears in Ch 7. The presence of s 261.1, whatever else its effect in considering the application of s 109 to charges under State law of theft of the property of the Commonwealth, a matter upon which it is unnecessary to enter here, could not displace or avoid the direct collision between the conspiracy provisions with which the appeal is concerned.

38 The balance of the special leave application should be dismissed. The appeal should be allowed and the order of the Court of Appeal of the Supreme Court of Victoria made 18 December 2008 set aside. In place thereof, leave to appeal against conviction and sentence should be granted, the appeal allowed, the presentment preferred against the appellant and his conviction on 21 February 2008 quashed, and the sentence imposed on 17 April 2008 set aside.

Footnotes

1. Public Prosecutions Act 1994 (Vic), s 22(1); Interpretation of Legislation Act 1984 (Vic), s 38.
2. *Cheatle v The Queen* (1993) 177 CLR 541; [1993] HCA 44.
3. See Sentencing Act 1991 (Vic), s 109(1).
4. The references to the Customs Act that follow are to Reprint No 14, dated 25 September 2002.
5. The references to the Commonwealth Criminal Code which follow are to Reprint No 3, dated 1 November 2004.
6. *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 464–5; [1995] HCA 47.
7. *Crampton v The Queen* (2000) 206 CLR 161; [2000] HCA 60.
8. See Customs Administration Act 1985 (Cth), s 4(1).
9. The references to the Commonwealth Crimes Act that follow are to Reprint No 9, dated 1 January 2004.
10. (1937) 58 CLR 618 at 630; [1937] HCA 82.
11. (1999) 197 CLR 61 at 76–7 [28]; [1999] HCA 12. See also *Local Government Association of Queensland (Incorporated) v State of Queensland* [2003] 2 Qd R 354 at 373 [51]; *Loo v Director of Public Prosecutions* (2005) 12 VR 665 at 688 [40].
12. (1937) 58 CLR 618 at 630.
13. (1999) 197 CLR 61 at 76 [27].
14. *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258–9; see also at 270 per Taylor J, 272 per Menzies J; [1968] HCA 2; *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399 at 406; [1977] HCA 51; *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 335, 338–9; [1987] HCA 13.
15. (1986) 160 CLR 330 at 339; [1986] HCA 24.
16. *Ex parte McLean* (1930) 43 CLR 472 at 483; [1930] HCA 12; *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47 at 57–8; [1986] HCA 42.
17. (1968) 117 CLR 253.
18. See (1968) 117 CLR 253 at 258. Cf *R v El Helou* (2010) 267 ALR 734 at 738–9 [24]–[28].
19. (1997) 191 CLR 119 at 129–30; [1997] HCA 5.
20. (1984) 158 CLR 447 at 457–8 and 476–7 respectively; [1984] HCA 74.
21. (1926) 38 CLR 441 at 450–1; [1926] HCA 50.
22. (1974) 131 CLR 338 at 347; [1974] HCA 36.
23. (1968) 117 CLR 253 at 258. See also at 272 per Menzies J.
24. (2009) 22 VR 93 at 99–100 [62]–[63].

25. *Meyrick* (1929) 21 Cr App R 94.
26. *R v Aspinall* (1876) 2 QBD 48.
27. *R v Theophanous* (2003) 141 A Crim R 216 at 249.
28. (2010) 84 ALJR 395; 266 ALR 399; [2010] HCA 17.
29. (2010) 84 ALJR 395 at 412–13 [51]–[58], 421–4 [96]–[107]; 266 ALR 399 at 418–20, 431–5.
30. (1948) 77 CLR 84 at 120; [1948] HCA 13.
31. A penalty unit means $110: Commonwealth Crimes Act, s 4AA(1).
32. (1989) 168 CLR 289; [1989] HCA 59.
33. (1989) 168 CLR 289 at 292.
34. (1989) 168 CLR 289 at 299.

...

44. The Commonwealth Criminal Code in its current form additionally contains such provisions in Ch 4 (s 72.32), Ch 5 (ss 80.6, 115.5), Ch 8 (ss 271.12, 272.7, 273.4, 274.6), and Ch 9 (s 300.4).
45. Chapter 4 is headed 'The integrity and security of the international community and foreign governments', Ch 8 'Offences against humanity and related offences', Ch 9 'Dangers to the community' and Ch 10 'National infrastructure'. Chapter 5, headed 'The security of the Commonwealth', contained its own complex concurrent operation provision (s 100.6).

Defences

PART 3

The Role and Range of Defences

CHAPTER 10

INTRODUCTION

10.1 In criminal law, the word 'defence' is used in several different ways:

1. In its broadest sense, any claim that could result in an acquittal can constitute a 'defence': for example, a claim that the prosecution has not proved its case beyond reasonable doubt or a claim that some procedural irregularity demands an acquittal.
2. In a somewhat narrower meaning, any claim which requires the discharge of an evidentiary or a persuasive burden by the accused (see 2.5–2.7, 2.11–2.14) constitutes a 'defence'. There is such a reverse evidentiary onus when the accused is relying on intoxication or some other form of impaired mental capacity as the basis for claiming a lack of intention to kill or do grievous bodily harm for the purposes of the offence of murder. There is also a reverse evidentiary onus when the accused asserts some special defence of justification or excuse.
3. The most precise meaning of the term 'defence' refers to those claims where, although it is accepted that the elements of the offence occurred, the accused seeks to assert some special justification or excuse for the conduct: see, further, 10.3–10.6. These are sometimes called 'exculpatory defences'. See, for example, self-defence and defence of other persons or property: Chapter 14.

Part Three of this book deals specifically with exculpatory defences. It also covers impaired mental states that may be used to support a claim that the requisite mental elements of the offence were lacking: for example, insanity and intoxication (see Chapters 17 and 18). The focus is on defences of general relevance rather than those defences specific to particular offences.

TYPES OF EXCULPATORY DEFENCE

10.2 Exculpatory defences can be divided into three categories:

1. defences where an excuse denies personal responsibility for what occurred — for example:
   - lack of will under the Criminal Codes of Queensland (Code (Qld)) s 23(1)(a) and Western Australia (Code (WA)) s 23A);

- accident under Codes s 23(1)(b) (Qld)/s 23B (WA);
- mistake of fact under Codes s 24(1) (Qld)/s 24 (WA); and
- claim of right under Codes s 22(2) (Qld)/s 22 (WA).

On the operation of these defences, see **Chapters 11–13**.

2. Contextual defences where, despite the existence of the necessary conduct and fault elements for the offence, the conduct occurs in special circumstances that justify or excuse it. Examples of contextual defences are:
   - self-defence and defence of other persons or property (see **Chapter 14**);
   - compulsion and emergency (see **Chapter 16**);
   - domestic discipline under Codes s 280 (Qld)/s 257 (WA); and
   - justifications based on specific legal powers relating to arrests, sentences and execution of warrants: Codes ss 247–59 (Qld)/ss 224–35 (WA).
3. Mental impairment defences, in cases where the mental impairment itself operates as an independent exculpatory defence as opposed to supporting a claim that a requisite mental element for the offence is absent. Evidence of mental impairment is often used to deny some element of an offence such as intent. In some instances though, mental impairment can provide an independent defence. For example, mental illness can affect the capacity to make moral judgments and to know that certain conduct is wrong, in which case it may permit one form of the insanity defence: Codes s 27(1) (Qld)/s 27 (WA). One form of the intoxication defence takes a similar form: Codes s 28(1) (Qld)/s 28, first para (WA). However, intoxication itself is never a defence. Rather, particular effects of intoxication can give rise to defences under certain exceptional conditions: see **Chapter 18**.

JUSTIFICATION AND EXCUSE

10.3 Most sections of the Codes dealing with defences do not actually use the term 'defence'. Indeed, the term 'defence' only appears in a few provisions, usually those providing for defences to specific offences: for example, Codes ss 210(5), 215(5) (Qld)/ss 321(9), 321A(9)–(10), 322(7), 330(9) (WA). Instead, most Code provisions dealing with defences merely state that 'a person is not criminally responsible for' certain conduct, or that 'it is lawful for' the person to engage in certain conduct. Examples of the former approach include: Codes ss 23–25, s 27, s 31. Examples of the latter include Codes ss 274–278 (Qld)/ss 251–255 (WA) and s 280 (Qld)/s 257 (WA).

In *R v Prow* (1989) 42 A Crim R 343 (**14.29C**), Thomas J suggested that the phrase 'it is lawful for' indicates a justification, whereas the phrase 'a person is not criminally responsible for' indicates merely an excuse. The term 'justification' tends to be used in the context of conduct which, although perhaps harmful in some respects, is not itself regarded as wrong. In contrast, the term 'excuse' tends to be used in the context of conduct that is regarded as wrongful, even though there may be extenuating factors which affect the legal response to such conduct.

10.4 The distinction between justification and excuse is relevant when calculating the right to use force in self-defence or the defence of another person.

In Queensland, the trigger for the right to use force is an 'unlawful assault': Code ss 271–272 (Qld). Defensive force may be used against a person who is not criminally responsible for assault because of, for example, a mistake of fact. As long as the assailant's defence is merely an excuse and not a justification, there is an 'unlawful assault' even though there is no criminal responsibility for it: see 14.9.

In Western Australia, force cannot be used to defend against a 'harmful act' if the harmful act is lawful: Code s 248(5) (WA). However, an act is not lawful merely because there is no criminal responsibility for it: s 248(6).

10.5 The distinction between justifications and excuses may also be of some assistance for analysing the range of exculpatory defences and understanding those situations in which a defence will or will not be available. Claims of justification and excuse have different significance for criminal law.

Where a justification for the commission of the conduct elements of an offence is accepted, it constitutes a good defence. See, for example, the variety of defences in the Codes authorising the use of some measure of force for the purposes of law enforcement (ss 247–249, 254, 256–264 (Qld)/ss 224–226, 231, 233–243 (WA)), defence of personal and real property (ss 274–279 (Qld)/ss 251–256, 244 (WA)) and discipline of children: s 280 (Qld)/s 257 (WA).

In contrast, excuses do not presumptively negative criminal liability. Excuses such as intoxication, emotional stress or financial hardship are generally addressed through the exercise of sentencing discretion after conviction. It is only for the strongest excuses that a complete defence is provided, on the basis that any ordinary person might or even would have acted in the same way. Consider, for example, the defences of compulsion under Code s 31(1)(d) (Qld) and duress under Code s 32 (WA): see Chapter 16. A defence may also be recognised for cases where a mental impairment makes the application of the standard law of criminal responsibility inappropriate: Codes s 27.

10.6 In some instances, excuses only result in partial defences, reducing what would otherwise constitute murder to the less serious offence of manslaughter for the purposes of introducing or increasing sentencing discretion.

- In Queensland, see provocation under Code s 304 (Qld); diminished responsibility under s 304A; killing in an abusive domestic relationship under s 304B.
- In Western Australia, see defensive force that is not a reasonable response under Code s 248(3) (WA).

Provocation is recognised as a complete defence to assault in the Codes of both Queensland and Western Australia: s 269 (Qld)/s 246 (WA); see further 15.8–15.10. This is a feature, peculiar to the Griffith Code. At common law, provocation generally does not operate as a defence to assault.

MENTAL IMPAIRMENT AND CRIMINAL RESPONSIBILITY

10.7 The standard rules relating to criminal responsibility are geared to an accused with normal mental capacity when the conduct elements of the offence were committed. It is presumed that the accused had the capacity to understand what was happening, to distinguish between right and wrong, and to choose to act differently. This presumption may be inappropriate

in cases of deficient mental capacity. Special rules then apply.

10.8 Although it is common to speak of insanity, diminished responsibility and intoxication as 'defences', the special rules on deficient mental capacity serve two very different functions:

1. Some rules benefit the mentally disordered person by expanding the grounds of exculpation available under general principles of criminal responsibility. General principles of criminal responsibility presume that persons are capable of learning standards of conduct and understanding why they should be observed. Hence, normative ignorance is not generally a defence, either under the Codes or at common law, and ignorance of the law is expressly excluded as a defence: Codes s 22(1) (Qld)/s 22 (WA). However, the mental capacity of a person may be so impaired that there is no ability to make standard judgments about what is right and wrong. This condition is recognised by the law of insanity under both the Codes s 27 and at common law. The defence is available to a person who lacks the capacity to understand or control his or her actions or to know that an act ought not be done or an omission ought not be made. There are parallel provisions in relation to the defences of intoxication and diminished responsibility: Codes s 28; Code (Qld) s 304A. Another example is provocation as a defence to assault, where a person who has been severely provoked may be excused from exercising the self-control expected of persons not subject to such provocation: see **Chapter 15**.
2. Some rules disadvantage the mentally disordered person either by restricting the standard grounds of exculpation or by qualifying the meaning of an acquittal.

   An example of restrictions on the standard grounds of exculpation is provided by the rules on intentional intoxication: Codes s 28. A person may be so intoxicated as not to have the state of mind which would ordinarily accompany certain conduct. It is only with respect to a limited category of offences (the so-called offences of 'specific intent') that evidence of intentional intoxication can be used to raise a doubt about the existence of a state of mind, even though some state of mind may ordinarily be a necessary element of a wider range of offences: see **Chapter 18**.

   An example of how some rules disadvantage the mentally disordered person by qualifying the meaning of an acquittal is provided by the disposition of cases where an accused is acquitted on the basis of the insanity defence. Both at common law and under the Codes, a successful insanity defence leads to a special verdict of not guilty on account of unsoundness of mind: Code (Qld) s 647; Criminal Procedure Act 2004 (WA) s 146. The effect of a special verdict of acquittal is that the accused is liable to detention for protective reasons: see **17.2**.

EVIDENTIARY AND PERSUASIVE BURDENS

10.9 Exculpatory defences and defences based on mental impairment require the accused to discharge at least an evidentiary burden before the defence will be put in issue: see **2.13**. If the evidentiary burden is not discharged, the judge will direct the jury that there is no evidence to support its consideration. In order to discharge this evidentiary burden, the accused is only required to offer or point to some evidence to support the claim. The accused need not prove the defence, even on a balance of probabilities. Once the evidentiary burden is discharged, the prosecution must disprove the defence beyond reasonable doubt.

10.10 A small number of defences also place the persuasive burden on the accused: see **2.5**. These include the defence of insanity under Codes s 26 and the defence of diminished responsibility in Queensland: Code (Qld) s 304A. Other specific examples include Codes ss 215(5), 222(4) (Qld)/ss 321(9), 321A(9) (WA). Reversal of the persuasive burden must be express for any substantive defence. The burden of proof is on the balance of probabilities.

Lack of Will and Accident

CHAPTER 11

THE SCHEME OF THE CODES

11.1 Two linked defences are created by the Criminal Codes of Queensland and Western Australia — lack of will and accident. First, a person is not criminally responsible for 'an act or omission' occurring 'independently' of the exercise of the person's 'will': Codes s 23(1)(a) (Qld)/s 23A (WA). Alternatively, a person is not criminally responsible for 'an event' occurring by 'accident': Codes s 23(1)(b) (Qld)/s 23B (WA). For both these defences, the evidentiary burden lies on the accused: see **2.13, 10.9**.

The basic relationship between the two defences was established by the High Court in *Kaporonovski v R* (1973) 133 CLR 209 at 231–2; 1 ALR 296. The judgment of Gibbs J has been accepted as authoritative on the distinction between 'act' in the defence of lack of will and 'event' in the defence of accident. His view was that 'act' refers to physical actions; 'event' refers to the consequences of those actions — such as death or injury.

A defence of lack of will means that the relevant physical actions were not under the mental control of the accused: see **11.3**. A defence of accident means that the consequences of those actions were neither foreseen nor foreseeable: see **4.25**.

11.2 The defences of lack of will and accident are subject to express qualification in cases where negligent acts or omissions are in issue.

- The opening words of Code s 23(1) (Qld) make the defences 'subject to the express provisions of this Code relating to negligent acts or omissions'.
- The opening words of both Code ss 23A and 23B (WA) make the defences 'subject to the provisions in Chapter XXVII and section 444A relating to negligent acts and omissions'.

If unwilled conduct is due to negligence, there may be liability for causing death or injury under the duty-creating provisions of ss 285–290 (Qld)/ss 262–267, 444A (WA). For example, if a driver falls asleep at the wheel and kills someone, the immediate cause of death will be unwilled. Nevertheless, the driver will commit manslaughter if it was criminally negligent to fall asleep and the criminal negligence was a cause of the death: see the discussion in *Jiminez v R* (1992) 173 CLR 572 at 578–80, 587–8; 106 ALR 162.

A defence of accident is unnecessary for a person who is accused of an offence on the basis of negligence alone (without any intentional violence). The practical effect of the qualification

respecting negligence is that such an accused has the benefit of the special test for criminal negligence: see 4.21–4.24; 4.33. There is no liability just because a death or injury was foreseen or foreseeable. Liability depends on the accused having been grossly negligent.

LACK OF WILL

11.3 The High Court has treated the requirement for will under the Codes as being substantially the same as the common law requirement for conduct to be voluntary: see *R v Falconer* (1990) 171 CLR 30; 96 ALR 545 at 11.13C.

The requirement for will or voluntariness is a requirement for the act or omission to be under the mental control of the person. This means that the conscious mind of the person must have directed the act or, in the case of an omission, must have been able to direct the required act: see the discussion of capacity to control action in *Falconer* (11.13C), above.

The requirement of will precludes the imposition of any scheme of vicarious liability under the Codes: *Grain Sorghum Marketing Board v Supastok Pty Ltd* [1964] Qd R 98 (21.17C); see also 21.7.

11.4 Will or voluntariness is a necessary but not always a sufficient condition for criminal responsibility. A person may act voluntarily without appreciating the nature or consequences of the conduct, and without being at fault for this lack of awareness. Therefore, a person who acts voluntarily may still have a defence of accident under the Codes s 23(1)(b) (Qld)/s 23B (WA) or a defence of reasonable mistake under the Codes s 24 or a defence of lack of intent where intent is an element of the offence.

The relationship between will and awareness was misunderstood in the joint judgment of Mason CJ, Brennan and McHugh JJ in *Falconer* at 11.13C. They suggested that the notion of voluntariness or will 'imports a consciousness in the actor of the nature of the act and a choice to do an act of this nature'. This was said to mean that, in a case of shooting, there would have to be a choice to discharge the gun. This is, however, incorrect. Where A shot B, having deliberately pulled the trigger believing the gun was unloaded, the proper defence to a charge of manslaughter or wounding would not be one of lack of will. The shooting would be willed if a conscious decision was made to pull the trigger. The defence should be either accident under s 23(1)(b) (Qld)/s 23B (WA) or lack of criminal negligence, depending on whether or not the conduct of the accused amounted to intentional violence: see 4.21–4.24, 5.22.

11.5 Unwilled or involuntary conduct can occur in various ways. One of the simplest ways is through external force or circumstances. If A pushes B against C, the assault upon C is committed by A and not B. The application of force to C is not under the mental control of B. See *Ugle v R* [2002] HCA 25; (2002) 211 CLR 171; 189 ALR 22, where a murder conviction arising from a fight was quashed because the trial judge had not directed the jury to consider a defence of lack of will, based on the possibility that the deceased had impaled himself on the knife held by the accused. See also *O'Sullivan v Fisher* [1954] SASR 33, where it was held that a person who was forcibly and unlawfully taken to a public place could not be convicted of an offence of being intoxicated in that place.

External factors can also make an omission unwilled. For example, in *Kilbride v Lake* [1962] NZLR 590, a conviction for an offence of not displaying a warrant of fitness on a vehicle was quashed. The case was decided on the basis that the appellant had displayed the warrant but it had become detached while he was away from the vehicle. The conduct element

of the offence was essentially omitting to display a warrant. The omission was held to be beyond the control of the appellant since there was no opportunity for him to replace the warrant.

11.6 Reflex action has sometimes been treated as unwilled: see the observations of Kirby and Callinan JJ in *Murray v R* [2002] HCA 26; 211 CLR 193; 189 ALR 40 (11.14C); see also *Falconer* (11.13C), where reflex action was offered as an 'obvious' example of lack of will. Reflex action must be distinguished from spontaneous action. Action is not unwilled merely because it is directed by a mind working quickly and impulsively: see *Ryan v R* (1967) 121 CLR 205 at 246 per Windeyer J, discussed by Gaudron J in *Murray*, above, at 11.14C.

11.7 A third way in which unwilled conduct can occur is where some mental disorder produces a state of 'automatism' under which the accused's conduct is directed by the unconscious mind: see, for example, *Cooper v McKenna* [1960] Qd R 406, where the automatism was caused by a physical blow, and *Falconer* (11.13C) where it was alleged to have been caused by a psychological blow.

Section 23(1)(a) (Qld)/s 23A (WA) must be read together with the sections relating to insanity and intoxication: Codes ss 27, 28. Cases of alleged automatism will only be determined under s 23(1)(a) (Qld)/s 23A (WA), and thus provide a complete defence, if the condition is caused by an external factor rather than an abnormal mind, and only if the external cause is not intoxication. Where lack of will is caused by a mental abnormality, the person will receive the special verdict of not guilty on account of unsoundness of mind and be liable to detention: see Chapter 17. Where lack of will is caused by intoxication, s 28 may nevertheless make the person liable for some offences: see Chapter 18.

In *Hawkins v R* (1994) 179 CLR 500; 122 ALR 27, the High Court (at 510) ruled that evidence of mental disease that is incapable of supporting a finding of insanity is inadmissible and irrelevant on the issue of voluntariness.

11.8 There was at one time uncertainty over the meaning of the word 'act' in the requirement in s 23(1)(a) (Qld)/s 23A (WA) for an act to be willed. There were two views, known as the 'narrow theory' of act and the 'broad theory'. The narrow theory is now established as the correct one. On this theory, 'act' is interpreted as referring to physical movements: see *Kaporonovski* (1973) 133 CLR 209 at 231–2; 1 ALR 296; *Falconer* at 11.13C. The consequences of acts (other than perhaps those which are so close and inevitable that they can be regarded as part of the movement itself — see *Falconer*) fall within the notion of an 'event' under s 23(1)(b) (Qld)/s 23B (WA). The broader view was that consequences should generally be treated as part of the notion of an 'act'. If this view were to prevail, the requirement for an act to be willed could not be confined to a requirement for it to be under the person's mental control: 'will' would have to mean something like 'intent'. This broad theory of the meaning of 'act' was rejected in *Kaporonovski*.

11.9 Determining the relevant 'act' for the purposes of the defence has continued to cause difficulty in cases where a series of willed acts involving a gun has culminated in a shooting alleged to be unwilled. See *Murray* (11.14C), where one of the grounds of appeal from a murder conviction was that the jury had not been directed about the defence of lack of will. The appellant admitted pointing a loaded shotgun at the deceased but claimed that his purpose had just been to cause fear and that he had not meant to fire the gun. There was a suggestion that he might have pulled the trigger as a reflex action after receiving a hit on the head. The members

of the High Court split over the relevant 'act'. For Gaudron, Kirby and Callinan JJ, the jury could have concluded that the relevant 'act' was the depression of the trigger or the discharge of the gun. It was then a question for the jury as to whether this act was unwilled. For Gummow and Hayne JJ, however, the movements of the appellant had to be '*taken as a whole*' and there was no basis for concluding that these movements, as a whole, were unwilled. See also *Agnew v R* [2003] WASCA 188 at [42], where Murray J said that a shooting could be willed 'even if that final movement of the trigger finger was itself a reflex action or convulsive movement'.

The approach taken by Gummow and Hayne JJ in *Murray* is susceptible to different interpretations. Perhaps they could be taken to mean only that pulling the trigger could still be willed even if it was spontaneous: see the observations of Windeyer J in *Ryan*, discussed in 11.6. They would then be making a point about the nature of some acts that might be labelled 'reflex' but which would be willed. This interpretation does not explain the reference to a set of movements '*taken as a whole*'. The reference suggests that a set of movements could be characterised as willed in total despite the final element being unwilled.

The High Court allowed the appellant's appeal in *Murray* on a different ground altogether, so that there was no need to resolve the difference of opinion over the defence of lack of will. Gaudron, Kirby and Callinan JJ might be viewed as taking the more conventional approach to the defence. It may be worth noting that this approach would not necessarily exclude all criminal responsibility for a death resulting from an unwilled shooting. The earlier willed act of pointing a loaded gun might well be held to be criminally negligent, so that there could be a conviction of manslaughter on that basis. The defence of lack of will is concerned with criminal responsibility for acts, not results, and more than one act may be held to have caused a death.

11.10 Criminal law recognises a presumption of normal mental capacity, including the capacity to control one's actions: see *Bratty v A-G for Northern Ireland* [1963] AC 386; [1961] 3 All ER 523, quoted in *Falconer* at 11.13C. The effect of this presumption is that an accused who bases a defence of lack of will on some mental disorder carries an evidentiary burden to put his or her mental capacity in issue. The prosecution ultimately carries the persuasive burden to prove will. Yet, the persuasive burden need only be discharged if the accused has first discharged the evidentiary burden: see *Falconer*. In *Falconer*, some judges urged that lack of will for the purposes of s 23(1)(a) (Qld)/s 23A (WA) should also have to be proved by the accused (as is the case with insanity, under s 26). This argument was rejected by the majority: see, further, 2.5.

In *Falconer*, a variety of expressions were used to convey the idea that the law presumes mental capacity in the absence of evidence to the contrary: 'an inference of fact', 'a matter of human experience', an 'evidentiary presumption', and an 'evidentiary onus'. References to a presumption or onus more accurately describe the position.

ACCIDENT

11.11 The scope of the defence of accident was analysed earlier in relation to the offence of manslaughter: see 4.21–4.28. The rules governing the defence are the same whatever offence is in issue. To qualify as an accident for the purposes of s 23(1)(b) (Qld)/s 23B (WA), an event must neither have been foreseen by the accused as a possible outcome nor have been foreseeable as a possible outcome to an ordinary person in the situation faced by the accused: see *R v Taiters* [1997] 1 Qd R 333 at 4.46C.

However, events are generally not accidents if they are unforeseen and unforeseeable because of some pre-existing condition rather than because of some complex chain of events. The 'eggshell skull' rule so called is a common law rule that an offender takes a victim as they are, with any defects or abnormalities that may make the victim more susceptible to harm than the ordinary person. Statutory versions of the 'eggshell skull' rule have been enacted in both Queensland and Western Australia for instances of causing either death or grievous bodily harm: Codes s 23(1A) (Qld)/s 23B(3)–(4) (WA). These provisions appear to apply to any victim, whether or not there was an intention to attack that particular person. See the discussion in 4.28.

As to what constitutes a defect, weakness or abnormality see *R v Steindl* [2001] QCA 434; (2002) Qd R 542. In that case, the victim was punched in the face causing a laser lens implant to be displaced and protrude from the pupil. McMurdo P held that the words should be given their current meaning consistent with changing technology. Thomas J (Davies JA disagreeing) held that the term abnormality includes transplanted organs, scars natural or surgical and fragments of shrapnel or coins lodged in the digestive system.

11.12 In *Taiters* (4.46C), above, the following jury instruction was recommended:

> The Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome.

This states the law on the defence of accident in positive terms. It avoids incorporating the double negative that would probably follow from starting with the phrase 'a person is not criminally responsible for …' from s 23 itself. The jury instruction would need to be supplemented in any case in which the 'eggshell skull' rule was in issue.

11.13C **R v Falconer**
(1990) 171 CLR 30; 96 ALR 545
High Court of Australia

Mason CJ, Brennan and McHugh JJ: Mary Sandra Falconer was convicted before the Supreme Court of Western Australia of the wilful murder of her husband Gordon Robert Falconer on 9 October 1988. The deceased was killed when Mrs Falconer fired a shotgun, the blast of which struck the deceased at close quarters. … In the Court of Criminal Appeal of Western Australia, Malcolm CJ stated in summary the effect of the evidence:

(a) the appellant had separated from her husband for the reason, among others, that he had a history of using violence towards her, including hitting her and grabbing her by the hair;
(b) the appellant had recently discovered that her husband had sexually assaulted two of their daughters and this had caused her great stress;
(c) criminal charges had been preferred against the appellant's husband and she had shown an increasing level of fear at what he might do to her or to her daughters;
(d) in the week preceding the shooting she had demonstrated fear, depression, emotional disturbance and an apparently changed personality;
(e) on the day of the shooting, according to the appellant, her husband had:
  (i) entered the appellant's house unexpectedly;
  (ii) sexually assaulted the appellant;

(iii) demonstrated dramatic changes of mood;
(iv) taunted her with the suggestion that neither the daughters nor the appellant would be believed in court; and
(v) reached out at her apparently to grab her by the hair.

From that point the appellant said she remembered nothing until she found herself on the floor with her shotgun by her and her husband dead on the floor nearby.

At the trial, after the Crown case had closed and Mrs Falconer and other defence witnesses had given evidence, her counsel intimated that he desired to call evidence from two psychiatrists with a view to showing that Mrs Falconer's conduct was consistent with non-insane automatism, that is to say, that she was not criminally responsible for her husband's death by reason of the first limb of the first paragraph of s 23 of the Criminal Code of Western Australia (hereafter the Code) …

Objection being taken to the admissibility of the psychiatric evidence for the purpose of showing that the shooting had occurred 'independently of the exercise of [the] will', the learned Commissioner received the evidence on voir dire. Dr Schioldann-Nielsen was directed to the evidence which allegedly led up to the shooting, and was then asked what effect that could have had on Mrs Falconer. He replied:

> I think Mrs Falconer could have panicked and that could have been the mechanism which released the full-blown dissociative state, so to speak.
>
> To the point where she would act? — Where part of her personality would be sort of segmented and not functioning as a whole and she became disrupted in her behaviour, without awareness of what she was doing.

Later, he explained:

> … in classical major dissociative state they can be acting normally, quietly normally, or purposefully or whatever, so that if there had been witnesses, wherever it happens, they would say, 'This person appears normal enough to me'.
>
> As in the case of a person concussed but not unconscious? — Yes.
>
> In that situation you say the act that was done would be, in the medical sense, involuntary? — Yes, that is consistent.
>
> Of course, notwithstanding all of your hearing of evidence nor all of what you have said or spoken to Mrs Falconer, you don't proffer any opinion as to what may have occurred that night? — No. We weren't there …

Dr Finlay-Jones, when asked about automatism, said:

> I believe it is possible to act in an automatic fashion without any evidence of internal or external stress. For example, somebody might be sitting listening to you cross-examining and knitting at the same time and may not be consciously aware of the stitches they are casting. It's unlikely, though, that they would sit and listen to you cross-examine and unconsciously pull the trigger of a gun at the same time.

His opinion was that psychological stress was insufficient by itself to produce the state known as dissociation: there had to be psychological conflict as well. He found the history of the instant case to raise that possibility. He said:

> I think she was faced with an intolerable dilemma at that moment, that on the one hand it is undeniable that he is, to use her words, 'a filthy bastard and yet I love him. Possibly by extension that makes me filthy too.' She is faced with what I would call a psychological conflict. I think it is in that setting of psychological conflict that a person is capable of losing control of the mind, of acting — perhaps quite briefly — in an automatic way. I think that her inability to remember what happened next is consistent with that.

Dr Finlay-Jones had examined Mrs Falconer and, from the history she had given him, he thought that the feeling that she described after the shooting was over was 'consistent with the reports of people who have been in dissociated states'.

Both Dr Schioldann-Nielsen and Dr Finlay-Jones were of the opinion that Mrs Falconer was, at the time of their respective interviews with her, 'completely sane'. Dr Finlay-Jones expressly and Dr Schioldann-Nielsen by implication held the opinion that, from the psychiatric viewpoint, she was completely sane at the time of the shooting.

The learned Commissioner rejected the evidence, but the Court of Criminal Appeal held that the evidence was admissible on the issue of 'voluntariness', that is, on the issue whether the act causing Mr Falconer's death was a willed act. The court allowed Mrs Falconer's appeal against conviction and ordered a retrial. The Crown seeks special leave to appeal against that order, submitting that the questions of law raised by the learned Commissioner's ruling and the judgments in the Court of Criminal Appeal are of far-reaching importance in the administration of the criminal law. We agree …

The present case arises under the Code which is identical in its relevant provisions with the original form in which the Queensland Criminal Code was enacted. The author of those Codes, Sir Samuel Griffith, was not conscious of any divergence between the provisions he had drafted and the common law, except in respect of incapacity to control actions in s 27. Of course, that is not conclusive of the meaning of any particular provision in the Codes, but it is an indication that the problem which arises now in a statutory context may be answered in a way which answers the corresponding problems under the common law. Though special leave is granted to the Crown only in exceptional cases, this case raises exceptionally important questions and special leave should be granted to consider them.

…

The first limb of s 23 requires the act to be willed; the second limb relates to events consequent upon the act: it excludes from criminal responsibility consequences of the act which are not only unintended but unlikely and unforeseen: see *Vallance v R* (1961) 108 CLR 56; *Mamote-Kulang v R* (1964) 111 CLR 62. In wilful murder, the offender must have a specific intention to cause the death of the deceased or of some other person (the Code, s 278) at the time when he does the act which causes the death; death is not the 'act' but the intended consequence. It follows that, under the Code as under the common law, it is the death-causing act which must be willed, not the death itself: see *Timbu Kolian v R* (1968) 119 CLR 47. The 'act' in s 23 has been differently described in judgments delivered in this court: see *Vallance*; *Timbu Kolian*; *Kaporonovski v R* (1973) 133 CLR 209. In our opinion, the true meaning of 'act' in s 23 is that which Kitto J in *Vallance* attributed to 'act' in s 13(1) of the Tasmanian Code, namely, a bodily action which, either alone or in conjunction with some quality of the action, or consequence caused by it, or an accompanying state of mind, entails criminal responsibility: see at 64. That meaning accords with the judgment of Menzies J in *Vallance* (at 71–2) and was adopted by Gibbs and Stephen JJ in *Kaporonovski*, at 231 and 241, respectively. That view distinguishes between 'act' and 'event' in s 23, so that

it is immaterial to the operation of the first limb of the section that the actor's mental state does not encompass the consequences of what he is doing.

In the present case, what is the 'act' to which the first limb in s 23 refers? Is it merely a muscular movement of the accused's body (the contraction of the trigger finger), or is it the discharging of the loaded gun, or is it the entirety which commences with the contraction of the trigger finger and ends with the fatal wounding of the deceased? In one sense, it can be said that the discharge of a gun is the consequence of a bodily movement of contracting the trigger finger. In our opinion, however, a consequence which the bodily movement is apt to effect and is inevitable and which occurs contemporaneously with the bodily movement is more appropriately regarded as a circumstance that identifies the character of the 'act' which is done by making the bodily movement: cf per Barwick CJ in *Timbu Kolian*, at 53. Adopting the meaning of 'act' expressed by Kitto J in *Vallance*, the act with which we are concerned in this case is the discharge by Mrs Falconer of the loaded gun; it is neither restricted to the mere contraction of the trigger finger nor does it extend to the fatal wounding of Mr Falconer.

Mrs Falconer is criminally responsible for discharging the gun only if that act were 'willed', that is, if she discharged the gun 'of [her] own free will and by decision' (per Kitto J in *Vallance*, at 64) or by 'the making of a choice to do' so (per Barwick CJ in *Timbu Kolian*, at 53). The notion of 'will' imports a consciousness in the actor of the nature of the act and a choice to do an act of that nature. In *Mamote-Kulang* (at 81) and *Timbu Kolian* (at 64) Windeyer J added 'some element of intention' to the notion of will but, with great respect, such an addition might cause confusion between will and intent in the Code in much the same way as voluntariness is liable to be confused with general intent in the context of the common law: see *He Kaw Teh v R* (1985) 157 CLR 523 at 569–72. Barwick CJ was alive to the distinction between will and intent in *Ryan*. He noted that intent usually relates to consequences, whereas will relates to the act done (the deed, as his Honour calls it) the doing of which is ordinarily presumed to have been willed …

…

The language of the Code corresponds with the descriptions of the incriminated act which the Chief Justice preferred: s 23 distinguishes between a will to act and an intention to cause a result. The requirement of a willed act substantially, if not precisely, corresponds with the common law requirement that an offender's act be done with volition, or voluntarily: cf *Timbu Kolian*, at 53, 62–3. (We shall refer to the Code requirement as will and to the common law requirement as voluntariness.) The requirement of a willed act imports no intention or desire to effect a result by the doing of the act, but merely a choice, consciously made, to do an act of the kind done. In this case, a choice to discharge the gun.

In the absence of some contrary evidence, it is presumed — sub silentio, as Barwick CJ said — that an act done by a person who is apparently conscious is willed or done voluntarily. That presumption accords with, and gives expression to, common experience. Because we assume that a person who is apparently conscious has the capacity to control his actions, we draw an inference that the act is done by choice. Keeping steadily in mind that the concepts of will and voluntariness relate merely to what is done, it would be an exceptional case in which a person, apparently conscious, committed an act proscribed as an element in a criminal offence without choosing to do so — or, at the least, without running the risk of doing so. (We need not now consider criminal responsibility for the running of a risk of engaging in proscribed conduct.) The presumption that the acts of a person, apparently conscious, are willed or voluntary is an inference of fact and, as a matter of fact, there must be good grounds for refusing to draw the inference. Generally speaking, grounds for refusing to draw the

inference appear only when there are grounds for believing that the actor is unable to control his actions. Although the prosecution bears the ultimate onus of proving beyond reasonable doubt that an act which is an element of an offence charged was a willed act or, at common law, was done voluntarily (*Woolmington v The Director of Public Prosecutions* [1935] AC 462; *R v Mullen* (1938) 59 CLR 124), the prosecution may rely on the inference that an act done by an apparently conscious actor is willed or voluntary to discharge that onus unless there are grounds for believing that the accused was unable to control that act.

In *Bratty v Attorney-General for Northern Ireland* [1963] AC 386, Lord Denning said (at 413):

> … whilst the *ultimate* burden rests on the Crown of proving every element essential in the crime, nevertheless in order to prove that the act was a voluntary act, the Crown is entitled to rely on the presumption that every man has sufficient mental capacity to be responsible for his crimes: and that if the defence wish to displace that presumption they must give some evidence from which the contrary may reasonably be inferred …
>
> The presumption of mental capacity of which I have spoken is a provisional presumption only. It does not put the legal burden on the defence in the same way as the presumption of sanity does. It leaves the legal burden on the prosecution, but nevertheless, until it is displaced, it enables the prosecution to discharge the ultimate burden of proving that the act was voluntary. Not because the presumption is evidence itself, but because it takes the place of evidence. In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity.

His Lordship was not concerned to distinguish between an act and its consequence but the presumption of mental capacity of which he speaks certainly includes a capacity to control actions …

As Lord Denning pointed out in the passage quoted from *Bratty*, there is a difference between the presumption of mental capacity which is made as a matter of human experience and the legal presumption of sanity or sound mind. In this context, 'mental capacity' means the capacity of a person to control his actions and we shall so describe it in order to distinguish more clearly between the presumption which people make as a matter of human experience that a person has that capacity and the legal presumption that a person is sane or of sound mind. Section 26 of the Code makes provision for the latter presumption in these terms:

> Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.

Thus the inference, grounded in human experience, that an act done by an apparently conscious person is willed is supported by a rebuttable presumption, created by statute, that the actor is of sound mind when the act is done. Section 26 supplies what might otherwise be supplied by evidence and requires the jury to determine whether the act was willed on the footing that the accused was of sound mind when the act was done unless the accused establishes on the balance of probabilities that he was not of sound mind at the time. An accused bears no ultimate onus of proving that his act was unwilled but he does bear an evidential onus of rebutting the presumption that he had the capacity to control his actions and, if he chooses to discharge that onus by showing that he was not of sound mind, he must prove that proposition on the balance of probabilities.

The foundation for the inference that an act done by an apparently conscious actor is willed or voluntary can be removed by evidence that the actor was not of sound mind or was insane when the act was done, but there are some cases where an act can be shown to be unwilled when it is done by an actor of sound mind. To take some obvious examples: if the act be a reflex action following a painful stimulus or if it be a spastic movement, an inference that the act was willed or voluntary would not be drawn though the actor be of sound mind when the act is done. In *Bratty*, Lord Denning made the point, at 409:

> No act is punishable if it is done involuntarily: and an involuntary act in this context — some people nowadays prefer to speak of it as 'automatism' — means an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleep-walking. The point was well put by Stephen J in 1889: 'Can anyone doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing,' see *R v Tolson* [(1889) 23 QBD 168 at 187].

When an act is done by an apparently conscious actor, an inference that the act is willed must be drawn — not as a matter of law but as a matter of fact — unless it be shown that the actor, being of sound mind, has been deprived of the capacity to control his actions by some extraordinary event or unless the actor, being of unsound mind, has thereby lost the capacity to control his actions. The accused bears no ultimate onus of proving that his act was not willed, but he bears the evidential onus of rebutting the inference that his act was willed, and there is no occasion for the jury to consider the possibility of an unwilled act unless that evidential onus is discharged. The inference that an act is willed is thus supported by the presumption that all persons have the capacity to control their actions unless they be of unsound mind, and an accused bears an ultimate onus of proving that he was of unsound mind if he chooses to raise that issue …

[**Toohey J** and **Gaudron J** each delivered a separate judgment, giving a similar interpretation to the notion of voluntariness or will. **Deane** and **Dawson JJ** delivered a separate judgment agreeing generally with the reasons of **Toohey** and **Gaudron JJ**.] Additional extracts from this case, dealing with the relationship between a defence of lack of will and a defence of insanity, are presented in **Chapter 17**: see **17.42C**.

11.14C Murray v R

[2002] HCA 26; (2002) 211 CLR 193; 189 ALR 40
High Court of Australia

Gummow and Hayne JJ:

25 The appellant was charged with the murder of Tony Celap at Yarraman in Queensland. Mr Celap died in the appellant's house as the result of shots discharged from a double-barrelled shotgun while the appellant was holding the gun. Both barrels were discharged but the weapon was faulty and prone to sympathetic discharge of the second barrel on the first barrel discharging. Further, the weapon could discharge if struck but there was no evidence at trial which suggested that it was struck before it discharged the shots which killed the

deceased. There was evidence at the appellant's trial from which it was open to the jury to conclude that the appellant had, for a long time, harboured feelings of considerable animosity towards the deceased. The appellant was convicted of murder.

26 He appealed to the Court of Appeal of Queensland against his conviction. By majority (McMurdo P and Atkinson J; McPherson JA dissenting), the Court of Appeal dismissed his appeal.[23]

27 Two issues arise on the appeal to this Court. First, should the Court of Appeal have held that there was a miscarriage of justice by reason of the trial judge not directing the jury about unwilled acts and events occurring by accident? Secondly, should the Court of Appeal have held that the trial judge's directions about onus of proof were inadequate?

…

The facts

31 On the night the deceased died, he and the appellant were drinking in the bar of an hotel. The appellant bought drinks for them both and they stayed until closing time. The appellant and the deceased left the hotel together and went, by car, to the appellant's house. Less than half an hour after the hotel had closed, the appellant spoke to police by telephone and said that he had just shot a person. There was evidence from neighbours which, if the jury accepted it, suggested that the shooting occurred about five minutes after the appellant had come home with the deceased.

32 The deceased was sitting in a chair in the living room of the appellant's house when he was shot. According to the appellant, shortly after arriving home he went to the lavatory. While he was relieving himself the appellant heard the deceased, yelling to him from the living room, and offering to fight him. The appellant went to his bedroom and picked up his shotgun from under the bed. It was loaded. Holding the gun in his right hand, the appellant went into the living room. According to the appellant's account in his evidence-in-chief, as he approached the deceased, the latter:

> sort of turned around to the side and about side on as he was getting up, and his arm shot out and hit me — something hit me in the head. I had the gun; as he was starting to get up, I lifted it, I think, and it was about waist height I'd say when I got hit in the head and the gun went off.

When asked by his trial counsel why he had taken the gun with him, the appellant said that he wanted the deceased to get out of the house, that he thought the sight of the gun would frighten the deceased, and that he would frighten the deceased with it and he would go.

33 The appellant maintained this version of events in cross-examination but, in addition, acknowledged that he might have cocked the gun at the time he pointed it at the deceased. Indeed, in answer to the question 'You might have intended to point it at him cocked?' he answered 'Yes, I believe I did, yes.' When asked where his finger was, he said '[i]t would have been somewhere around the trigger guard' and that it '[c]ould well have been' on the trigger. Nonetheless, he said he could not give an answer on why the gun went off. He denied pulling the trigger deliberately.

34 When, after police were called, the appellant was examined by a doctor, he was found to have a small puncture wound on his forehead, a scratch on his nose and an abrasion on the

right chest. It may be supposed that at least the injury to the forehead was not inconsistent with the appellant's account that he was struck on the head by something thrown by the deceased but it may be doubted that the evidence at trial permitted any definite conclusion about what caused his injuries.

The trial judge's directions

35 In her directions to the jury, the trial judge told them that the prosecution had to prove that the appellant intended to kill or do grievous bodily harm. 'The question [her Honour said] is whether he had that intent at the time of the act which caused [the deceased's] death.' This, she said, was a different question from motive.

36 Leaving aside for the moment the questions about burden of proof that are presented by her Honour's repeated references to the jury 'accepting' the appellant's evidence, and her Honour's casting questions for the jury as a choice between alternatives, the general tenor of her Honour's directions can be understood as presenting three issues for the jury's consideration. The first issue to be decided by the jury was said to be whether the appellant had acted to frighten the deceased and drive him out of the house, or had intended to kill or do grievous bodily harm. The second issue was whether the deceased's death was accidental … The third issue put to the jury was described as relating to criminal negligence. Reference was made in the charge to the provision of the Queensland Code (s 289) obliging persons in charge of dangerous things to use reasonable care and take reasonable precautions to avoid danger to the life, safety and health of others. The jury was told that if satisfied that the accused had acted with criminal negligence, a verdict of manslaughter should be returned. (The relationship between provisions like s 289, homicide provisions, and provisions concerning unwilled acts and accidental events, was considered in *Callaghan v The Queen*[29] and in *Ugle v The Queen*,[30] both cases arising under the Criminal Code (WA).)

37 In considering the sufficiency of the directions given at the appellant's trial it is as well to begin by recalling the well-known statement in *Alford v Magee*[31] that a trial judge is 'charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are'. The jury is to be instructed on so much of the law as they need to know to decide *those* issues.

38 Reduced to its essentials, the first complaint of the appellant in this case is that the trial judge should have told the jury that there was an issue about whether the prosecution had proved that this was not a case where there had been an act or omission that occurred independently of the exercise of the appellant's will …

Unwilled acts and events occurring by accident

…

46 At trial, that first limb received next to no attention. Trial counsel for the prosecution submitted (in effect) that only the second limb of s 23(1) applied and trial counsel for the appellant did not demur, either when the matter was raised before the judge began her charge or later, by way of exception to what had been said. Nor did trial counsel for the appellant raise the subject in his address to the jury, focusing instead upon other aspects of the case. Ordinarily, that course of events at trial should be enough to demonstrate that an unwilled act was not an issue in the trial. If it had been, counsel would be expected to address the jury about it and both counsel would be bound to draw the trial judge's attention to relevant authorities touching the issue.

47 It is as well, however, to go on to explain why there was no issue about the operation of the first limb of s 23(1). In order to do so, it is necessary to identify the relevant 'act'.

48 Consideration of the several cases in this Court in which questions about unwilled acts have been examined[45] reveal some of the difficulties that, if not implicit in the concept of unwilled acts, at least are likely to arise in dealing with that concept. Prominent among those difficulties is understanding what is the relevant 'act', or in this case, the relevant 'death-causing act'.[46] Although it may now be regarded as clear that in this case, as in *Falconer*, the death-causing act was the discharging of the loaded shotgun,[47] why is that the relevant 'act' and what exactly does it encompass?

49 In deciding what is the relevant act, it is important to avoid an overly refined analysis. The more narrowly defined is that 'act', the more likely it is that there will be thought to be some question about whether the accused willed that act. Or, to put the same point another way, the more precise the identification of a particular physical movement as the 'death-causing act', the more likely it is that it will be harder to discern a conscious decision by the actor to make that precise and particular physical movement. As H L A Hart pointed out[48] more than 40 years ago, a theory which splits an ordinary action into three constituents — a desire for muscular contractions, followed by the contractions, followed by foreseen consequences — is a theory based on a division quite at variance with ordinary experience and the way in which someone's own actions appear to that person. As Hart said,[49] 'The simple but important truth is that when we deliberate and think about actions, we do so not in terms of muscular movements but in the ordinary terminology of actions.'

50 The difficulty of over-refinement can be exemplified by comparison of this case with the facts in *Ryan*. In *Ryan*, Windeyer J characterised what had happened as Ryan pressing the trigger[50] 'in immediate response to a sudden threat or apprehension of danger'. In this case, the appellant said that the weapon discharged immediately upon his being struck by something the deceased threw at him. There seems little, if any, relevant distinction between the two descriptions. Of both it may be said that:[51]

> The latent time [between threat, or assault, and firing the weapon was in each case] no doubt barely appreciable, and what was done might not have been done had the actor had time to think.

But to identify the 'act' as confined to that which was the immediate physical movement, a dorsi-flexion of the finger,[52] made in response to a perceived threat, or in this case the alleged blow, so confines the time for choice by the actor as to invite the conclusion that the actor did the particular act without thought, and therefore without willing it. That is altogether too narrow a view of what is the relevant 'act' which, in this case, would divorce the contraction of the finger from the admittedly deliberate pointing of a loaded and cocked weapon at the deceased and its discharge. So to confine the understanding of the relevant 'act' would be to adopt an approach that over-refines the application of the criminal law, introducing nice distinctions that are not based upon substantial differences.

51 That is why the 'act' to which s 23(1) refers is not restricted to the appellant's contracting his trigger finger. But what is encompassed by saying that it is the appellant's discharging the loaded gun that must be willed? It now seems clear from *Falconer*[53] that the 'element of intention' which Windeyer J (in both *MamoteKulang v The Queen*[54] and *Timbu Kolian v The Queen*[55]) said should be added to the notion of will may not always be helpful, but there is

much force in the views expressed by Windeyer J in *Ryan*[56] to the effect that the language of 'will' and 'intellect', 'unintentional' and 'inadvertent', is necessarily imprecise. As Barwick CJ said in *Timbu Kolian*,[57] 'we lack a sufficiently flexible and at the same time precise vocabulary in this area of discourse'. In the end, it must be accepted that the distinctions with which the cases grapple may be founded upon overly simple understandings of the way in which human beings act which are understandings that are not easily applied to cases at the margin.

52 In a case like the present, we do not think it useful to examine the problem by reference to presumptions that an act done by a person who is apparently conscious is willed or done voluntarily.[58] Approaching the problem in that way may reveal which party must raise the issue to have it considered – the so-called evidentiary burden of proof. It may even help the tribunal of fact to decide what inferences can, or should, be drawn from evidence that the accused was conscious at the time of the act in question. But it is not an approach which tells the tribunal of fact how or when that tribunal may reach a conclusion contrary to the starting point provided by the presumption.

53 Rather than adopting approaches such as these, it is necessary to focus upon the relevant 'act'. Once it is recognised that the act is the act of discharging the loaded shotgun it can be seen that the act comprises a number of movements by the appellant that can be identified as separate movements. He loaded the gun; he cocked it; he presented it; he fired it. Some of these steps may be steps to which the appellant would say that he had turned his mind; others may not have been accompanied by conscious thought. It is by no means unknown for someone to carry out a task (like, for example, loading a weapon) without thinking about it, if it is a task the person has undertaken repeatedly. In some circumstances, the trained marksman may respond to a threat by firing at the source of that threat as soon as the threat is perceived, and may do so without hesitating to think. But in neither example could it be said that the act (of loading or firing the weapon) was an unwilled act. Similarly, once it is recognised that the relevant act in this case is the act of discharging the loaded shotgun, it can be seen that whether or not particular elements of that composite set of movements (load, cock, present, fire) were the subject of conscious consideration by the appellant, there is no basis for concluding that the set of movements, *taken as a whole*, was not willed. There was no suggestion of disease or natural mental infirmity; there was no suggestion of sleep walking, epilepsy, concussion, hypoglycaemia or dissociative state.[59]

…

[Despite their conclusions respecting s 23, **Gummow** and **Hayne JJ** quashed the conviction and ordered a retrial on the ground that the jury had been misdirected with respect to the burden of proof.]

Gaudron J: …
9 To describe the act causing death in a firearms case as the discharging of the firearm is to conceal a number of difficulties. Thus, in *Vallance v The Queen*, Windeyer J said that 'discharging a firearm is, of course, a complex act, involving loading the piece, cocking it, presenting it, pressing the trigger'.[5] Even so, it might, with equal accuracy, be described as pressing the trigger of a loaded and cocked gun.

10 The difficulties associated with identifying the act causing death in a firearms case may be seen in *Ryan v The Queen*,[6] a fatal shooting case involving a charge of murder under the Crimes Act 1900 (NSW) but which, otherwise, bears strong similarity to the present case. The accused in that case pointed a loaded and cocked rifle at a service station attendant

and, while still pointing the rifle with one hand, tried to tie the attendant up with the other. The attendant moved suddenly and the accused's finger pressed the trigger without, on the accused's account, any intention on his part. In that case Taylor and Owen JJ said:

> the wounding and death [of the service station attendant] were caused by a combination of acts … includ[ing] the loading and cocking of the rifle, the failure to apply the safety catch, the presentation of the rifle … with the finger … on the trigger in circumstances in which an attempt at resistance might well have been expected.[7]

Their Honours added that it was 'impossible to isolate the act of pressing the trigger … and argue that it, alone, caused the wounding and death'.[8]

11 In *Ryan*, Windeyer J identified the act causing death as 'the discharging of a loaded firearm when it was pointed towards the man who was killed'.[9] On the issue whether it was the act of the accused, his Honour expressed the view that phrases such as 'reflex action' and 'automatic reaction' have no application where a person 'has put himself in a situation in which he has his finger on the trigger of a loaded rifle levelled at another man'.[10] His Honour explained that if the person concerned 'then presses the trigger in immediate response to a sudden threat or apprehension of danger … his doing so is … a consequence probable and foreseeable … and in that sense a voluntary act'.[11] His Honour added that 'what was done might not have been done had the actor had time to think'[12] but questioned the notion that the act was involuntary 'merely because the mind worked quickly and impulsively'.[13]

12 When regard is had to the different approaches taken to identifying the act causing death in *Ryan*, the wisdom of what was said by Dixon CJ in *Vallance* becomes apparent. In *Vallance*, Dixon CJ expressed the view that 'it is only by specific solutions of particular difficulties raised by the precise facts of given cases that the operation of such provisions as s 13 [of the Tasmanian Criminal Code] can be worked out judicially'.[14]

13 There is another aspect to s 23(1)(a) of the Code that should be noted. Although it is accurate to speak in murder cases of the 'act' referred to in s 23(1)(a) as the 'act causing death', it is for the jury to determine what act or acts were done by the accused and whether they or any of them caused death. Thus, in *Ryan*, Barwick CJ expressed the view that, on the facts of that case, 'the jury could choose the presentation of the gun in the circumstances [in which it was presented] or its subsequent discharge as the act causing death'.[15] And on the view that the act causing death was the discharge of the gun, his Honour allowed that there were at least four possibilities, namely:

1 voluntary discharge with the intention of harming the deceased;
2 voluntary discharge with the intention only of frightening the deceased;
3 voluntary discharge in panic with no specific intention either to do harm or to frighten the deceased;
4 discharge by the pressing of the trigger in a reflex, convulsive movement.[16]

His Honour expressed the view, in relation to the fourth of those possibilities, that the accused's description of the killing as an 'accident' was inconsistent with an admission that the gun was voluntarily discharged.[17]

14 Subject to two matters which will be dealt with shortly, I think the analysis by Barwick CJ in *Ryan* is legally and logically correct and that that analysis is applicable in this case. The first, as has already been noted, is that *Ryan* was concerned with a charge of murder under the

Crimes Act 1900 (NSW). At the relevant time, s 18(1) of that Act defined murder to include an act causing death that was done with reckless indifference to human life or done in an attempt to commit or during or immediately after the commission of an act obviously dangerous to human life.[18] Thus, the act causing death could be identified by Taylor and Owen JJ as 'the presentation of the [loaded and cocked] rifle … with the finger of the [accused] on the trigger in circumstances in which an attempt at resistance might well have been expected'.[19]

15 Unlike s 18(1) of the Crimes Act 1900 (NSW), as it stood at the time of the decision in *Ryan*, the definition of murder in s 302(1) of the Code[20] contains no provision permitting a person to be convicted of murder simply for an act done with reckless indifference to human life or done in an attempt to commit or during or immediately after the commission of an act obviously dangerous to human life. Thus, if the act causing death in this case were to be identified as simply presenting the loaded shotgun, that might constitute manslaughter by negligent act,[21] but it would not constitute murder.[22]

16 The second matter that should be noted with respect to the analysis undertaken by Barwick CJ in *Ryan* concerns his Honour's acceptance of the possibility that, in that case, pressure was applied to the trigger by a reflex or automatic motor action. The question whether a reflex or automatic motor action is an involuntary or unwilled act is a question for the jury. And on that issue, there is much to be said for the view expressed by Windeyer J in *Ryan* that the pressing of a trigger in response to a sudden threat or apprehension of danger is a probable and foreseeable consequence of presenting a loaded gun and a jury might, on that account, find it to be a voluntary act.

…

20 Although the trial judge's directions were not entirely explicit, it is clear that the jury was directed that if it accepted the appellant's version which, as earlier indicated, raised the possibility either that the gun discharged without the application of pressure to the trigger or that pressure had been applied by reflex or automatic motor action, it should acquit him of murder and consider whether or not he was guilty of manslaughter on the basis of criminal negligence.

21 In framing the matters which the jury had to decide by reference to the appellant's version of events, the trial judge sufficiently raised the questions whether the gun discharged without the application of pressure to the trigger and whether it was discharged by the appellant in a reflex or automatic motor action, treating the latter possibility, in effect, as an unwilled act. There was thus no need for her Honour to direct the jury with respect to that issue. Accordingly, no miscarriage of justice was occasioned by the failure to give such directions and the argument for the appellant to the contrary must be rejected.

22 Before leaving the question of unwilled act, it is appropriate to observe that the directions given by the trial judge were, in one sense, unduly favourable to the appellant. They excluded from the jury's consideration the question whether, if the trigger was pressed as a result of a reflex or automatic motor action, that was an unwilled act. They also withdrew from the jury's consideration the possibility that the accused might be guilty of manslaughter on a basis other than criminal negligence.

…

[Despite her conclusions respecting s 23, **Gaudron J** joined **Gummow** and **Hayne JJ** in quashing the conviction and ordering a retrial on the ground that the jury had been misdirected with respect to the burden of proof.]

Kirby J: …

Directions on unwilled acts

82 *Application of the Code, s 23(1)(a)*: It is proper to acknowledge that doubts have been expressed in earlier cases as to whether, in the nature of the components of murder under the Code, s 23(1)(a) could have any application. The central reason for such doubts is that, for murder under s 302(1)(a) of the Code, reference to acts 'independently of the exercise of the person's will' is seen by some to contradict the necessity of establishing 'intention' as an express ingredient of the offence. Such doubts were stated in *R v Mullen*[104] both by Latham CJ[105] and by Dixon J.[106]

83 The same opinion has been reflected in opinions of judges of the Queensland Court of Appeal, very experienced in the meaning and application of the Code.[107] Obviously, considerable respect must be paid to these opinions. However, I agree with Callinan J[108] that, neither as a matter of legal authority nor as a matter of the proper understanding of the language of the Code, is s 23(1)(a) ousted in the case of a charge of murder brought under s 302(1)(a) of the Code.[109]

84 First, the opinions of Latham CJ and Dixon J in *Mullen* were not part of a rule established by that decision. They are not, therefore, binding in this case.

85 Secondly, it is difficult, as a matter of principle, to accept the proposition that s 23(1)(a) has no application to a charge of murder simply because that offence postulates intention as an element. The provisions of that paragraph are, in their terms, applicable to a great number and variety of offences mentioned in the Code for most of which the existence of the requisite intent is an essential legal ingredient. It seems unlikely that a general provision, stated at the outset of the Code, would be inapplicable to all of those offences simply because intent on the part of the accused is an ingredient of each offence.

86 Once the necessity to read s 23(1)(a) with the multitude of offences provided by the Code (including that stated in s 302(1)(a)) is acknowledged, it is crucial to respect the relevant delineation of functions that must be observed in a trial by jury. In such a trial, the applicable law is explained by the judge but factual disputes are reserved to the jury. In the present case, it was necessary for the prosecution to establish the existence at the relevant time of the intention to cause the death of the person killed, mentioned in s 302(1)(a). Appropriate instructions were given by the judge on that issue. But if, on the facts, s 23(1)(a) arguably applied, it was the accused's right to have that paragraph's provisions, in their particularity, explained to the jury as the Code contemplates. It might be said that par (a) gives added emphasis to the issue of the will of the accused that is already reflected to some degree in the definition of the offence of murder. But by directing the collective mind of the jury specifically to the exemption from criminal responsibility for specified 'acts' or 'omissions', s 23(1)(a) reiterates and reinforces the obligation of the prosecution to prove beyond reasonable doubt the 'act or omission' upon which it relies. It requires the prosecution to negative the proposition that any such 'act or omission' occurred independently of the exercise of the accused's will.

87 In a sense, the ingredient of intention, included in the definition of murder in s 302(1)(a) of the Code, identifies the prosecution's obligations broadly or globally. On the other hand, the excuse from criminal responsibility stated in s 23(1)(a) focuses the mind of the decision-maker more narrowly and specifically on the 'acts or omissions' that resulted in the offence. Both the provisions appear in the Code. The accused is entitled to whatever benefits,

in the conclusions of the jury, may be derived from each.[110] In some cases, depending on the evidence, there will be no additional relevance of s 23(1)(a) of the Code. But in the present case, where the factual dispute concerned the last 'act' that caused the death of the deceased (the pulling of the trigger or whatever other 'act' caused the appellant's gun to discharge) it was necessary for the trial judge to leave the provisions of s 23(1)(a) to the jury. She was bound to do so because the provision was clearly relevant to the factual case that the appellant was presenting for the jury's consideration and which the prosecution had labelled 'a pack of lies'.

88 The appellant did not contest the 'acts' anterior to the final (or 'death-causing') act that caused his gun to discharge. But what he did posit was the real possibility that the final and ultimately death-causing 'act' had occurred independently of his will. That possibility was arguably consistent with the appellant's being struck on the forehead in a way that might have caused the trigger of the gun to have been depressed involuntarily. If that were the conclusion of the jury, on the facts, it would (subject to consideration of criminal negligence) have been open to the jury to decide that the appellant was not criminally responsible for the 'act' in question because the ultimately fatal 'act' had occurred 'independently of the exercise of [the appellant's] will'.

89 I agree with Gaudron J that the identification of what was the relevant 'act' and whether it was willed or not were questions for the jury.[111] They were not questions of law for the judge. Even if the final 'act' was a reflex action, it only took on its fatal character because of earlier acts of the appellant dangerous to human life. Thus, I agree with Gaudron J that if the jury came to the conclusion that the ultimate 'act' that led to the depression of the trigger of the loaded gun pointed at the deceased could be described as a 'reflex' act, it was still a question for the jury whether that act was properly to be viewed as having occurred 'independently of the exercise of the [appellant's] will'.

90 A conclusion that s 23(1)(a) arguably applied to the evidence in the case gives rise to the necessity to instruct the jury on the provisions of the Code relating to negligent acts and omissions.[112] As it is common ground that the trial judge did not give the jury instruction about the application of s 23(1)(a) and as, in my view, such instruction was obligatory in the circumstances, the trial departed from the requirements of the law.

91 *Inapplicability of the proviso*: The Director of Public Prosecutions argued that, if this conclusion were reached, no miscarriage of justice had actually occurred and that, accordingly, the 'proviso' should be applied to uphold the appellant's conviction.[113] I disagree. I have already conceded that the evidence against the appellant was very strong. A jury might well regard the niceties inherent in the appellant's contentions as artificial and completely unpersuasive. But what is ultimately involved here is not an evaluation of the evidence by this Court. It is a consideration of the consequence of the failure of the trial judge accurately to instruct the jury whose function it was to reach a conclusion on the point. Moreover, the exemption concerned was pertinent to the way in which the appellant gave his evidence and conducted his defence.

92 Addressing the attention of the jury to the provisions of s 23(1)(a) had certain advantages for the appellant beyond those deriving from the accurate instruction which the trial judge gave to them about the need to be satisfied beyond reasonable doubt of the intent necessary to find the appellant guilty of murder. Properly addressed, s 23(1)(a) would have sharply focused the jury's attention on the question that the appellant's conduct of his case posed. This was

whether the prosecution had proved beyond reasonable doubt that the final 'act' that caused the death of the deceased was done in the exercise of the appellant's will. Or whether the prosecution had failed to negative the real possibility that the discharge of the gun was the result of an act unaccompanied by the requisite will. In terms of the evidence, the question was whether the prosecution had failed, for example, to negative the real possibility that the gun ultimately discharged in some way consequent upon the appellant having being struck in the middle of the forehead by something thrown at him by the deceased in such a fashion as to cause the gun to discharge, although the only intention of the appellant in procuring the gun and pointing it at the deceased had been to frighten the deceased away.

93 *Conclusion: The trial miscarried*: In the circumstances of this trial, and the way the evidence was adduced, I am not satisfied that the prosecution has shown that the misdirection that I have found deprived the appellant of no real chance of acquittal.[114] The appellant's conviction was not inevitable. It follows that the conviction must be set aside and a new trial ordered.

…

Callinan J: …

149 A defence under s 23(1)(a) does not depend upon proof of, or the possibility of automatism or the like. It is available if the prosecution is unable to prove that the act was not willed, whether the absence of will can be traced to a condition which can be satisfactorily described in medical or psychological terms, or whether it was simply an act neither impelled by the mind nor which the mind endorsed immediately before, or at the time of its occurrence. There may be some cases in which a sequence of acts is so interconnected, or that the first, or an intermediate act in the sequence, has so inevitable an outcome that to regard the ultimate act as the 'act' for the purposes of s 23(1)(a) would be artificial and unrealistic, but such cases will be rare. The jury in this case would not have been obliged so to regard this case.

150 Here the relevant act was, as the appellant submitted, identifiable, the discharge of the gun. Everything leading up to that point might have made it unlikely that it occurred as an unwilled act, but as there was evidence that it was, an obligation to give a direction about it by reference to s 23(1)(a) did arise.

151 This was so even though intention was 'the issue' at the trial. The trial judge's attention should have been drawn to the need for such a direction accordingly. The submissions that were made on the relevance of s 23 did not assist her Honour in this respect. The direction should be given, even in a case in which the substantial issue is intention, in order to draw to the attention of the jury the matters which are capable of forming a foundation for a conclusion that the prosecution had not negatived an unwilled act or accident. The directions should identify the evidence from which the 'act' and the event are discernible and distinguish between them. The fact that the Code makes specific provision for defences on these bases, independently of the creation of offences of which intention is a specific element, provides an indication that separate and specific treatment of matters capable of falling within s 23 is required. Section 23 is concerned with all offences, except for ones of negligence. It is hardly likely that it would have been enacted as part of the Code if reference to it were optional or unnecessary in the vast range of offences of which intent is an element …

153 I do not think that it is an answer to the appellant's submission to say that the jury must have found, by bringing in the verdict that they did, that the appellant intended to kill Mr Celap. A direction with respect to s 23(1)(a) was required to ensure that the jury focus

their minds on the state of mind and actions of the appellant at the actual time of the 'act', the discharge of the shotgun, but of course in the context of his antecedent acts.

...

[Although **Callinan J** agreed with **Kirby J** respecting the s 23 issue, he also joined **Gummow** and **Hayne JJ**, and **Gaudron J**, in ruling that a retrial was required because of a misdirection respecting the burden of proof.]

Footnotes

Gummow and Hayne JJ:

23. *R v Murray* [1999] QCA 341.
29. (1952) 87 CLR 115.
30. [2002] HCA 25.
31. (1952) 85 CLR 437 at 466.
45. *Vallance* (1961) 108 CLR 56; *MamoteKulang* (1964) 111 CLR 62; *Timbu Kolian* (1968) 119 CLR 47; *Ryan v The Queen* (1967) 121 CLR 205; *Falconer* (1990) 171 CLR 30.
46. *Falconer* (1990) 171 CLR 30 at 38.
47. (1990) 171 CLR 30 at 39.
48. 'Acts of Will and Responsibility', in Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, (1968) 90 at 101. (The article was first published in 1960.)
49. 'Acts of Will and Responsibility', in Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, (1968) 90 at 102.
50. (1967) 121 CLR 205 at 245.
51. *Ryan* (1967) 121 CLR 205 at 245.
52. *Timbu Kolian* (1968) 119 CLR 47 at 64 per Windeyer J.
53. (1990) 171 CLR 30 at 39.
54. (1964) 111 CLR 62 at 81.
55. (1968) 119 CLR 47 at 64.
56. (1967) 121 CLR 205 at 244.
57. (1968) 119 CLR 47 at 53.
58. *Timbu Kolian* (1968) 119 CLR 47 at 53 per Barwick CJ.
59. *Falconer* (1990) 171 CLR 30 at 61 per Deane and Dawson JJ.

Gaudron J:

5. (1961) 108 CLR 56 at 80.
6. (1967) 121 CLR 205.
7. (1967) 121 CLR 205 at 231.
8. (1967) 121 CLR 205 at 231.
9. (1967) 121 CLR 205 at 239.
10. (1967) 121 CLR 205 at 245.
11. (1967) 121 CLR 205 at 245.
12. (1967) 121 CLR 205 at 245.
13. (1967) 121 CLR 205 at 245–6.
14. (1961) 108 CLR 56 at 61. See also *Kaporonovski v The Queen* (1973) 133 CLR 209 at 220 per Walsh J.
15. (1967) 121 CLR 205 at 218.
16. (1967) 121 CLR 205 at 209.
17. (1967) 121 CLR 205 at 212.
18. Section 18(1)(a) of the Crimes Act 1900 (NSW) was amended by s 5(a) of the Crimes and Other Acts (Amendment) Act No 50 of 1974 (NSW) by omitting from s 18(1)(a) the words 'of an act obviously dangerous to life, or'.

19. (1967) 121 CLR 205 at 231.
20. Section 302(1) of the Code provides:

> Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say —
> (a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;
> (b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;
> (c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;
> (d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);
> (e) if death is caused by wilfully stopping the breath of any person for either of such purposes;
> is guilty of 'murder'.

21. Manslaughter is defined in s 303 of the Code as '[a] person who unlawfully kills another under such circumstances as not to constitute murder is guilty of "manslaughter"'. Chapter 27 of the Code addresses Duties Relating to the Preservation of Human Life and includes the Duty of persons doing dangerous acts (s 288) and the Duty of persons in charge of dangerous things (s 289).
Section 288 provides:

> It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty.

Section 289 provides:

> It is the duty of every person who has in the person's charge or under the person's control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

22. Cf the situation where death results from the presentation of a loaded gun during the prosecution of an unlawful purpose. In this regard, see *Fitzgerald* (1999) 106 A Crim R 215.

Kirby J:
104. (1938) 59 CLR 124.
105. (1938) 59 CLR 124.

106. (1938) 59 CLR 124 at 137.
107. *Guise* (1998) 101 A Crim R 143 at 151.
108. Reasons of Callinan J at [148].
109. Nor does it appear to have been the purpose of the Code as conceived by its drafter: see note by Sir Samuel Griffith on cl 25 (later s 23) in *Draft of a Code of Criminal Law Prepared for the Government of Queensland* (1897) at viii.
110. Cf *R v Van Den Bemd* (1994) 179 CLR 137 at 139.
111. Reasons of Gaudron J at [16].
112. Eg s 289: see reasons of Callinan J at [137].
113. The Code, ss 668E(1) and (1A); *Wilde v The Queen* (1988) 164 CLR 365 at 373; *KBT v The Queen* (1997) 191 CLR 417 at 423–4, 433; *Festa v The Queen* (2001) 76 ALJR 291 at 325–6 [197]–[204], 329 [222]–[225]; 185 ALR 394 at 440–2, 446–7.
114. *Mraz v The Queen* (1955) 93 CLR 493 at 514; *Domican v The Queen* (1992) 173 CLR 555 at 565–7; *Festa v The Queen* (2001) 76 ALJR 291 at 326 [203], 330 [228]; 185 ALR 394 at 442, 447–8.

Mistake of Fact

CHAPTER 12

INTRODUCTION

12.1 A mistake of fact is sometimes offered as explanation for breaching legal prohibitions. The claim is advanced that, if all had been as the accused believed, no breach would have occurred. The significance of such claims depends on the elements of the offence in issue and on the scope of certain special defences. The Criminal Codes of Queensland and Western Australia incorporate a special defence of mistake of fact: Codes s 24; see also the Commonwealth Criminal Code s 9.1. In many instances, particularly in offences involving an element of intention, mistakes can be addressed without resort to this special defence.

MISTAKES AND SUBJECTIVE MENTAL ELEMENTS

12.2 Offences such as those involving the possession of drugs have a basic mental element built into the prescribed conduct elements: see **8.18–8.22**. In addition, some offences contain subjective fault elements such as intention or recklessness: see, for example, **4.4–4.5** (murder); **7.10** (stealing).

A mistake of fact may be inconsistent with these specific states of mind. A person who believes that a suitcase is empty does not 'possess' drugs which are found within it. A person who pulls the trigger of a gun, mistakenly believing it to be unloaded, does not have an intention to kill. A person who picks up a mobile telephone belonging to someone else, mistakenly believing that it is his or her own, does not have an intention to deprive the owner of it. In these instances, it makes no difference whether the mistake is reasonable or unreasonable. In either case, the mistake is inconsistent with the state of mind which is required for the offence: see the remarks about attempted rape in *Attorney-General's Reference No 1 of 1977* [1979] WAR 45 at **6.29C**.

MISTAKE, ACCIDENT AND NEGLIGENCE

12.3 For many offences against the person, the prosecution must either:

- defeat a defence of accident under the Codes s 23(1)(b) (Qld)/s 23B (WA) by proving that the injury inflicted was foreseeable; or
- prove that there was a criminally negligent breach of one of the duty-imposing provisions in Codes ss 285–290 (Qld)/ss 262–267 (WA).

See 4.21–4.24 on the relationship between these provisions.

An objectively reasonable mistake may be inconsistent with the assertion that injury was foreseeable or that there was criminal negligence. For example, if there was a reasonable belief that a gun was unloaded, it would not be foreseeable that pulling the trigger would cause injury to anyone. Moreover, pulling the trigger might not be a criminally negligent act.

Ordinarily, unreasonable mistakes will be immaterial in relation to liability for offences subject to these provisions. However, a mistake that is unreasonable may not be so wildly unreasonable as to amount to criminal negligence. For criminal negligence, the mistake must be grossly negligent: see 4.32. It is possible, although unlikely, for a charge of criminal negligence to fail because an honest albeit unreasonable mistake was made.

In *Pacino v R* (1998) 105 A Crim R 309 (WA CCA), the court failed to distinguish between the different standards in issue for criminal negligence and for the special defence of mistake of fact under the Codes s 24: see the discussion in 4.35.

12.4 A reasonable mistake of fact may also be inconsistent with any other form of negligence prescribed as an element of an offence. For example, the offence of receiving under the Code (Qld) s 433(1) requires the person to have had 'reason to believe' that the property was 'tainted'. There would be no reason to so believe if there was a reasonably mistaken belief that the property had been acquired lawfully.

SECTION 24 OF THE CODES

12.5 Where a mistake of fact cannot be addressed in any other way a defence may be provided by the Codes s 24:

> A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.

This provision establishes the test for excusing criminal responsibility in relation to several serious offences: see, for example, 6.14–6.19 (respecting mistaken beliefs in consent to sexual interaction) and 8.30–8.32 (respecting mistaken beliefs about substances that are in fact illegal drugs). Section 24 also establishes the test for criminal responsibility in relation to a host of minor offences in governmental regulatory schemes.

12.6 The evidentiary burden to raise a defence under s 24 lies on the accused, although the prosecution carries the persuasive burden to defeat the defence when it is in issue: see *McPherson v Cairn* [1977] WAR 28 at 12.14C. There are two elements about which the evidentiary burden must be discharged. The accused must positively hold an honest belief in the existence of a state of things and that belief must be objectively reasonable. If there is evidence of an honest and reasonable but mistaken belief, the prosecution must negative the existence of the belief or its reasonableness beyond reasonable doubt.

12.7 A successful claim under s 24 will not always result in a complete acquittal. Section 24 only provides that the person who makes an honest and reasonable mistake is to be treated as if the facts had been as they were believed to be. This may mean that a person who makes a mistake still commits a less serious offence or is perhaps exposed to a lesser range of penalties. If someone possesses a prohibited substance specified in a category attracting a high scale of penalties, reasonably believing that the substance is one which would fall within a different category attracting a lower scale of penalties, the effect of s 24 may be that the lower scale applies: see **8.5–8.6, 8.31**.

12.8 A defence under s 24 is available only where the mistake was an objectively reasonable one. This requirement has produced a dramatic divergence between the law on mistaken belief in consent to sexual interaction in the code jurisdictions and in the common law jurisdictions. The latter but not the former will permit a defence of mistake in circumstances where the belief is unreasonable: see *Attorney-General's Reference No 1 of 1977*, above, at **6.29C**. See also the discussion of a mistaken belief about the character of a substance which happens to be a proscribed drug at **8.30**.

12.9 The divergence is narrowed by the decisions of the Queensland Court of Appeal in *R v Mrzljak* [2004] QCA 420; [2005] 1 Qd R 308 (6.30C) and the Western Australia Court of Appeal in *Aubertin v State of Western Australia* [2006] WASCA 229; 33 WAR 87 at 6.31C. In these cases, it was insisted that the issue under s 24 is whether the accused's own belief was reasonable and that this is a different issue from whether a reasonable person would have formed the same belief.

These rulings are significant in two ways. One is that they have made the test adaptable for the mental capacity of the accused. Individual limitations or impairments (excluding certain factors such as intoxication) can be taken into account in determining what might have been reasonable. See the discussion in **6.21–6.25**.

The rulings are also significant because they allow for the possibility that various beliefs about some matter might each be reasonable. In *R v Wilson* [2008] QCA 349; [2009] 1 Qd R 476 at **12.18C**, the Queensland Court of Appeal quashed a conviction of dangerous driving in a case where the appellant's defence had been that his failure to notice an oncoming motorcycle involved a reasonable mistake of fact. The trial judge had directed the jury that the reasonableness of the accused's belief was to be determined by reference to the standards of 'an ordinary, reasonable person in the appellant's position'. There was no issue of impaired capacity. Nevertheless, it was held that the wrong test had been used because it did not focus on the reasonableness of the appellant's own belief. Fraser JA said at [38]:

> In my opinion the vice in this direction was that it denied the possibility that different people in the appellant's position might have held different beliefs, each of which was nevertheless a reasonable belief.

12.10 An unreasonable mistake is a negligent mistake. Thus, offences to which s 24 might apply can be committed negligently. The restrictive wording of s 24, however, also allows some persons to be convicted who were not negligent. Unless a mistake is made, it is immaterial that reasonable care or due diligence may have been exercised to prevent the offence occurring: see *G J Coles & Coy Ltd v Goldsworthy* [1985] WAR 183 at **12.15C**.

12.11 Section 24 was also held in *G J Coles & Coy Ltd v Goldsworthy* (12.15C) to require a 'positive' belief. This seems to exclude any state of mere inadvertence or ignorance no matter how reasonable the state of mind might be. If this view is correct then s 24 would be available to a person who possesses a prohibited drug honestly and reasonably believing that it is aspirin, but not to a person who possesses a prohibited drug having no idea what the substance is but, quite reasonably, never contemplating the possibility that it might be a prohibited drug. It is difficult to see why such a sharp distinction should be made between mistake and ignorance. However, the same distinction is drawn at common law in Australia: see *State Rail Authority of NSW v Hunter Water Board* (1992) 28 NSWLR 721.

12.12 The phrase 'belief in the existence of any state of things' in s 24 has sometimes been said to cover only matters of present fact and to exclude any belief about the consequences or potential consequences of acts.

In *Gould & Barnes* [1960] Qd R 283 at 291–2, it was said that the defence would be available for a mistaken belief about the contents of a bottle, or about the chemical properties of the contents, but not for a mistaken belief that a particular usage of the contents would be safe: see also *Gould & Barnes* at 297–8. Nevertheless, the question should be regarded as still open. *Gould & Barnes* can be contrasted with *Pacino*, above. In *Pacino*, a mistaken belief that some dogs were not dangerous was treated as a mistake about 'a state of things'. In any event, criminal responsibility for unintentionally causing death or injury may sometimes be negatived in ways other than through recourse to s 24. For example, in *Pacino* the alleged mistake was relevant to whether there had been criminal negligence: see **4.35, 12.3**.

12.13 In Queensland, a restriction upon s 24 could be important in cases of self-defence and other uses of defensive force: see **14.37**. The first paragraph of the Code s 271 (Qld) requires that the force used be 'reasonably necessary' for self-defence: see also ss 274–278 (Qld) on defence of property. There is a question whether mistakes about the necessity to use the force can fall within s 24. A negative answer was given by some judges in *Marwey v R* (1977) 138 CLR 630 at 637, 642; 18 ALR 77: see further the discussion in **14.37**.

12.14 Sections 24(2) (Qld)/s 24 (WA) allow for the exclusion of the defence of reasonable mistake by either express or implied provisions.

An example of an express exclusion is found in the Codes s 229 (Qld)/s 205 (WA) which govern certain offences involving sexual interaction with children and young persons. This provision makes it immaterial, except as otherwise expressly stated, that the accused believed that the other person was not under the prescribed age. When the provision applies, it would be irrelevant that the mistaken belief about the age of the person was reasonable. The draconian features of this provision are moderated by several provisions that allow a defence of reasonable mistake in some circumstances involving offences against children: Codes ss 210(5), 215(5) (Qld)/ss 321(9), 321A(9) (WA). However, these provisions are less advantageous to an accused than s 24 because they place a persuasive burden of proof, not an evidentiary onus, on the accused.

An example of an implied exclusion of s 24 is *McPherson v Cairn* (**12.14C**) which concerned an offence relating to the operation of a commercial vehicle outside the terms of a licence. It was held that the express provision of a defence of mistake for the driver impliedly excluded any defence for the owner. 'Implied' exclusions must, however, be necessarily implied by the text or context of the offence description. In contrast, at common law, the exclusion of a defence of mistake has sometimes been justified on the basis of 'the subject matter' of the offence.

The courts have rejected such an approach in relation to Codes s 24: *Geraldton Fishermen's Co-operative v Munro* [1963] WAR 129.

MISTAKE OF FACT AND COMMONWEALTH OFFENCES

12.15 Mistakes of fact in relation to Commonwealth offences are governed by provisions of the Criminal Code (Cth). These provisions reflect common law principles. At common law and under the Commonwealth Code, the significance of a mistake depends on the classification of the offence within a threefold scheme: see *He Kaw Teh v R* (1985) 157 CLR 523; 60 ALR 449; Criminal Code (Cth) ss 5, 6.

1. Offences of *mens rea* ordinarily require proof of some state of mind such as intention or recklessness. A mistake of fact, whether reasonable or not, may be inconsistent with the relevant state of mind. In this respect, mistake of fact at common law or under the Criminal Code (Cth) operates in much the same way that it does when intention or recklessness are in issue under the state Codes. A common law presumption of *mens rea* for serious offences, now codified in the Criminal Code (Cth), will ordinarily require proof of intention or recklessness: see *He Kaw Teh*, above; Criminal Code (Cth) s 5.6. The result is that the scope for unreasonable mistakes to negative intention or recklessness is wider at common law and under the Criminal Code (Cth) than under the state Codes: see, for example, the discussion of mistakes about consent to sexual interaction in **6.17–6.26**.

   For Commonwealth offences, the applicable provision for offences of *mens rea* is now the Criminal Code (Cth) s 9.1 which provides that, for offences with a fault element other than negligence, a person is not criminally responsible if:

   (a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and

   (b) the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.

   The reasonableness of an alleged mistake is a factor to be considered in deciding whether it was actually made: s 9.1(2). An unreasonable belief, however, provides a good defence.

2. Some offences permit a defence of honest and reasonable mistake. These offences are called offences of 'strict liability' at common law and that term is adopted in the Criminal Code (Cth) s 9.2. Mistakes operate in relation to offences in this category in much the same way as mistakes do in relation to offences governed by Codes s 24: see **12.5–12.12**. At common law, however, fewer offences fall into this strict liability category because of the width of the *mens rea* category referred to above.

   The Criminal Code (Cth) s 9.2(1) provides that a person is not criminally responsible for an offence, even though no fault element is prescribed, if:

   (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and

   (b) had those facts existed, the conduct would not have constituted an offence.

This provision, like Codes s 24, requires a positive mistake: see 12.11. Thus, there is no defence if the accused was merely ignorant of a fact, no matter how reasonably, rather than having formed a mistaken positive belief.

3. Some offences do not permit any mistake of fact to negative criminal responsibility. These are called offences of 'absolute liability'. This term is adopted in the Criminal Code (Cth) s 6.2 which provides that, if absolute liability applies to an offence or an element of an offence, a defence of mistake of fact is unavailable.

12.16C **McPherson v Cairn**
[1977] WAR 28
Supreme Court of Western Australia, Full Court

Burt J: The Transport Commission Act 1966–1972 is as appears from its long title: 'An Act to establish a Commission to control and license the transport of passengers and goods by Road and by Air and to control the operation of ships engaged in the coasting trade and for incidental and other purposes.' The control of the transport of goods by road is achieved in this way. Subject to certain exceptions which are not relevant to this appeal: 'Every vehicle that is operated after the coming into operation of this Act is required to be licensed under this Part' (s 20(1)) …

The respondents to this appeal were charged in the Court of Petty Sessions at Geraldton that on 26 April 1974 at Ord Street, Geraldton, they 'were the owners of a public vehicle [described] which operated whilst it was not licensed as such under the Transport Commission Act 1966–1972; contrary to section 50(1)(a) of the said Act …'

Section 50 of the Act is in the following terms:

> (1) The driver and the owner of a public vehicle that is operated and that —
> (a) is not licensed as such under this Act, or
> (b) being licensed, is carrying goods not authorised, or otherwise than authorised, by the licence;
> are, subject to subsection (2) of this section, severally guilty of an offence.
> Penalty: …
> (2) In any prosecution against a driver under this section it is a good defence if the driver shows that he believed, on reasonable grounds, that the public vehicle was operating in accordance with a licence granted under this Act.

In passing I must say that I would read the complaint to be alleging that no licence had been granted with respect to the vehicle under s 33(1) of the Act. It is common ground, however, both before me and in the court below, that the vehicle was, in that sense, licensed, but it was at the material time being operated outside the authority of the licence so granted. That being so, the charge should, I think, have been laid under s 50(1)(b) and not under s 50(1)(a).

The defence raised to the complaint so understood was that the respondents believed on reasonable grounds that the Commissioner had granted to them a permit and that the vehicle was at the material time being operated within the authority of that permit, and hence in the terms of subs (2) of s 50 'in accordance with a licence granted under this Act'. See the definition of 'licence' in s 4.

The complaint was dismissed, it being held:

(a) that the operation of the rule expressed by s 24 of the Criminal Code had not in the terms of that section been excluded 'by the express or implied provisions of the law relating to the subject';
(b) that a mistake as to whether a permit had been granted was a mistake of fact;
(c) that the onus of disproving a mistake once a basis for it had been laid was on the prosecution;
(d) that the onus could only be discharged by proof of guilt and hence by disproof of mistake to the criminal standard of persuasion — beyond a reasonable doubt; and
(e) that on the facts and as expressed by the magistrate: 'the prosecution has not satisfied me that it has discharged its obligation to exclude beyond a reasonable doubt the operation of the honest and reasonable but mistaken belief of' the defendants, that belief being that a permit authorising the operation had been granted.

From that decision the appellant, the complainant in the court below, appeals upon the single ground that the magistrate erred in law in holding that a defence pursuant to s 24 of the Criminal Code was available to the respondents.

In argument before me it was submitted that the magistrate erred in law for two reasons.

It was first said mistaken belief as to the issue of a permit was a mistake of law and not a mistake of fact. No argument in support of that submission was developed. A permit lies in grant and whether a grant has or has not been made seems to me to be essentially a question of fact: cf *Proudman v Dayman* (1941) 67 CLR 536 at 540, per Dixon J.

The second submission was that the operation of the rule formulated in s 24 of the Criminal Code had been 'excluded by the implied provisions of the law relating to the subject'. Little argument was advanced to me in support of or against that view, but upon a consideration of it, it is a submission with which I agree.

It has been decided by authority binding upon me:

(*a*) That unless the operation of s 24 of the Criminal Code is excluded 'by the law relating to the subject it is of general application and applies to all persons charged with any offence against the statute law of Western Australia': s 36 of the Criminal Code and *Geraldton Fishermen's Co-operative Ltd v Munro* [1963] WAR 129.
(*b*) That once a foundation for mistake in the sense of the section has been laid in the evidence the onus being on the prosecution to prove guilt beyond a reasonable doubt it follows that even if the explanation is not affirmatively established, nevertheless if the tribunal of fact thinks that it might reasonably be true the defendant must be acquitted: *Brimblecombe v Duncan* [1958] Qd R 8 at 12, 22 and 23 and the cases cited there: *Munro's* case, supra, at 134 and 135.
(*c*) That the formulation of an offence in absolute terms, by which I mean in terms which contain no mental element such as knowledge or intention, does not by implication exclude the operation of s 24. Indeed there is much to be said for the view that it is only in such cases that s 24 operates: see *R v Martin* [1963] Tas SR 103, particularly the reasons of Burbury CJ.
(*d*) The operation of s 24 is not by implication excluded by reason of the subject matter of the statute: *Munro's* case, supra, at 133. The implication must arise from the 'implied provisions of the law relating to the subject' and not from 'the subject to which the law relates': see *Brimblecombe v Duncan*, supra, per Stanley J at 18.

(*e*) Whether in any particular case the operation of s 24 is excluded 'involves solely a question of statutory construction' of the 'penal section (read of course in the context of the whole Act in which it stands)': see *Munro's* case, supra, at 133. It is that penal section in that setting which is the 'law relating to the subject' within the meaning of s 24 of the Criminal Code.

When one comes to consider that law — s 50 of the Act — it will be seen that the offence contains no mental element. Each, the owner and the driver of the unlicensed vehicle which is operated are 'subject to subsection (2) of this section, severally guilty of an offence'. Subsection (2) deals specifically with a mistake of the kind relied upon in the present case. Its terms have already been set out. It will be noted from them that although subs (1) of s 50 enacts that 'the driver and the owner are, subject to subsection (2) of this section, severally guilty of an offence' subs (2) only operates in a prosecution against the driver and the defence thereby created only protects the driver. The reason for this is, no doubt, that the obligation to obtain a licence is thrown on to the owner and not on to the driver. If the vehicle is not licensed 'its nefarious character is not intrinsic' and from the driver's point of view 'it arises from antecedent breaches of the law generally by other persons' — in this case by the owner. In such a case 'it seems natural to treat ignorance upon reasonable grounds' (of the fact that the vehicle is not licensed or is not operating in accordance with the licence granted under the Act) 'as an exculpation': see Dixon J in *Maher v Musson* (1934) 52 CLR 100 at 105. Such cannot be said of the owner. In my opinion the operation of s 24 of the Criminal Code is, by implication, excluded by the law relating to the subject upon a prosecution of the driver. It is in effect replaced by subs (2) and by that replacement the onus of proof is shifted. Various sections of the Criminal Code operate in the same way. By way of illustration see ss 187(2) and 193. I think too that the same implication arises in a prosecution against the owner, but in that case it is not replaced by subs (2). In each case the legislature has addressed its mind to the question of mistake. In each case the offence is subject to subs (2), but when one reads that subsection it appears that it has created a defence which is available to the driver and which is not available to the owner, and this I think sustains the implication that in a prosecution against the owner the operation of the rule formulated in s 24 of the Code, as to a mistaken belief within subs (2) which is here the case, is excluded.

It would indeed produce a strange consequence if such were not the case. It would mean that in a prosecution against the driver the onus would be on him to prove on the balance of probabilities that he believed on reasonable grounds that the public vehicle was operating in accordance with a licence granted under this Act. Upon a prosecution against the owner, on the other hand, the necessary foundation having been laid in the evidence the onus would be on the prosecution to disprove that belief and to do so beyond reasonable doubt. Such a conclusion would I think deny the policy which can be gathered from the section itself.

I would make the order absolute and set aside the decision and return the case to the magistrate to be dealt with according to law.

12.17C

G J Coles & Coy Ltd v Goldsworthy

[1985] WAR 183
Western Australia Court of Criminal Appeal

Burt CJ: The appellant was charged in the Court of Petty Sessions at Perth upon the respondent's complaint 'that on the 10th day of September 1983 at 224 Belmont Avenue, Belmont' it 'sold food not of the nature quality and substance demanded by the purchaser in that it contained rodent faeces and rodent hair thereby contrary to the provisions of s 220 of the Health Act 1911 as amended'.

It was at trial proved and indeed admitted that the food — a one kilo packet of toasted muesli — was not of the nature, quality or substance demanded by the purchaser for the reason alleged in the complaint.

The premises identified in that complaint is a supermarket known as Coles New World which at the material time was managed by Mr Pracilio. The offending muesli had been manufactured and packaged for the appellant at Wahgunyah in Victoria by Clifford Love & Company Pty Ltd and Inter City Mills Pty Ltd trading as Best Foods. The product was made to the appellant's specifications and was placed by the manufacturer in a sealed packet upon which was printed: 'Toasted Muesli. 1 kilo. G J Coles & Company Limited, Melbourne. Toasted muesli. Use by 25th February, 8.' The product left the factory of Best Foods in cartons containing 12 such packets and they were delivered to the store managed by Mr Pracilio so packed. Upon arrival in the store the packets were taken out of the carton and as required they were priced and put on the shelves. The practice within the store was that if any goods, be they in packets, tins or whatever, appeared to be damaged they would be put on one side. Otherwise they would be put on the shelves for sale without any other examination and indeed no other kind of examination short of opening the container which would render the contents unsaleable was possible. Mr Pracilio was asked:

> Did you have any reason to think that there was anything in that packet of muesli other than muesli of the nature, quality and substance which the purchaser demanded?

to which he replied,

> As far as I am concerned that is sold to me as muesli and that is all I expect to be in the packet. I couldn't see anything else.

And that, so far as he was concerned, was all that there was to say about it.

The appellant has made arrangements whereby many kinds of foodstuffs are manufactured and packaged for it by independent manufacturers to its specifications and those products are marketed under the appellant's name. The evidence was that nation-wide there are about 200 factories so engaged. The production from such factories is monitored by the appellant. Production samples are sent to the appellant's head office on a regular basis, sometimes as frequently as once a week. The purpose of this is not to detect contamination. The purpose 'is to check the actual eating quality of the product'. As explained by Mr Hocking, who is a food technologist employed by the appellant:

> We taste it and compare it against the previous production lot to make sure that we are achieving a consistent quality and we also have a programme of submitting these samples to a public analyst or submitting relevant samples to a public analyst, much the same way

as a local health inspector would do, to check that they are complying with chemical and microbiological requirements of the Food and Drug Regulations.

The appellant carries out no random or other tests of the products manufactured and got up for sale by independent manufacturers to detect 'foreign body contamination'.

…

In the result the appellant (sic Hocking), as it would seem to me, was in no better position to detect contamination of products manufactured for it than was Mr Pracilio. The products, specifically muesli, are received by it from the manufacturer in packets which cannot without destroying their retail value be opened and, as Mr Hocking pointed out, to sample by opening, say, one per cent of all containers containing food manufactured for the appellant would destroy retail stock valued at about $30 million per year.

Upon those facts the appellant contended before the magistrate that it was not criminally responsible for the sale identified in the complaint because of the operation of s 24 of the Criminal Code …

The magistrate rejected this contention and convicted the appellant. This is an appeal from that decision.

…

In the course of argument counsel for the appellant in effect submitted that if it could be shown that a retailer in the position of the appellant had exercised due diligence to prevent the contamination of products sold by it, that was enough to establish mistake in the sense of s 24 of the Code so denying criminal responsibility for the sale of food of a quality which would otherwise attract the operation of s 220 of the Health Act. And, further, that in a case, which is this case, in which the retailer had purchased the goods from a reputable manufacturer got up in such a way as to make inspection of the contents by the retailer impossible the exercise of due diligence required no more than the examination of the integrity of the package and hence if the package was not apparently damaged criminal responsibility was denied if its contents were in fact contaminated. Support for the first limb of that proposition can be found in the literature dealing with the defence of mistake at common law to the charge of an offence said to be one of strict liability. The defence of reasonable mistake at common law is said to be the half-way house 'between *mens rea* and strict responsibility'; Glanville Williams: *Criminal Law: The General Part*, p 271, because 'since a reasonable mistake is one which a reasonable man would have made in the circumstances, there is normally no criminal responsibility without negligence'; Colin Howard: 'Strict Responsibility in the High Court of Australia', 76 *LQR* 547, 548 …

I cannot accept this as being the law of the Code. As it seems to me the operation of s 24 of the Code is either excluded by the provisions of the law relating to the subject or it is not. There is under the Code no half-way house or middle road and if there is to be a half-way house it must be found within the statute creating the offence. To hold that it follows from the operation of s 24 of the Code that 'the accused might defend himself by showing that he exercised due diligence to comply with the law', bearing in mind that the received doctrine is that the ultimate onus is distinct from the evidentiary onus, and assuming that to have been discharged, is on the prosecution to negative mistake in the sense of s 24 of the Code beyond reasonable doubt would, in its application to s 220 of the Health Act, be to hold that that section should be read: 'Any person who negligently or without having exercised due diligence sells any food' within the section commits an offence. To do that would, in my opinion, give s 24 of the Code an operation extending far beyond its terms. Expressed without reference

to the onus of proof, what s 24 of the Code requires, in my opinion, is simply what it says, namely that 'a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist'. The belief 'under' which the act is done must be honest, which is to say no more than it be held in fact; it must be reasonable, which is to say that it must be based on his appreciation of primary objective fact which is in reason capable of sustaining the belief; it must be mistaken and it must be a positive belief because the extent of the criminal responsibility is not to be greater 'than if the real state of things had been such as he believed to exist'. One can readily agree that a mistake made carelessly is not a reasonable mistake but because it can be shown that a person 'exercised due diligence to comply with the law' is not necessarily to say that he did the act or omitted to do the act under a mistake of the kind spoken of in s 24 of the Code …

The magistrate was satisfied that there had been no mistake satisfying the requirements of s 24 of the Code. I would agree with him and dismiss the appeal.

…

But having said that it would seem to me that the use of the criminal law and the procedures of the criminal law so as to ensure that members of the public who purchase food should get what they have agreed to buy and that it should not be contaminated is not likely, in this kind of case, to be an effective way or a just way of achieving that end. No doubt the Act in its present form was appropriate to the circumstances pertaining when it was enacted but it does not to me seem to be appropriate to contemporary practices in the mass manufacture and packaging of food which is acquired by a trader, necessarily I think on trust, for sale by him to the ultimate customer.

[**Smith** and **Brinsden JJ** in separate judgments also dismissed the appeal.]

12.18C R v Wilson

[2008] QCA 349; [2009] 1 Qd R 476
Queensland Court of Appeal

McMurdo P:

1 Andrew Henry Wilson was found guilty on 18 October 2007 after a four day trial of dangerous operation of a motor vehicle causing death and grievous bodily harm on Sunday 28 August 2004. He was sentenced to four years imprisonment with parole eligibility after 18 months and was disqualified from holding a driver's licence for four years. On 18 August 2008 he was granted an extension of time to appeal against his conviction limited to the following grounds. The first was that the learned primary judge erred in directing the jury on s 24 Criminal Code 1899. The second was that the judge failed to direct the jury as to the fault element of the offence of dangerous operation of a motor vehicle. He has also applied for leave to appeal against his sentence, contending that it was manifestly excessive in that the judge gave insufficient weight to the serious nature of the injuries that he suffered as a result of his commission of the offence.

The evidence at trial

2 The prosecution case was as follows. Mr Wilson drove his Harley Davidson motorcycle on the wrong side of the Pacific Highway south of Cardwell in North Queensland by overtaking

a Pulsar sedan when it was unsafe to do so because a motorcyclist, John Charles Wood, was travelling in the opposite direction. The dangerous operation of his motorcycle was his manner of overtaking the Pulsar up to the moment of colliding with Mr Wood's motorcycle. As a result, he caused the death of Mr Wood, and grievous bodily harm to Mr Wilson's pillion passenger and then girlfriend, Tamara Renee Neilsen. Mr Wilson also suffered grave injuries in the accident. He was one of about 120 motorcyclists travelling in convoy as part of a fundraising ride from Cairns to Forrest Beach, east of Ingham. The accident occurred about 5 pm just south of the Sunday Creek Bridge. Another participant in the motorcycle ride, Ms Penelope Anne Vickers, described the day of and up until the accident as '[a]bsolutely beautiful. A perfect day for riding'.

3 Mr Daniel John Parry, the driver of the Pulsar; his passenger, Ms Charmaine Karen Paul; and Mr Heath Kimberley Drendel, a motorcyclist immediately following Mr Wilson in the southbound lane, each saw Mr Wood's motorcycle approaching Mr Wilson's motorcycle in the northbound lane prior to the collision. Mr Wilson's motorcycle had its headlight illuminated but Mr Wood's motorcycle headlight was not illuminated. Mr Parry thought that Mr Wilson was overtaking at a speed of between 130 to 150 kms per hour. He said that after Mr Wilson had overtaken him, Mr Wilson remained on the wrong side of the road as Mr Wood's motorcycle travelled closer to Mr Wilson's motorcycle. The motorcycles collided even though there was sufficient room for Mr Wilson's motorcycle to return safely onto the correct side of the road in front of Mr Parry's Pulsar.

4 Mr Drendel estimated Mr Wilson's speed at between 120 and 130 kms per hour. The accident occurred in the afternoon when there were shadows on the road. He thought Mr Wilson and Mr Wood did not see each other in time to avoid the collision. The incident happened so quickly that Mr Drendel was unable to avoid colliding with one of the motorcycles: he was unsure whether it was Mr Wilson's or Mr Wood's; he came off his motorcycle over the handlebars.

5 At the time of the accident, Mr Rodney John Hawten was also following Mr Wilson behind two other motorcyclists, Mr James Davie and Ms Vickers. He saw the accident as 'two eruptions of smoke' about 150 metres in front of him. He described the accident scene to police as 'a long straight section of road, with the road surface in excellent condition and there was no apparent oncoming traffic'.

6 Photographs tendered of the accident scene confirmed that the road was long, straight and in sound condition with apparently good visibility both ways.

7 Mr Wilson gave evidence that he was travelling south behind the Pulsar for some time. Upon reaching a straight stretch of highway he looked ahead to see if it was clear to overtake the Pulsar. He could not see any traffic coming in the opposite direction and commenced his overtaking manoeuvre. He was travelling at about 110 kms per hour. The indicators on his motorcycle had been removed and he used hand signals to indicate the lane change. He crossed the centre line and was travelling about a half a metre from it on the wrong side of the road as he accelerated past the Pulsar. The Pulsar crossed the centre line and came very close to touching his left boot. For that reason, Mr Wilson moved further to his right, very close to the centre of the northbound lane. He checked his rear vision mirror to make sure he was not cutting off another vehicle from behind. When he looked forwards he was staring directly at Mr Wood's motorcycle coming straight towards him and had no time to take evasive action. He said 'I did not even have time to think. It was right there.' In cross-examination he agreed that it was 'a perfect day for riding'.

The judge's omission to direct the jury that fault was an element of an offence against s 328A Criminal Code

8 Before Mr Wilson was asked whether he intended to give or call evidence, the judge, in the absence of the jury, told trial counsel that he considered that the prosecutor had wrongly stated in opening his case that the prosecution had to prove fault as an element of the offence of dangerous operation of a motor vehicle under s 328A Criminal Code. The judge considered that the prosecutor's statement was inconsistent with the High Court's decision in *Jiminez v The Queen*.[1] Neither counsel sought to dissuade his Honour from that view. In the summing-up, the judge did not direct the jury that fault was an element of the offence. After the jury retired to consider its verdict, neither counsel applied for a redirection on this aspect of the summing-up. His Honour independently raised the matter again and gave detailed reasons for not directing the jury that fault was an element of the offence, emphasising that he had instead directed them on mistake of fact under s 24 Criminal Code. Both counsel agreed with his Honour's approach and did not seek any redirection.

…

15 It follows from *Jiminez* that in a trial for an offence against s 328A the jury need not be told that fault is an element of the charge. That is not to say that in establishing the offence any consideration of the offender's mental state must necessarily be disregarded. Section 24 and other provisions of ch 5 Criminal Code like s 23, s 25 and s 31 are sometimes raised in such cases. Whether such provisions are raised will always depend on the relevant evidence at trial. Section 24 was raised in this case and his Honour directed on it. His Honour was right in not directing the jury that fault was an element of the offence of dangerous operation of a motor vehicle under s 328A Criminal Code…..

The directions on s 24 Criminal Code

16 Section 24(1) Criminal Code relevantly provides:

> **24 Mistake of fact**
> (1) A person who does … an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act … to any greater extent than if the real state of things had been such as the person believed to exist.

17 The judge gave the following directions on s 24 Criminal Code:[14]

> Members of the jury, our law provides that a person cannot be found guilty of an offence if the actions which constitute the offence were done because he made an honest and reasonable mistake. What Mr Wilson has essentially told you, members of the jury, is that when he pulled out to pass to overtake the Nissan Pulsar he believed that the road ahead was clear in the northbound lane, that there was nothing within any sort of proximity which would pose any danger. You might take the view that he was wrong, because you might take the view that it's obvious that Mr Wood's motorcycle was within very close proximity and because of that close proximity that constituted a danger. So under those circumstances, Mr Wilson made a mistake. However, to excuse a person from criminal responsibility for dangerous operation of a vehicle, the mistake must be both honest and reasonable.
>
> You might have little difficulty coming to the conclusion that Mr Wilson's mistake was honest. There is no suggestion that he wanted to commit suicide or kill or injure

anyone particularly, including Ms Neilsen. So you might have no difficulty coming to the conclusion that his mistake was honest.

The real question you have to consider, members of the jury, then is was it reasonable? He doesn't have to prove its reasonable. In order to reject the defence of honest and reasonable mistake, you have to be satisfied beyond reasonable doubt that his mistake was not reasonable. And whether his mistake was reasonable, once again, is to be determined by the objective standard of ordinary, reasonable people. An ordinary, reasonable person in the position that Mr Wilson was in. In order to reject the mistake of defence you must be satisfied beyond reasonable doubt that an ordinary, reasonable person would not have made that mistake.

Once again, you look at the whole of the circumstances. It was a long, straight stretch of road ahead of Mr Wilson. If there was nothing coming then it wouldn't have been particularly dangerous to pass. So you picture yourselves the theoretical, ordinary, reasonable person pulling up to overtake at whatever speed you think he did and consider whether an ordinary, reasonable person could have made that mistake. It really comes down to this, members of the jury, would an ordinary, reasonable person, keeping a reasonably good lookout, that you would expect an ordinary, reasonable person to do when starting to overtake a vehicle in front at that speed, would such an ordinary, reasonable person have looked closely and carefully enough to observe Mr Wood's oncoming motorcycle.

So, members of the jury, you consider that in the whole of the circumstances. You may take into account of course that Mr Parry observed the motorcycle — Mr Wood's motorcycle from some considerable distance away; Ms Paul who was in the Nissan also observed the motorcycle coming from — obviously not as far away as Mr Parry did, but saw it coming. Bear in mind of course they would have been a little in front of Mr Wilson when he commenced his overtaking manoeuvre. You also have the evidence of Mr Drendel who was behind Mr Wilson. He observed the oncoming motorcycle. Now, the fact that they saw the motorcycle at various times — at different times — is not definitive of the issue, but it is evidence which gives you, or may give you, a clue as to the ability that an ordinary, reasonable motorist, pulling out to pass would have had, had that ordinary, reasonable person taken reasonable care to ascertain the presence or otherwise of oncoming vehicles.

You have Mr Wilson's evidence that the Pulsar moved over to the right and even came across the centreline to some degree. It's a matter for you whether you believe him or not. Both Ms Paul and Mr Parry rejected such a proposition. It's for you to decide who or what you believe.

However, if the Nissan Pulsar did pull over to the right a bit then it would not be unreasonable for Mr Wilson to be at least distracted by that to momentarily glance at it before moving over himself, and he also told you that he looked in the rear-view mirror and saw a bike behind him. So you take that into account as well.

On the other hand, you can take into account that those two instances were a small part of the total movement between when he started to overtake and when the collision occurred. So it's a matter for you, you assess it.

Are you satisfied beyond reasonable doubt that any reasonable person in Mr Wilson's position would have or should have observed the oncoming motorcycle and thereby gave off the overtaking manoeuvre and simply remained there?

Once again, it's a matter for you, members of the jury. You call on your own objective experience and your own vast collective experience of driving on roads, being overtaken and overtaking yourselves. What do you expect of the ordinary reasonable person, or what

would you expect of the ordinary reasonable person in that particular situation in which Mr Wilson was?

So if you are satisfied beyond reasonable doubt that his mistake was not reasonable, then you go on to consider other matters. If you are not satisfied beyond reasonable doubt that his mistake was unreasonable, you return a verdict of not guilty and you don't need to consider the further aspects.[15]

18 Neither the prosecutor nor defence counsel applied for any redirection on this aspect of the summing-up.

19 Mr Collins now submits that the primary judge erred in directing the jury to consider mistake of fact by reference to whether the jury were satisfied that any reasonable person in Mr Wilson's position would or should have observed Mr Wood's oncoming motorcycle. Mr M J Copley, who appears for the respondent in this appeal, with his customary balance, concedes that the judge's directions were wrong: the correct question was whether the prosecution proved beyond reasonable doubt that there were no reasonable grounds for Mr Wilson's honest but mistaken belief that it was safe to overtake the Pulsar.

20 Mr Copley's concession is rightly made for the following reasons. It is clear from its terms that s 24 requires a consideration of whether there were reasonable grounds for the accused person's belief as to a state of things, not, in the primary judge's words, whether a theoretical, ordinary, reasonable person would or should have made the mistake. The belief must be both subjectively honest and objectively reasonable but it is the accused person's belief which is of central relevance. An accused person may hold an honest and reasonable but mistaken belief as to a state of things even though another ordinary, reasonable person may not have made that mistake. This distinction, which is admittedly subtle, was noted by this Court in *R v Julian*[16] when discussing self defence under s 271 Criminal Code and more recently in *R v Mrzljak*[17] when discussing s 24. The primary judge instructed the jury to focus on whether the mistake was reasonable in that the jury 'must be satisfied beyond reasonable doubt that an ordinary, reasonable person would not have made that mistake'. The judge told the jury to 'picture yourselves the theoretical, ordinary, reasonable person pulling up to overtake at whatever speed you think he did and consider whether an ordinary, reasonable person could have made that mistake'. The judge instructed the jury that the case really came down to 'would an ordinary, reasonable person have looked closely and carefully enough to observe Mr Wood's oncoming motorcycle'. The judge asked the jury whether they were 'satisfied beyond reasonable doubt that any reasonable person in Mr Wilson's position would have or should have observed the oncoming motorcycle'. Nowhere in the judge's directions on s 24 did his Honour emphasise to the jury the need to focus on whether they were satisfied beyond reasonable doubt that Mr Wilson's belief, that there were no oncoming motor vehicles when he overtook the Pulsar, was not reasonable.

…

23 The distinction between the directions given by the primary judge and those which should have been given consistently with *Julian* and *Mrzljak* may appear at first to be hair-splitting semantics but on careful reflection the differences are potentially significant, at least in this case. The consequences of Mr Wilson's mistake were horrific, namely the death of Mr Wood and the serious injuries to Ms Neilsen and Mr Wilson himself, as well as causing Mr Drendel to come off his motorcycle. A jury apprehending those consequences could be expected to conclude, putting themselves in Mr Wilson's position, that no theoretical, ordinary, reasonable

person would, could or should have made such a grave mistake. Had the jury been directed to focus on Mr Wilson's honest but mistaken belief as to there being no oncoming traffic when he overtook the Pulsar, they may have been more willing to conclude that the prosecution had not proved beyond reasonable doubt that Mr Wilson's honest but mistaken belief was unreasonable in the circumstances.

24 The relevant facts pertaining to the offence as particularised by the prosecution are outlined at [2]– [7] of these reasons. After reviewing the evidence, I consider that this was a case where a jury, equally reasonably, could have found Mr Wilson guilty or not guilty of dangerous operation of a motor vehicle causing death and grievous bodily harm. The central issue, whether the prosecution established beyond reasonable doubt that Mr Wilson's honest but mistaken belief that it was safe for him to overtake the Pulsar was not a reasonable belief, was one which, equally reasonably, could have been determined either way by a jury. Had the correct direction been given on s 24, the scales may have tipped in Mr Wilson's favour. I am not satisfied that, despite the misdirection on s 24, no substantial miscarriage of justice has actually occurred in the jury's return of the guilty verdict.

25 It follows that in my view the appeal against conviction should be allowed, the verdict of guilty set aside and a re-trial ordered.

…

Fraser JA:

…

38 In the second group of directions the trial judge directed the jury that whether the appellant's mistake was reasonable was to be determined by reference to the standards of an ordinary, reasonable person in the appellant's position. That required the jury to apply the wrong test. In my opinion the vice in this direction was that it denied the possibility that different people in the appellant's position might have held different beliefs, each of which was nevertheless a reasonable belief.

39 The Crown was required to prove beyond reasonable doubt that the appellant's belief was not a reasonable belief. It did not discharge that onus by proving beyond reasonable doubt only that 'a' reasonable person would not have held that belief. The principles of criminal responsibility embodied in s 24 do not operate by reference to what might be expected of a reasonable person but by reference to the reasonableness of an accused person's belief. In that way, s 24 allows for the possibility that reasonable people in an accused person's situation might have held a variety of beliefs, perhaps even diametrically opposed beliefs, about the relevant state of affairs.

40 In that respect I would apply in the context of s 24 the following passage in Dowsett J's reasons in *R v Julian*[25] (in which his Honour was construing the expression 'believes, on reasonable grounds' in s 271(2) of the Code):

> The word 'reasonable' is widely used in the law. Great issues are often resolved by reference to it. It is not, however, a term of art. It is an ordinary word having the meaning attributed to it by ordinary people. The Shorter Oxford English Dictionary defines the word relevantly as:-
>
> Having sound judgement; sensible; sane … Agreeable to reason; not irrational, absurd or ridiculous … Not going beyond the limit assigned by reason; not extravagant

or excessive; moderate … of such an amount, size, number, etc., as is judged to be appropriate or suitable to the circumstances or purpose …

Inherent in all of these meanings is the element of judgment. This inevitably implies the possibility that reasonable people will differ in their judgments without departing from the bounds of reasonableness. …The defender's belief must be reasonably open on the facts, not the only belief open on those facts.

41 The standard of care of the 'reasonable person' supplies the touchstone of civil liability for injury alleged to have been caused by a defendant's negligence.[26] The effect of the trial judge's direction that the jury must test the application of s 24 by reference to the theoretical conduct of a reasonable person, rather than by reference to the reasonableness of the appellant' belief, was in that respect to assimilate proof of criminal responsibility to proof of civil liability for negligence. That must be regarded as a substantial error.

…

51 For these reasons I agree with the orders proposed by McMurdo P.

[**Douglas J** agreed with the reasons and orders proposed by the President and **Fraser JA**.]

Footnotes

1. (1992) 173 CLR 572; [1992] HCA 14.
14. Record Book, vol 1, pp 222–6.
15. Errors as in the original transcript.
16. (1998) 100 A Crim R 430 at 434 (Pincus JA), 438 – 440 (Thomas J).
17. [2005] 1 Qd R 308; [2004] QCA 420 at 315 [21] (McMurdo P), 321 [53] (Williams JA) and 326–7 [79]–[81] (Holmes J).
19. *Criminal Code* 1899 (Qld), s 328A(4)(a).
25. (1998) 100 A Crim R 430; [1998] QCA 119.
26. *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40 at 47–48.

Ignorance of Law

CHAPTER 13

THE GENERAL PRINCIPLE

13.1 Ignorance or mistake of law is treated less favourably than ignorance or mistake of fact. Ignorance or mistake of fact will often provide a defence, at least if there was a positive belief which was reasonable: see Chapter 12. In contrast, ignorance or mistake of law will generally not provide any defence.

The Codes of Queensland and Western Australia s 22 provide:

> Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence.

For Commonwealth offences, see the Criminal Code (Cth) ss 9.3–9.4. A similar principle is recognised at common law, where it is common to use the Latin expression *ignorantia juris non excusat*.

Both at common law and under the Codes, the principle is often expressed in terms of 'ignorance' of the law rather than 'm istake' though it is well established that the principle applies to positively mistaken beliefs as well as to states of ignorance. The Criminal Code (Cth) ss 9.3–9.4 expressly refer both to ignorance and mistake.

13.2 The principle that ignorance of the law is no excuse applies in two somewhat different kinds of cases:

1. A person may commit the conduct elements of an offence, fully aware of what he or she is doing, but without appreciating that the conduct is legally prohibited. For example, someone may not appreciate that a permit is required in order to run a commercial operation or make alterations to a building. In such cases, the principle that ignorance of the law is no excuse operates to deny any special exculpatory defence: see 10.1–10.2 on the concept of exculpatory defences which justify or excuse commission of the conduct elements of an offence.
2. A person may commit the conduct elements of an offence, not being aware of what he or she is doing because of ignorance about some matter of law which is part of the offence description. For example, a person may possess a substance, knowing what it is but without realising that it has been classified as an illegal

drug (a 'dangerous' drug in Queensland, a 'prohibited' drug in Western Australia or a 'controlled' drug under Commonwealth law): see 8.3. The classification of the substance is a matter of law and part of the definitional elements for the offence of possession of an illegal drug. Another example may be provided by the offence of bigamy. The offence involves a ceremony of marriage between two persons, one of whom is already married: the Marriage Act 1961 (Cth) s 94; Code (Qld) s 360. A mistaken belief that a person is not married may result from either a mistake of fact or a mistake of law. A mistake of fact may sometimes provide a defence: see, for example, *R v Tolson* (1889) 23 QBD 168; [1886–90] All ER Rep 26, where there was a mistaken belief in the death of an earlier spouse. In contrast, ignorance of the law is no defence: see, for example, *R v Kennedy* [1923] SASR 183, where there was a mistaken belief that an earlier marriage was invalid because it was with a first cousin.

In this second category of cases, the rule that ignorance of the law is no excuse does not exclude a special exculpatory defence for having committed the elements of the offence. Instead, it prevents an accused claiming lack of responsibility with respect to one of the definitional elements of the offence.

13.3 Various rationales have been offered to explain why ignorance of the law should not operate as a defence. A justification is easiest to find for offences that are moral or social wrongs (*mala in se*): see, further, 1.3. In such cases, a person should already know that he or she ought not to do the act or make the omission, quite independently of its specific legal prohibition. Ignorance of the legal prohibition is considered immaterial to an assessment of the person's culpability. The principle is, however, more difficult to justify for those offences that are essentially contraventions of schemes of governmental, social and economic regulation (*mala prohibita*). The purpose of denying a defence for such offences is presumably to encourage people to check the legal status of their conduct before they engage in it.

13.4 Traditionally, little allowance has been made for the difficulties that even the most careful person may encounter in trying to ascertain what is actually required by the law. In *Ostrowski v Palmer* [2004] HCA 30; (2004) 218 CLR 493; 206 ALR 422 (13.18C), Palmer was convicted of fishing for rock lobster in a prohibited area. He had made enquiries of the Fisheries Department and had been given information which did not identify the area proposed to be fished as one where fishing for rock lobster was prohibited. The High Court, nonetheless, held that s 22 applied. As Palmer had made a mistake of law rather than a mistake of fact, the conviction was affirmed.

NON-PUBLICATION OF STATUTORY INSTRUMENTS

13.5 At common law, there is a recognised exception to the general principle to the effect that ignorance of the existence of delegated legislation, such as regulations and by-laws, may afford a defence if the relevant legal instrument creating the law has not been published or otherwise brought to the attention of the persons affected: see, for example, *Lim Chin Aik v R* [1963] AC 160; 1 All ER 223. There is no equivalent rule applicable to statutes. This is presumably because statutes are always published. In contrast, although delegated legislation is usually published, this may not always be the case.

This exception to the general principle respecting ignorance of the law was not written into the original Griffith Code.

- In Queensland, there is now a statutory version of the exception: Code (Qld) s 22(3)–(4).
- Western Australia has no statutory recognition of the exception though common law principles may allow it.
- The Criminal Code (Cth) s 9.4(2) is another statutory version of the exception.

13.6 The Code (Qld) s 22(3) provides:

> A person is not criminally responsible for an act or omission done or made in contravention of a statutory instrument if, at the time of doing or making it, the statutory instrument was not known to the person and had not been published or otherwise reasonably made available or known to the public or those persons likely to be affected by it.

Section 22(4) (Qld) provides that 'publish', in relation to a statutory instrument that is not subordinate legislation (s 22(4)(b)), means publish in the Government *Gazette*. In relation to subordinate legislation (s 22(4)(a)), to publish means to notify in accordance with the notification provisions of the Statutory Instruments Act 1992 (Qld).

For an example of the application of these provisions, see *Hogan v Sawyer*; *Ex parte Sawyer* (1990) 51 A Crim R 46. The case concerned prison rules made under statutory authority. A prisoner had been told that money was not allowed in a penal institution. He was not, however, informed that possessing money was a criminal offence rather than just a breach of prison rules which would only have subjected him to disciplinary action.

CLAIM OF RIGHT

13.7 Both the Codes and the common law accept that ignorance of the law can negative criminal responsibility for property offences where the ignorance gives rise to a 'claim of right' to the property. The Codes s 22(2) (Qld)/s 22 (WA) provide:

> But a person is not criminally responsible, as for an offence relating to property, for an act or omission done or omitted to be done by him with respect to property in the exercise of an honest claim of right and without intention to defraud.

A similar rule for Commonwealth offences is found in the Criminal Code (Cth) s 9.5.

The defence can be available to a person aiding a person with an honest claim of right: *Mueller v Vigilante* [2007] WASC 259; 215 FLR 68; 177 A Crim R 506 (13.19C).

13.8 It is not ignorance of the criminal law that founds a claim of right, but ignorance of the law of property rights. A claim of right is not a claim to act in a particular manner but a claim to an entitlement in or with respect to property: *Walden v Hensler* (1987) 163 CLR 561; 75 ALR 173.

This exception to the general principle that ignorance of the law is no excuse mainly operates to negative criminal responsibility for offences such as stealing, where a person acts under a mistaken belief in having a legal entitlement to the property. It has sometimes been suggested that, at common law, the exception for claims of right may extend beyond property offences and cover any claim made as a matter of private or civil law. Under the Codes, however, the exception is expressly limited to property offences.

13.9 A claim of right may be a claim to take or use or have access to property as well as a claim of ownership: see *Walden v Hensler* (1987) 163 CLR 561; 75 ALR 173; *Molina v Zaknich* [2001] WASCA 337; (2001) 24 WAR 562. The claim need not necessarily be a reasonable one: see *Walden v Hensler*, above; *Molina v Zaknich*, above, at [78]. Moreover, it need not have any foundation in accepted legal doctrine: see *Walden v Hensler*; *Molina v Zaknich* at [78]. However, it must be a claim of a legal right, not just a moral right.

13.10 If the phrase 'without intention to defraud' is to have any meaning, it would operate to exclude the use of deceitful means to obtain the property which is claimed. The phrase may, however, be superfluous. The weight of authority suggests that, if there is an honest claim of right, there cannot be an intention to defraud: see *R v Kastratovic* (1985) 42 SASR 59; *Love v R* (1989) 17 NSWLR 608. The use of unlawful or dishonest means to obtain property does not exclude a defence of claim of right in relation to that property: see *Lenard v R* (1992) 57 SASR 164 at 177–8; *Noble v South Australian Police* (1994) 70 A Crim R 560 at 568.

13.11 The important phrases in s 22, namely 'offence relating to property' and 'claim of right', came under examination in *Walden v Hensler*. In that case, a 3:2 majority of the High Court held that the defence of claim of right was not available to a traditional Aboriginal person who had been charged with keeping wild fauna contrary to the Fauna Conservation Act 1974 (Qld). The argument for the accused was that, on the basis of Aboriginal custom and his own experience, he believed that he was entitled to keep the fauna. The majority of the High Court, although rejecting this defence, did so for different reasons:

1. All five judges agreed that a 'claim of right' must involve more than a claim of ignorance of or exemption from the criminal law. On this basis, Deane and Dawson JJ held that the accused's claim in *Walden v Hensler* could not qualify as a 'claim of right' within s 22. The other three judges, however, took the view that the accused's claim did involve more than a state of ignorance of the criminal law or a belief in exemption from it. For Brennan and Toohey JJ, there had been a mistake about the legal significance of Aboriginal custom (presumably a mistaken belief that an entitlement to keep the fauna under Aboriginal law would provide an exemption from the prohibition under criminal law); for Gaudron J, there had been a mistake about the significance of obtaining permission to hunt from the local landowner.
2. Four of the five judges held that the phrase 'offence relating to property' is not to be interpreted narrowly and limited to an offence relating to the invasion of private property rights. Brennan J, however, did limit the meaning of the phrase in this way. On this basis he joined Deane and Dawson JJ in ultimately upholding the conviction.

13.12 There has been some disagreement about what *Walden v Hensler* decided with respect to the scope of the defence of claim of right.

In *Molina v Zaknich* [2001] WASCA 337; (2001) 24 WAR 562 at [101], the Western Australia Full Court held, on the authority of *Walden v Hensler*, that s 22 should be given 'its literal and broad effect', without any restriction to claims about private proprietary or possessory rights. The case concerned a union official who was convicted of an offence relating to having remained on a construction site at a prison after he had been warned to leave by a person in charge. On appeal, it was held that a belief in entitlement to disregard the warning would be a good defence.

In *Stephenson v Yasso* [2007] QCA 40; 2 Qd R 150, McMurdo P accepted the interpretation of *Walden v Hensler* offered in *Molina v Zaknich*. McPherson JA, however, appeared to question this interpretation.

See the discussion of the authorities in *Mueller v Vigilante* [2007] WASC 259; 215 FLR 68; 177 A Crim R 506 (13.19C).

13.13 The equivalent defence for Commonwealth offences is narrower in scope. The Criminal Code (Cth) s 9.5 uses the phrase 'a mistaken belief about a proprietary or possessory right' instead of 'claim of right'. The Commonwealth defence, therefore, cannot be used for mistaken beliefs about the scope of governmental regulatory schemes.

THE EXERCISE OF LEGAL POWERS

13.14 A distinction is often drawn between ignorance or mistakes about the general law and ignorance or mistakes about the exercise of powers affecting the legal position of particular individuals. An example of the former would be a mistaken belief that heritage buildings could be demolished without a permit; an example of the latter would be a mistaken belief that the requisite permit to demolish a particular heritage building had actually been issued. The general principle that ignorance of the law is no excuse applies only to mistakes about the general law. The classic statement of this position occurred in *Cooper v Phibbs* (1867) LR2HL 149 at 170, where Lord Westbury said:

> It is said, '*Ignorantia jus haud excusat*'; but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country.

13.15 Mistakes about the exercise of legal powers in respect of individuals have generally been treated as mistakes of fact. For example, consider the contrast between the bigamy cases of *R v Kennedy* [1923] SASR 183 (discussed at 13.2) and *Thomas v R* (1937) 59 CLR 279; [1938] ALR 37. In both of those cases, the accused claimed to have believed that he was unmarried at the time when he underwent a second marriage ceremony. In *Kennedy*, a mistake about the degrees of consanguinity which would have invalidated the earlier marriage was held to be no defence. In *Thomas*, however, a mistake about whether the earlier marriage had actually been terminated by a divorce decree was held to be a good defence. See also *McPherson v Cairn* [1977] WAR 28 (12.16C), where a mistake about the scope of a licence to run a taxi business was treated as a mistake of fact.

JUDGMENT IN THE APPLICATION OFGENERAL STANDARDS

13.16 The law is sometimes expressed in terms of loose general standards that require the exercise of judgment when applied to particular facts. For example, various offences penalise aspects of indecency or obscenity: Codes ss 227–228 (Qld)/ss 203–204 (WA). The meaning of 'indecency' or 'obscenity' is a matter of law. Indecency in the context of s 227 (Qld)/s 203 (WA) involves 'lewdness' and 'moral turpitude': *R v Bryant* [1984] 2 Qd R 545, discussed in *Drago v R* (1992) 8 WAR 488 at 6.20C. The test for obscenity is whether the material has a tendency to 'deprave or corrupt': *R v Hicklin* (1868) LR 3 QB 360 at 371. For both words, a judgment has to be made about how these somewhat loose and general tests apply to particular acts or

material. Moreover, a person may correctly understand the general law and yet be mistaken about how it would apply to particular acts or material. There are conflicting authorities on the way in which the latter kind of mistakes should be classified.

In *Sancoff v Holford* [1973] Qd R 25 (13.20C), the Queensland Court of Criminal Appeal held that a mistake about whether a publication was obscene was a mistake of law. In *R v Wampfler* (1987) 11 NSWLR 541, however, the New South Wales Court of Criminal Appeal treated a mistake about whether an article was indecent as a mistake of fact. Curiously, the same court in *Strathfield Municipal Council v Elvy* (1992) 25 NSWLR 745 took the opposing view about a mistake over whether an interest in property amounted to a 'pecuniary interest'. The test for a 'pecuniary interest' was whether there was a reasonable likelihood or expectation of appreciable financial loss or gain. A councillor's error in applying this test to his own circumstances was held to be a mistake of law.

13.17 Mistakes about how general standards apply to particular facts fall on the borderline between mistakes of law and mistakes of fact. They are similar to mistakes of law in that they are mistakes about what the general standard means; but they are also similar to mistakes of fact in that the answer to how the law applies will depend on an assessment of the facts themselves, by the tribunal of fact whose decisions may be difficult to predict. The answers are not expressly stated in print, readily available to be discovered by the diligent person who is anxious to conform to the law. Nevertheless, the weight of authority favours the view that such mistakes are mistakes of law.

13.18C

Ostrowski v Palmer

[2004] HCA 30; (2004) 218 CLR 493; 206 ALR 422
High Court of Australia

Callinan and Heydon JJ:

61 The respondent is a professional fisherman. He was induced to fish in forbidden waters by the provision to him of inaccurate or incomplete materials by an official of the State Government department responsible for administering fisheries. The question in the appeal is whether his mistaken belief was as to a state of things or as to a matter of law …

Facts and relevant provisions

…

65 At all material times the respondent was the lessee of a commercial fishing licence pursuant to which he fished for rock lobsters. The licence permitted him to fish in particular for western rock lobsters in a 'managed fishery' with 87 pots in zone B of the western rock lobster fishery ('Zone B').

66 On or about 11 November 1998 the respondent visited the Fremantle office of the relevant State Government department, Fisheries Western Australia ('Fisheries WA'), to obtain the relevant regulations for Zone B. He was told by an unidentified official that 'a copy of the current regulations to cover the 98/99 fishing season for lobsters' was not available, but that if he were to return on 13 November 1998, 'they would have them available'.

67 Two days later, the respondent returned to the office of Fisheries WA, Fremantle, where an 'office lady' at the public counter told him that the office 'still did not have the regulations on hand'. She volunteered however to photocopy 'the copy that they had themselves'.

The appellant accepted that the inference that the regulations to which the woman was referring were complete was available. We interpolate that on the uncontradicted account of the respondent, the inference was irresistible.

68 In consequence, the respondent was given a photocopy of the 'West Coast Rock Lobster Limited Entry Fishery Notice 1993' made under s 32 of the Fisheries Act 1905 (WA) ('the Management Plan') and a bundle of notices given pursuant to the Fisheries Act or the Act. Neither the Management Plan nor the bundle of notices made any reference to the Regulation. At the same time the respondent was told that 'if [he] required any further information [he should] take one of the pamphlets' which were on a rack in the public reception area of the Fremantle office of Fisheries WA. Accordingly, the respondent took a copy of a pamphlet entitled 'Fishing for Rock Lobsters' for the 1998/99 rock lobster season issued by Fisheries WA. The pamphlet in question related to recreational fishing. It stated that the waters mentioned in the Management Plan '[were] not specifically set out in these pamphlets'. It is common ground that the respondent did not inform the staff that he was the holder of a commercial fishing licence. Subsequently, it was clear that the person to whom the respondent spoke should, or would have been aware that he was a commercial fisherman because he ordered a commercial research log book at the same time.

69 Between 5 and 10 February 1999, the respondent fished with 54 rock lobster pots within the waters described in the table to the Regulations. There is no doubt that the respondent knew the location of each of the 54 rock lobster pots. He also truly believed, it is not suggested to the contrary, that his licence permitted him to fish in the waters in which he was fishing. The respondent was observed checking and resetting the rock lobster pots by fisheries officers. They made no attempt to rebuke or stop him from continuing to fish. There is no suggestion that the respondent sought to conceal his activities in any way or that he was doing otherwise than attempting to earn a living in a responsible and lawful manner.

70 The respondent was charged with a breach of r 34 of the Regulations. The respondent was tried by a magistrate at Carnarvon. In the course of the proceedings the appellant proved the relevant regulation and the table. This was done in accordance with the Western Australian practice, the necessity for which at common law was explained by Roberts-Smith J (Wallwork J and Pidgeon AUJ agreeing) in *Norton v The Queen*.[62] Extraordinarily, and after the uncontested facts to which we have referred emerged, the appellant pressed the prosecution. To do so in those, and the further circumstances that a conviction would result not only in the distress and opprobrium that any conviction carries, but also in the imposition of harsh mandatory penalties, has the appearance of an act of mindless oppression. The magistrate found that the respondent:

> did not direct his mind to that Regulation because he did not know anything about it … that means there is no evidence before the court about a reasonable belief as to the operation of Regulation 34. If follows … that section 24 does not arise, the honesty and reasonableness of the [respondent's] belief are not such as required to be negatived by the prosecution.

Section 22 operates ignorance of the law is no excuse [*sic*].

71 In convicting the respondent, the magistrate also observed that:

> the [respondent] has acted entirely honestly and in my view, reasonably throughout.

72 In consequence of the conviction the magistrate was obliged to impose a mandatory penalty of $27,600 pursuant to s 222 of the Act and in addition ordered that the respondent pay a fine of $500 and costs of $2000.

The appeal to the Full Court

…

75 The respondent's appeal to the Full Court (Malcolm CJ and Olsson AUJ, Steytler J dissenting) succeeded. The leading judgment (with which in substance Malcolm CJ agreed) was given by Olsson AUJ. His Honour stated his reasons in this way:[66]

> With all due respect, it seems to me that, in the instant case, the learned magistrate has overlooked what was a fundamentally important facet of the pertinent circumstances.
>
> …
>
> On the evidence which the learned magistrate plainly accepted, the appellant expressly went to a major office of Fisheries WA (as the proper regulatory authority) to procure from it a copy of the applicable Regulations, so that he could, inter alia, inform himself of what were, and were not, permissible fishing areas within zone B. That was, undoubtedly his express purpose, which he communicated to the relevant officer at the time.
>
> In response to that request officers of Fisheries WA ultimately gave him what they represented was a complete set of the relevant Fishery Notices, amended up to date. That representation was false, no doubt unwittingly. The appellant quite reasonably and accurately interpreted the material given to him as indicating that there was no gazetted restriction on fishing in the area in which he in fact worked at the time of the alleged offence.
>
> The belief arrived at by the appellant was the direct product of a mistake of fact engendered by the incorrect representations made to him, namely that the documentation supplied was complete and accurate. It was not. Hence his mistaken belief.
>
> In those circumstances the matter before the learned magistrate was, in my opinion, a classic illustration of a proper s 24 defence. The appellant had put forward evidence of an honest and reasonable, but mistaken, belief in the existence of a state of things by reason of which he acted as he did. Unlike the situation in *Pennings*,[67] he did apply his mind to the critical issue and his belief was the product of a mistake of fact induced by the actions of Fisheries WA. The statements made to him concerning the documentation supplied were positively misleading as to a vital factual state of affairs — whether they contained all applicable materials upon which he could determine his licence rights. Patently (and I may say inexcusably) they did not …

The appeal to this Court

…

84 It is impossible not to sympathize with the respondent. On any fair and objective view he was not culpable in any way. To the contrary he was most diligent. He went to the office of the administering authority twice in order to ascertain what his obligations were. Entirely openly and strictly in accordance with his licence he sought to comply with his understanding of what he could do based on official information personally provided by officials.

85 Be that as it may, it is the task of this Court to apply the law by answering the question whether the respondent should be regarded merely as having been ignorant of the law, an excuse which s 22 of the Code would deny him, or whether he had an honest and reasonable, but mistaken, belief in the existence of a state of things which if they had in fact existed

would have meant that he was not criminally responsible. The question is an important one. A mockery would be made of the criminal law if accused persons could rely on, for example, erroneous legal advice, or their own often self-serving understanding of the law as an excuse for breaking it, however relevant such matters might be to penalty when a discretion, unlike here, in relation to it may be exercised.

86 The evidence and the findings as to the respondent's honesty and reasonableness are one way and need no further reference. What then were the mistaken 'things' which he honestly and reasonably believed to exist? Olsson AUJ described them as the completeness of the 'applicable materials upon which [the respondent] could determine his licence rights'.[81] We do not disagree with that description so far as it goes but do not think that it is a complete one. It is also another matter whether the things to which his Honour referred formed part of or constituted the relevant operative mistake.

…

90 The difficulty for the respondent is that there were here a series of mistakes, the one to which Olsson AUJ referred, the actual decision to rely on the information with which he had been provided, and the actual reliance, by fishing in the embargoed waters. The last is a different mistake from, for example, a mistake as to the location of his vessel or his lobster pots. The last, it can be seen, is discrete in time, place and physical activity from the other two, although but for them it is unlikely that it would have been made. The offence of which the respondent was convicted was not of failing to obtain, or hold and rely on complete and accurate materials, but of fishing where professional fishing was impermissible. The elements of the offence consisted of fishing in the embargoed waters, an activity which the respondent knew to be proscribed. Unfortunately, in the circumstances he could be no less guilty than a motorist who has done everything reasonably possible to ascertain the speed limits on a stretch of roadway along which he is to travel but having failed to do so, in one or more instances, exceeds those limits because he was unaware of them.

91 During the course of the appeal the appellant objected to any reliance by the respondent on the ground of defence which the Full Court did not need to determine, that is, a defence of official inducement to act, because evidence relevant to it might have been adduced at trial had it been raised there. The objection was upheld and accordingly needs no further reference.

92 We regret to say that for the reasons which we have given the appeal must be upheld. The judgment of the Full Court of the Supreme Court of Western Australia should be set aside and the conviction reinstated. The order for costs in favour of the respondent in the Full Court should stand. The appellant should pay the respondent's costs of the application for special leave and the costs of the appeal as agreed by the appellant.

[Separate judgments also allowing the appeal were given by **Gleeson CJ** and **Kirby J** and by **McHugh J.**]

Footnotes

62. (2001) 24 WAR 488 at 520–1 [162]–[163].

…

66. *Palmer v Ostrowski* (2002) 26 WAR 289 at 301–2 [67]–[78].
67. *Penning v Williams* unreported, Supreme Court of Western Australia, 13 September 1996.

…

81. (2002) 26 WAR 289 at 301 [73].

13.19C

Mueller v Vigilante

Supreme Court, Western Australia
[2007] WASC 259; (2007) 215 FLR 68; (2007) 177 A Crim R 506

McKECHNIE J:

Introduction

1 This appeal raises the issue of honest claim of right under the *Criminal Code* (WA) (Code) s 22 and whether a person may not be criminally responsible for an offence by honestly claiming a right to property enjoyed by another.

The circumstances giving rise to the appeal

2 A person must not have in the person's possession any totally protected fish: *Fish Resources Management Act 1994* (WA) s 45 (FRMA). The appellant is an officer with the Kimberley Land Council. He is not of Aboriginal descent. On 30 July 2006 the respondent decided to go fishing in his boat. He was accompanied by his brother and two Aboriginal boys aged 12 and 13. They were fishing for crabs and he and the boys had pots and bait. A number of crabs were caught and stored in the single esky aboard. The respondent was the driver of the boat. When, in due course, the fishers returned to the Derby boat ramp, Fisheries inspectors found 11 brown crabs in the esky, nine of which were less than the legal size of 120 mm. Most were about 100 mm. Undersized brown crabs are totally protected fish.

Proceedings at trial

3 The prosecution tendered a statement of agreed facts substantially as just set out. The only witness was the respondent who was not cross-examined. The respondent gave evidence that he was a Senior Coastal Officer for the Kimberley Land Council and had worked in Kalumburu for four years. In that capacity he had undertaken a number of trips with traditional owner groups and often in a position where people were fishing and hunting according to custom. Referring to the boys' father he said:

> I know that he has lived in Derby most of his life and he is a man that practises his lore and culture and that he — in my experience with him, he wouldn't fish in an area that's not his country.

4 He was asked about his intention:

> MR IRVING: What was your intention on this day in respect of these crabs? — Well, initially when there was only my brother and myself going fishing we were only intending to get legally sized crabs and then [the father] asked if his boys could come with us and they brought their own — some of their own equipment and it was at one point where we started pulling in the pots that his eldest son asked — there were some undersized crabs and I was going to throw them in and he asked whether he could keep them, and it was at that point that I considered that — with my understanding of the lore and their customary rights I said, 'Okay, well, I guess that's within your rights to keep those crabs' so it was at that point that the decision was made to allow them to be in the esky.
>
> As far as you are concerned though, what is the position of the KLC as distinct from what the fisheries officers were putting to you? — My understanding — my opinion of it is that Aboriginal people's practices to hunt and fish are determined by their customs under the Native Title Act and that includes sustainability matters, whereas things like size

limits and bag limits are not a traditional factor. They are something that is being imposed on them by the legislation and so it is inconsistent with the Native Title Act.

…

6 The magistrate found that the respondent was in possession of totally protected fish. No cross-appeal is brought against that finding although it will be necessary to further analyse the finding and the facts. The magistrate could not exclude the possibility that the respondent was acting under an honest claim of right and therefore dismissed the prosecution. It is from that dismissal that the prosecution now brings this appeal.

7 The findings of fact are not challenged on appeal but the conclusion of law is.

8 Two issues arise for consideration:

1. Is a claim for possession of the crabs, as part of traditional rights, a claim of right in respect of property?
2. If it is a claim of right in respect of property, can the respondent take the benefit of that claim?

Possession

9 The FRMA defines possession:

> **'possession'** includes having under control in any place, whether for the use or benefit of the person in relation to whom the term is used or another person, and whether or not another person has the actual possession or custody of the thing in question. (s 4)

10 The magistrate found:

> On the evidence I am satisfied and find that the accused organized the fishing trip in order to take his brother out fishing for crabs, that the vessel used was one in which the accused had a half share, that he took 6 pots for the purpose. Further that he took the sons of his friend and they too brought pots for the fishing expedition. I find there was one esky used and all crabs caught were put in that container. I find that the accused knew that undersized crabs had been caught and one of the boys asked his permission to retain them. I accept that the catch had not been divided before the Fisheries Officers inspected the boat. Whether or not the undersized crabs were to be retained by the boys or shared with the accused is irrelevant. The accused was, as he admitted, in charge and he gave permission for the undersized crabs to be retained. Thus, even if those crabs were for the use or benefit of the boys, the accused was in control of the vessel as is evident from him organizing the trip, it being, for practical purposes on that trip, his boat; further, he did most of the 'driving' as he called it, he threw or caused to be thrown back the 'really small' crabs and, indeed, from the fact of being asked by the boys whether they could retain the undersized crabs. I find that the accused was in control of the boat and in possession of the mud crabs. (11)

Honest claim of right

11 The Code provides:

> **Ignorance of law, honest claim of right**
> Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by an offender is expressly declared to be an element of the offence.

> But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud. (s 22)

Is a claim for possession of the crabs part of a traditional right?

12 The possession of the crabs by the Aboriginal boys can be analysed in a number of ways. On one analysis, no claim of right arises because, having regard to the *Native Title Act 1993* (Cth) s 211, there are no conduct elements of a criminal offence in respect of the FRMA s 46. The respondent has no claim which can be attached, so to speak, to the boys' claim of right. The claim of right to the undersized crabs arises, in the case of the boys, from the fact that they caught the crabs. By the act of catching, the crabs became their property. Because s 46 of the FRMA is inapplicable, they commit no offence in possessing the crabs. On this analysis, if the respondent thought they may have a claim of right to the possession of the crabs arising under the *Native Title Act*, he has made a mistake of law under Code s 22 first paragraph, which does not provide a criminal excuse. His possession of the crabs is therefore without an excuse.

13 On another view, prima facie, all persons were in possession of totally prohibited fish. The conduct elements of an offence under the FRMA s 46 were made out. However, the boys could mount a claim of right to possess the fish on the basis that they were satisfying their personal, domestic, or non-commercial communal needs in the exercise or enjoyment of their native title rights and interests. The right or interest being claimed is the native title right preserved by the *Native Title Act* s 211.

14 This analysis is correct. An Aboriginal person does not have an unfettered immunity from the FRMA s 46. There must be some evidence that they were satisfying personal, domestic, or non-commercial needs and; further, that they were doing so in exercise or enjoyment of native title rights or interests. It is necessary, on this analysis, for the Aboriginal person claiming the right to, in fact, assert the right. The right is not created by statute — the *Native Title Act* s 211 preserves traditional rights in some circumstances. The rights existed before the statute. The *Native Title Act* does not diminish the right. It removes Commonwealth and state prohibitions in the exercise of the right in circumstances specified in s 211. Because these circumstances are specified, an Aboriginal person seeking to establish that state law, such as FRMA, is inapplicable to them, must bring themselves within s 211(2). So much is consistent with *Wilkes v Johnson* [1999] WASCA 74; 21 WAR 269 at [105].

15 I hold that on the facts the boys could mount a claim of traditional rights with respect to fishing.

Is the right to possess crabs a right in respect of property?

16 The next question, which is a subsidiary question, is whether the right extends to a claim in respect of property under Code s 22.

17 *Walden v Hensler* (1987) 163 CLR 561 was decided when there was no statutory entrenchment of native title rights as now appears in the *Native Title Act* s 211. Although it remains an authority on the Code s 22, having regard to the *Native Title Act* s 211, any principle that may be extracted from *Walden v Hensler* to the effect that a traditional right may not be a right under Code s 22 can now be doubted.

18 In *Molina v Zaknich* [2001] WASCA 337; 24 WAR 562, the court held that Code s 22 should be given its literal and broad effect and may be raised in relation to offences not

contained in the Code. It also applies to a claim of right arising under a statute as well as at common law.

19 I interpose to note that the claim of right asserted in the present case is at least a claim under statute, although it is better understood as a traditional right to property which is created through the activity of fishing. A right to fish must necessarily cover a right to property produced by the activity of fishing. Also the concept of possession generally, and the definition of 'Possession' in FRMA s 4 specifically, is the control or custody of a thing. A thing in law is anything that may be the subject of a property right.

20 *Molina v Zaknich* was considered in *Stevenson v Yasso* [2006] QCA 40; 2 Qd R 150. Yasso was charged with unlawfully possessing commercial fishing apparatus while not the holder of an authority under the *Fisheries Act* s 84(1). McMurdo P analysed *Walden v Hensler* and *Molina v Zaknich* concluding:

> All this suggests that whilst the law as to the operation of s 22 *Criminal Code* may not be entirely settled, the issue of Mr Yasso's entitlement to possess the net in the exercise of an honest claim of right under s 22 *Criminal Code* was raised on the evidence. It must follow from the magistrate's conclusion that Mr Yasso was acting in the traditional way of an Aborigine in his possession of the net, that the magistrate was also satisfied that the prosecution had not disproved beyond reasonable doubt that Mr Yasso was in possession of the net whilst acting under an honest claim of right by way of Aboriginal tradition under s 14 of the Act. That conclusion also supports the orders I propose. [58], [64]–[67]

21 Fryberg J expressly declined to consider the Code s 22.

22 McPherson JA disagreed with McMurdo P. He said:

> The offence of possessing such a net is constituted quite independently of any element of catching fish with it. It would, as I have said, have been committed if Mr Yasso had never caught fish with the net, but had simply kept it at home and never used it at all. It follows that the fact that he believed he was entitled to use it in catching fish, whether or not under Aboriginal tradition, cannot under s 22(2) of the Code excuse his possession of it. In relying on s 22(2), Mr Yasso was claiming a right that was not an answer to the charge of possessing the net in breach of the statutory prohibition.
>
> Some reliance has been placed by the President in her reasons on the decision of the Full Court of Western Australia in *Molina v Zaknich* (2001) 24 WAR 562, in determining the *ratio decidendi* of the High Court in *Walden v Hensler* (1987) 163 CLR 561. In doing so, their Honours arrived at a ratio by combining the reasons of the two minority dissenting Justices, who were Toohey and Gaudron JJ, with those of Deane J, who was one of the majority consisting of Brennan CJ, Dawson J and Deane J. With great respect, this is, I think, not a legitimate course to follow. In *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303, 314, Mason CJ, Wilson, Dawson and Toohey JJ agreed in saying:
>
> Certainly, it would not be proper to seek to extract a binding authority from an opinion expressed in a dissenting judgment.
>
> And in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 417, Kirby J said 'the opinions of judges in dissent are disregarded for this purpose, however valuable they may otherwise be'. I know that in ***Jones v Bartlett*** (2000) 205 CLR 166, 225, Gummow and Hayne JJ have since said that, where a binding authority cannot be extracted from

the majority judgment, a dissenting judgment may 'deserve respectful consideration'. But in *Walden v Hensler*, the majority was unanimous in deciding, unlike the minority, that s 22(2) afforded the appellant with no ground of exemption or exculpation in respect of the offence he had committed under s 54(1)(a) of the *Fauna Conservation Act 1974* of taking or keeping fauna. Their conclusion that, as a matter of sentencing discretion under s 657A of the Code, the conviction should not be recorded did not affect their decision that it should stand as a conviction according to law.

I do not consider, however, that the decision or the reasoning in *Molina v Zaknich* (2001) 24 WAR 562 calls for a different result to be reached in the present case. In my opinion the offence under the Act and Regulations of possessing a prescribed net was proved against Mr Yasso beyond reasonable doubt. It was not an offence of taking or keeping fish. The fact that he was under s 14(1) of the Act entitled to 'take' or catch fish under Aboriginal tradition afforded him with no answer to the charge laid in the complaint. [102]–[104]

23 With great respect, McPherson JA seems to have missed the point. Sometimes the Justices of the High Court reason in different ways to reach a conclusion. It may be necessary to analyse the reasoning to discern whether there is a common statement of principle. In *Walden v Hensler* a common statement of principle as to the construction of Code s 22 does emerge even though the Justices differed in the application of that principle to the facts in the case.

24 McPherson JA sought support from the judgment of Kirby J in *Garcia v The National Australia Bank Ltd* (1998) 194 CLR 395 at 417. However, it may be respectfully contended that Kirby J was in fact alone in expressing his view which led him to a rejection of the statements of Dixon J in *Yerkey v Jones* (1939) 63 CLR 649. The other members of the court accepted the principle in *Yerkey v Jones*.

25 While I consider that the analysis of McMurdo P would compel the conclusion in this case that the claim of right was a claim able to be advanced under s 22 of the Code, it must be acknowledged that her judgment is not a binding judgment of the Court of Appeal as neither of the other judges adopted it. I use it therefore for its persuasive value, preferring it, as I do, to that of McPherson JA.

26 I hold that possession of the crabs by an Aboriginal person in the facts of this case constitutes a claim of right in respect of property.

Can the respondent take the benefit of that claim?

27 As a matter of general principle, and without regard to authority, I would have thought that the Code s 22 is wide enough to encompass a person acting on behalf of another person in respect of property, or authorised by another person to act on their behalf in respect of property, pursuant to a claim of right. It is not difficult to imagine situations where a person, in pursuing a claim of right, seeks the assistance of others. There is no reason why the principal might escape criminal responsibility for pursuing an honest claim of right but the person aiding the principal would be criminally liable.

28 There are few decided cases on claims advanced by an aider to a person exercising a claim of right. Those cases tend to support a general principle that an aider might come under the umbrella of an honest claim of right.

…

40 There are two cases from Queensland that are more or less directly on point. Each is a decision of the Court of Appeal on a provision of the Code, that is, in this respect, identical.

I am bound by those decisions unless convinced that the interpretation is plainly wrong: *Australian Securities Commission v Malborough Gold Mines Ltd* (1993) 177 CLR 485 at 492; *Farrah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 236 ALR 209 at [135].

R v Waine [2005] QCA 312; (2006) 1 Qd R 458

41 Keane JA (McMurdo P and Wilson J agreeing) said:

> What is important is the honest belief that one is legally entitled to do to the property that which one is doing. That belief as to entitlement may come equally from the consent of the owner, or from a person believed to be the owner, as well as from a mistaken belief as to one's own title.
>
> In this case, the appellant was acting as the agent of Mr Sempf. If Mr Sempf can assert an honest claim of right to deal with the property, so, in my view, may the agent who believes she is authorised by him to do what he might do. It was submitted on behalf of the respondent that only a claimant to a beneficial interest in property in that claimant may raise a defence under s. 22(2) of the *Criminal Code*. But the language of s. 22(2) does not suggest that the defence which it affords can or should be read down in this way; and to read the language of s. 22(2) as if it were so confined would be inconsistent with the liberal construction of the provision supported by *R v Jeffrey & Daley*. [25], [29]

R v Jeffery & Daley [2002] QCA 429; 136 A Crim R 7

42 The accused were charged with robbery. One accused alleged that he took money believing it to be an entitlement of the other accused's compensation. Jerrard JA (McMurdo P and Atkinson J agreeing) said:

> Despite the understandable doubts of the learned trial judge, I consider that that claimed belief did raise for consideration by the jury a defence pursuant to s 22 of the *Criminal Code*. S 22(2) relevantly provides that:
>
> > A person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud.
>
> The appellant Daley took possession of and carried away the amount of $300.00, and now claims to have believed then to an entitlement, apparently as of a right, in Ms Jeffrey to compensation. As it is the Crown case that the appellants were acting together in taking money from Mr Wilkins, the appellant Daley must be entitled to the protection of any honest belief he had then as to Ms Jeffrey's right to monetary damages as compensation for the physical damage to her vehicle, and right to money from Mr Wilkins as that compensation.
>
> While Mr Daley's claimed belief must be honestly held to raise a defence under s 22, it does not matter if the right asserted by the belief is one which is unfounded in law or fact. An honestly held belief in a claim of right in Ms Jeffrey, whom he was assisting, to at least as much money as Mr Wilkins then had on him, although unfounded or unreasonable, would relieve Mr Daley from criminal responsibility for taking that money from Mr Wilkins' possession with intent to permanently deprive him of it. The lack of criminal responsibility for the element of stealing, which is an essential part of the offence of robbery, would mean he could not be held criminally responsible for that more serious offence. This would not relieve him of criminal liability for the serious assault the jury necessarily found he committed at that time.

The judgment of Macrossan J (as he then was) in *R v Williams* observed at page 295 line 32 that there seems to be no reason to doubt the correctness of the decision in *R v Skivington* [1968] 1 QB 166, in which was held that on a charge of robbery with aggravation, an honest belief by the accused person of his entitlement to the money in question, was enough to raise the defence of honest claim of right. This was because it was not necessary for the accused also to believe that he was entitled to take the money in the way that he did. Those observations of Macrossan J, with which I respectfully agree, apply in the instant case. A claimed belief under s 22 might save Mr Daley from a conviction for robbery, but not for assault occasioning bodily harm. The latter offence is not one relating to property. [22], [23], [24]

Resolution of the present case

43 I hold that Code s 22 may apply in circumstances where the claimant is acting pursuant to a claim of right held by another person. In the present case, although there was no occasion for them to formally exercise it, the boys, by reason of their status as Aborigines, had a claim of right to the undersized crabs that were in the possession of the respondent. They were entitled to possession. The respondent's possession of the undersized crabs was no more than an incident of the possession of the persons who had a claim of right to possess.

44 The magistrate held:

What makes this case more difficult is the expanded definition of possession in the FRMA. I accept and find that the accused allowed the boys to retain the undersized crabs, which were placed in the esky pending arrival at shore when the boys would take them home. That was done in the honestly held belief that they were entitled to fish for the crabs, irrespective of size, according to traditional law and custom. Alternatively, the accused failed to return the undersized crabs to the river on the basis of the said belief. The latter alternative would constitute an omission in terms of s 22 and goes to possession in the sense of the accused's control over the fish in the esky.

The accused's joint possession, in terms of s 4 FRMA was thus in the exercise of an honestly held belief in the right, or entitlement, of the boys to fish for crabs, irrespective of their size. [21], [22]

Conclusion

45 I am of opinion that a claim by an Aboriginal person in the circumstances arising in this case is a claim of right with respect to any property within the meaning of the Code s 22. I am further of opinion that as such a claim is able to be advanced by the respondent in this case by reason of the nature of possession of the undersized crabs, notwithstanding that he is not the primary beneficiary of a claim of right.

46 The magistrate was correct. The appeal is dismissed.

13.20C Sancoff v Holford

[1973] Qd R 25
Queensland Supreme Court

Hanger CJ: The appellant, Holford, was convicted by the stipendiary magistrate, of a charge that on December 10, 1971, he had in his possession, apparently for the purpose of sale, obscene publications, namely one book entitled *Love Play* and seventeen books entitled *Sexual Techniques*; he was fined $40.

The offence is provided for by s 12 of the Vagrants, Gaming and Other Offences Act 1931–1971. The section provides (inter alia):

> Any person who …
> (a) … has in his possession apparently for the purpose of sale … any obscene publication … shall be liable for a first offence to a penalty of forty dollars or imprisonment for three months.

There was no question that the appellant had possession of the books mentioned nor that he had them in his possession apparently for the purposes of sale. The points argued were that the books were not obscene and that if they were, the appellant had a good defence to the charge under s 24 of the Code …

I am unable to say that the test which the magistrate applied in finding that the books were obscene was wrong; nor am I able to say that, when that test is applied, the conclusion of the magistrate was not one which he could reasonably reach on the material before him.

The remaining question arises from s 24 of the Code …

It was not in question that this provision of the Code is of general application to the statute law of Queensland.

One of the books is named *Sexual Techniques*. The dust cover describes it as 'an illustrated guide to "love"'. It contains in fact many photographs of a nude male and a nude female in the act of intercourse. The other book is named *Love Play*; and the front cover has the words 'over 100 full page photographs of love positions'. Each of the books states on the front that the book is not for sale to persons under eighteen years of age.

In giving evidence before the magistrate, the appellant said that he knew of the book *Sexual Techniques* from reading English magazines where it was displayed prominently. Sancoff, the police officer who took possession of both books, said that the appellant said to him: 'These books are not obscene; I have sold hundreds of them; nearly everyone in Mackay has one.' The making of this statement was not denied by the appellant and the magistrate appears to have found that it was made.

I do not think there can be any doubt that the appellant was familiar with the contents of each of the books.

The basis of the assertion of a defence arising from s 24 was that the appellant did not believe that the contents of the books were obscene, though he knew the contents of the books.

I think s 24 has no application to the case. The position may be contrasted with that arising if a person has in his possession a book which he has not opened which is marked 'Electrical Engineering' but which contains inside nothing but pornographic pictures. Here a plea that the possessor believed the contents of the book to relate only to electrical engineering would establish a belief in a state of things — the contents of the book. But the belief — if it existed — of the appellant in the instant case, based on a knowledge of the contents of the books

is a very different thing. Knowing all the primary facts of the matter, the appellant claims to have reached a mistaken conclusion as to the result of the facts — that the books were not obscene and that he was entitled to sell them within the law. I think this was an error in law which was no excuse.

The argument for the appellant fails.

[**Williams J** delivered a separate judgment discharging the order to review. **W B Campbell J** agreed with the judgments of **Hanger CJ** and **Williams J**.]

Self-Defence and Other Defensive Force

CHAPTER 14

THE RANGE OF DEFENCES

14.1 The Criminal Codes of Queensland (Code (Qld)) and Western Australia (Code (WA)) (the Codes), like the common law, authorise some use of force in self-defence and in defence of other persons (Codes ss 271–273 (Qld)/s 248 (WA)) and in defence of real and moveable property: ss 267, 274–278 (Qld)/ss 244, 251–255 (WA). These provisions provide detailed directions as to how much force can be used in specified circumstances.

The Criminal Code (Cth) s 10.4 establishes a defence called 'self-defence' that covers defence of other persons and defence of property as well as defence of self.

14.2 Self-defence is the most commonly invoked ground for the use of defensive force and the subject of most case law. The relevant provisions are ss 271–272 (Qld)/s 248 (WA).

- In Queensland, the contents of the provisions are extended to cover the use of force in aid of another person by s 273 (Qld).
- In Western Australia, the wording of the basic defence covers both self-defence and defence of another person: s 248(4)(a) (WA).

14.3 Other provisions of the Codes which could conceivably justify defensive force have received little attention:

- The Code (Qld) s 266 allows for 'reasonably necessary' force to be used to prevent the commission of offences for which an offender can be arrested without warrant (see **25.17–25.22** on powers of arrest without warrant) and in order to prevent violence by a person believed, on reasonable grounds, to be an involuntary patient under the Mental Health Act 2000 (Qld).
- The Code (WA) s 243 allows for 'reasonably necessary' force to be used to prevent violence to any person or property by a person believed, on reasonable grounds, to be 'mentally impaired'.
- The Code (Qld) s 31(1)(c) allows for 'reasonably necessary' acts to be performed in order to resist violence threatened to oneself or another person in one's presence.

These provisions overlap with the sections dealing with defence of the person and property but have been largely ignored in favour of the more detailed specifications of the latter.

The courts have not appeared willing to allow the conditions for defence of the person or property to be avoided by resort to these more loosely worded provisions.

14.4 Two key principles have shaped the development of the common law on the use of defensive force and the design of the Codes:

1. any force used should be necessary to repel the attack; and
2. any force used should be a reasonable response to the attack.

The principle of necessity provides the basic justification for the use of defensive force and also provides an initial assessment of the degree of force which is justified. The principle of reasonableness then attaches an additional restriction to the use of defensive force. The force needed to repel an assault may not be justified if it would involve an escalation of violence. For example, minor assaults may have to be tolerated if the only way they can be repelled is through the infliction of serious bodily harm.

- In Queensland, these general principles are reflected in the detailed conditions for the use of defensive force in the Code. These provisions have often been criticised for their complexity and obscurity: see, for example, *R v Gray* (1998) 98 A Crim R 589 at **14.44C**.
- In Western Australia, a simplified scheme for defence of persons now applies. The existing scheme for defence of property, however, is maintained.

The result is that the law on defence of persons now diverges between the two states whereas the law on defence of property is still the same.

The provision on defensive force in the Criminal Code (Cth) s 10.4 is relatively simple and clear: see **14.41**. However, issues of defensive force usually arise in connection with state offences against the person.

14.5 Most provisions of the Codes on defensive force incorporate the phrase 'it is lawful for': see, for example, s 271 (Qld)/s 248 (WA). In contrast, the expression '[a person] is not criminally responsible for' is used in s 272 (Qld) with respect to self-defence against a provoked assault. In *R v Prow* (1989) 42 A Crim R 343 (**14.43C**), Thomas J suggested that the phrase 'it is lawful for' expresses the idea of a strong defence in which the use of force is justified while the phrase 'is not criminally responsible for' expresses the weaker idea that the conduct is merely excused: see **10.3–10.5**.

DEFENCE OF PERSONS IN QUEENSLAND

14.6 The Code ss 271–272 (Qld) prescribes conditions for the use of force to defend oneself against an assault. The purpose of using the force must be to *defend* against the assault. The law of self-defence does not permit an act of retaliation or revenge against an assault. See *James v Sievwright* [2003] WASCA 251 (**14.48C**) on a similar issue in connection with defence of a dwelling under s 244 (WA).

The Code specifies different conditions for the use of 'justified' force against an unprovoked assault (s 271(Qld)) and 'excused' force against a provoked assault: s 272 (Qld). See **10.3** on the general significance of the contrast between the phrases 'it is lawful for' and '[a person] is not criminally responsible for'. A person who initially provokes an assault can be regarded as partly responsible for the subsequent retaliation and, therefore, as deserving of no more than an 'excuse' for the use of defensive force. Moreover, such a person may perhaps be expected to show some tolerance of the retaliation.

14.7 Section 273 (Qld) permits the use of force to defend another person, subject to the same conditions as for self-defence, as long as aid is given 'in good faith'. The provision states:

> In any case in which it is lawful for any person to use force of any degree for the purpose of defending himself or herself against an assault, it is lawful for any other person acting in good faith in the first person's aid to use a like degree of force for the purpose of defending the first person.

This formulation fits neatly with a case where one person is using or is entitled to use lawful force in self-defence against an assault and another person comes to his or her aid. However, the fit might appear more awkward where a third party acts to defend someone who is not aware of the assault.

Suppose a threat of harm to a child is made to the child's mother. If the person making the threat has actually or apparently a present ability to effect the purpose, as required by s 245, there will be an assault on the child. Yet, if the child did not know of the assault, the child could not lawfully use force in self-defence. It would be absurd for the mother to be denied any right to use force to defend the child on this ground. One way of avoiding the absurdity would be to interpret the opening words of s 273 to mean: 'In any case in which it *would be* lawful for any person…'. Section 273 would thus read: 'In any case in which it would be lawful for any person to use force of any degree for the purpose of defending himself or herself against an assault, it is lawful for any other person acting in good faith in the first person's aid to use a like degree of force for the purpose of defending the first person.' It would be lawful for the child to use some degree of force to defend himself or herself against the assault, even though ignorance of the assault prevents the child actually acting for this purpose.

The requirement for an assault

14.8 Under the Code ss 271–272 (Qld), the trigger for the use of force is the occurrence of an 'unlawful assault'. The definition of an assault in s 245 (Qld) encompasses situations in which violence is merely threatened, as long as there is actually or apparently a present ability to implement the threat: see **5.7**. In such cases, the provisions on defensive force can be interpreted to permit pre-emptive strikes: see, for example, *Hall v Fonceca* [1983] WAR 309 at **5.26C**. There is also authority from the Northern Territory (dealing with similarly worded provisions) that the assault which constitutes the trigger for the use of force can encompass a continuing assault in the form of a threat, even though the assailant is temporarily unable to carry it out at the time when defensive force is applied: see *R v Secretary* (1996) 5 NTLR 96 (**5.27C**), discussed at **5.8**. Nevertheless, defensive force must be used in response to an unlawful assault rather than in anticipation of an attack that may or may not occur.

It should be noted that there must be some 'bodily act or gesture' accompanying the threat to constitute an assault under the Code; words alone cannot suffice: see further at **5.7**.

14.9 There is some uncertainty about entitlement to use defensive force against a non-responsible attacker, such as an insane person or a person acting under duress or a mistake of fact. Such a person would not have the responsibility necessary for the commission of the offence of assault: see **Chapters 12, 16, 17**.

In *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 at 663–4; 71 ALR 641, it was held that the trigger for self-defence at common law is simply the need to defend oneself, so that force can be used even against an insane attacker. In order to achieve the

same result under the Codes, however, the words 'unlawful assault' would have to be read as including assaults which are excused but not justified: see 10.3–10.5 on the distinction between justifications and excuses. This appears to be the interpretation given to the provision in *White v Conway* (Qld CCA, No 37 of 1991, unreported). In that case, it was held that a person could be using force in self-defence despite striking the wrong person because of a reasonable mistake of fact about who was the attacker. It was also held that the third party who was subjected to this defensive force could, in turn, defend himself against it because the initial defensive force would be excused not justified, and would therefore be unlawful (although the defence failed on the facts of the case itself). However, see *Gray v Smith* [1997] 1 Qd R 485, where it was assumed that an assault for which there would be a defence of provocation would not be an unlawful assault for the purposes of the law of self-defence.

In the case of an insane attacker, the defence of prevention of crime under the Codes s 266 (Qld)/s 243 (WA) may be available as an alternative. This defence is expressly extended to cover the use of force to prevent violence by a mentally ill person: see 14.2. No reference is made, however, to other non-responsible attackers.

Self-defence against an unprovoked assault

14.10 The Code s 271 (Qld) deals with self-defence against an unprovoked assault. There are two parts in this section.

The first part establishes the test for a general defence of self-defence; the force used must be 'reasonably necessary' to repel the assault: s 271(1) (Qld). Excluded from the application of this general defence, however, are cases in which the defensive force used was either intended or likely to cause death or grievous bodily harm. Such cases will be covered, if at all, by the second part.

The second part establishes the test for a defence of self-defence involving the use of force intended or likely to cause death or grievous bodily harm. The person must reasonably apprehend death or grievous bodily harm from the attack and must also believe on reasonable grounds that there is no other way of avoiding these injuries: s 271(2) (Qld). Grievous bodily harm is defined in s 1 as (a) loss of a distinct part or an organ of the body or (b) serious disfigurement or (c) 'any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health'.

Although most cases of homicide or grievous bodily harm will fall under s 271(2), the more liberal terms of s 271(1) will apply where force which happened to cause grievous bodily harm was neither intended nor likely to have done so: see *Prow* (14.43C) and also *R v Peachey* [2006] QCA 162 at [28].

14.11 The composite term 'reasonably necessary' in Code s 271(1) (Qld) indicates that the calculation of what is necessary is not expected to be precise; a rough measure of necessity is required, but that is all. In addition, the term 'necessary' probably encompasses the idea that the response should be reasonable. This is how the term 'necessary' is used in the common law of self-defence: see *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 at 662; 71 ALR 641.

The general concept of reasonableness is also reflected in the detailed prescriptions of s 271(2) (Qld)/s 248(WA) for the use of force that is intended or likely to cause death or grievous bodily harm. In effect, these prescriptions detail the threshold at which the law accepts that it is reasonable to respond to an assault by inflicting death or grievous bodily harm.

14.12 The interpretation of Code s 271(2) (Qld) has been controversial.

In *Gray* (**14.44C**), the Queensland Court of Appeal emphasised the differences between the phraseology in the two parts of s 271. The court took the view that s 271(1) (Qld) creates an objective test of necessity while s 271(2) directs attention to the reasonableness of the defender's state of mind. It was held to be a misdirection to instruct a jury, with respect to s 271(2), that, in addition to the other conditions being satisfied, the force had to be objectively necessary.

The court in *Gray* acknowledged that s 271(2) does refer to using such force as is 'necessary for defence' as well as to reasonable grounds for the defender's state of mind. It is provided that a person who reasonably apprehends death or grievous bodily harm from the attack and believes on reasonable grounds that there is no other way of avoiding these injuries may use such force as is necessary for defence. Nevertheless, the court concluded that its interpretation was required by previous authority as well as, presumably, the need to disentangle the complexity in the Codes. The same approach was adopted by the Western Australia Court of Criminal Appeal in *Minniti v R* [2001] WASCA 148; 120 A Crim R 531. See also *James v Sievwright* (**14.48C**) on defence of a dwelling under s 244 (WA).

The interpretation favoured in *Gray* has been questioned in some later Queensland cases: see *R v Vidler* [2000] QCA 63; (2000) 110 A Crim R 77 at **14.45**; *R v Corcoran* [2000] QCA 114; 111 A Crim R 126, Pincus and Thomas JA; *R v Greenwood* [2002] QCA 360, Jerrard JA. Some judges of the Queensland Court of Appeal have said that *Gray* should be regarded as binding for the moment but that its reconsideration may be desirable. However, in *R v Wilmot* [2006] QCA 91, the authority of *Gray* was accepted without question.

The significance of this debate turns on the scope for the defence to be available despite some mistake on the part of the defender: see **14.37**.

14.13 Another issue is the interpretation of the expressions 'reasonable apprehension' and 'believes, on reasonable grounds' in s 271(2) (Qld).

In determining whether an apprehension or belief was 'reasonable', what is relevant is not what a reasonable observer would have thought, but what the accused might reasonably have thought in the situation in which he or she was placed: *Viro v R* (1978) 141 CLR 88 at 146; 18 ALR 257 at 303. Thus, account can be taken of the accused's prior experience with and knowledge of the assailant in deciding whether an apprehension was reasonable. This has been particularly important in a series of cases where women in prolonged abusive relationships have eventually killed their partners: for example, *Lavallee v R* [1990] 1 SCR 852; 55 CCC (3d) 97 (**14.46C**) and *Secretary* (**5.27C**), above. See also the comments of the High Court in *Osland v R* [1998] HCA 75; 197 CLR 316; 159 ALR 170 (**14.47C**), endorsing the admissibility of expert psychiatric evidence to assist understanding of such abusive relationships.

14.14 In *R v Julian* [1998] QCA 119; (1998) 100 A Crim R 430 at 433–4, 438–9, 448, it was accepted that a test of reasonable grounds for a belief is not the same thing as a test of what the reasonable person would have believed. It was said to be an error to direct a jury in terms of the reasonable person. The concern was that it might divert attention from the possibility that more than one view might be regarded as reasonable. As it was put by Dowsett J:

> [R]easonable people will differ in their judgments without departing from the bounds of reasonableness. Section 271(2) requires that the defender's belief must be justifiable by reference to the grounds upon which it is based. It does not contemplate that there will necessarily be only one belief which a reasonable person could hold in the circumstances. The defender's belief must be reasonably open on the facts, not the only belief open on those facts.

Subsequently, this concern to avoid reference to the reasonable person was disparaged in *R v Vidler* [2000] QCA 63 at [22]; (2000) 110 A Crim R 77:

> In practical terms, however, it is difficult to see any difference between a belief of a reasonable person in the position of the accused and a belief of the accused person based on reasonable grounds.

The court in *Vidler* suggested that the difference between these expressions is so tenuous that no jury could be misled into applying the wrong considerations. Nevertheless, the reasoning in *Julian* has been approved for other contests where reasonable grounds for a belief are in issue. For example, see *R v Wilson* [2008] QCA 349; [2009] 1 Qd R 476 at [40] (12.18C) on mistake of fact.

14.15 In *R v Mrzljak* [2004] QCA 420; [2005] 1 Qd R 308 (6.30C), the court addressed a similar problem of interpretation in relation to the defence of honest and reasonable mistake of fact under the Codes s 24. The majority of the court held that a reasonable belief is not necessarily one which would have been held by a reasonable person: Williams JA at [53], Holmes J at [79]. Holmes J referred to *Julian*, above, as supporting authority for this proposition. The majority in *Mrzljak* used this interpretation to justify its view that personal characteristics of the accused could be taken into account in determining what might have been reasonable, including intellectual impairment and mental disorder, although not intoxication: see 6.17. The majority favoured a flexible approach under which the issue would be what might have been reasonable for the particular accused, taking account of any relevant limitations or impairments of that accused.

The flexibility sought in *Mrzljak* might just as easily have been achieved by conceiving a reasonable person as one with the limitations or impairments of the accused. The general issue of how much flexibility should be built into objective tests is not resolved by whether or not reference is made to a reasonable person. It must be addressed as a question of principle: see the discussion in 6.17.

Self-defence against a provoked assault

14.16 The Code s 272(1) (Qld) establishes more restrictive rights of self-defence for an aggressor who started the fight or provoked the assault. The policy behind this provision is to force persons who are responsible for the initiation or escalation of conflict to make some sacrifices in order to stop it. Thus, a person who is subject to s 272(1) (Qld) cannot use any defensive force unless the assault is sufficiently serious to raise a reasonable apprehension of death or grievous bodily harm and to induce a reasonable belief that there is no other way of avoiding these injuries. This is the same test as that for the use of force intended or likely to cause death or grievous bodily harm in defence against unprovoked assault: s 271(2) (Qld). If a provoked assault is not this serious, it must be tolerated.

14.17 Under Code s 272(2) (Qld), the following additional conditions limit the scope of the defence:

- Protection under s 272(1) (Qld) does not extend to a person who had previously tried to kill or cause grievous bodily harm to the attacker, either in the original provocation or at some intermediate time;
- 'nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was possible'.

Read by itself, the condition respecting declining conflict does not make sense. The phrase 'nor, in either case' suggests an additional exclusion but the term 'unless' suggests a qualification to the exclusion of a person who had previously tried to kill or cause grievous bodily harm. In *Randle v R* (1995) 15 WAR 26, it was suggested that the sets of conditions should be run together, so that the denial of the defence to persons who had previously tried to kill or cause grievous bodily harm does not apply to persons who had redeemed themselves by subsequently declining further conflict and taking advantage of any opportunities for quitting or retreating. Malcolm CJ said, at 37:

> In my opinion, despite the fact that the first two clauses of the second paragraph of s 249 state cases where the protection would not be available in any event, the effect of the final clause is to qualify that absence of protection by stating particular circumstances under which the defence will nonetheless be available in either of those two cases. In effect, this means reading the provision as if the words 'nor, in either case' were deleted and the final clause began with 'unless', thus qualifying the denial of protection.

The same interpretation was adopted in *Wilmot* [2006] QCA 91; 165 A Crim R 14 at [49].

14.18 The restrictive conditions of Code s 272 (Qld) mainly apply to persons who started a fight by committing an assault. Even in the absence of an initial assault, s 272 (Qld) can apply to defensive force against a provoked attack. Nevertheless, in several cases it has been held that the restrictive definition of provocation in ss 268–269 (Qld) applies to the use of defensive force: see, for example, *Prow* at 14.29C; *R v Dean* [2009] QCA 309. The Code provisions on provocation refer to provocation that causes actual loss of self-control and which is sufficient to cause an ordinary person to lose self-control: see Chapter 15. It may only be provocation of that kind which will restrict a person to the defensive rights conferred by s 272 (Qld).

Killing for preservation in an abusive domestic relationship

14.19 There is a special form of the defence of self-defence in Queensland which does not require an assault before force can be used. In 2010, a new partial defence to murder was introduced, reducing the offence to manslaughter: Code (Qld) s 304B. Section 304B(1) provides that the offence is reduced to manslaughter where:

a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and

b) the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and

c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.

An abusive domestic relationship is defined as one 'existing between 2 persons in which there is a history of acts of serious domestic violence committed by either person against the other': s 304B(2) (Qld).

14.20 Section 304B creates a form of the defence of self-defence because it requires that the action causing death be taken in the belief, on reasonable grounds, that it is necessary for self-preservation.

However, unlike the general defence of self-defence under ss 271–272, it is not required that the killing occur in defence against an assault which is in progress and its reasonableness is not assessed by reference to the immediate behavior of the deceased. The focus instead is on the overall character of the relationship and the fears that may reasonably be generated by a series of incidents which have occurred in the past. It is expressly provided that the relevant history may include 'acts that appear minor or trivial when considered in isolation' (s 304B(3)) and may include 'acts of the deceased that were not acts of domestic violence': s 304B(6). It is also provided that the killing may occur 'in response to a particular act of domestic violence committed by the deceased that would not, if the history of acts of serious domestic violence were disregarded, warrant the response': s 304B(4).

In recognition that domestic violence may be two-way, s 304B(5) provides that a person may claim the defence 'even if the person has sometimes committed acts of domestic violence in the relationship'.

14.21 Section 304B is designed primarily for the weaker, usually female, party in a domestic relationship who, reasonably fearing death or grievous bodily harm, makes a pre-emptive strike rather than waiting until a dangerous assault is already in progress. The role of this partial defence will depend in part on the interpretation of the requirement for an assault in the complete defence of self-defence in s 271(2). Its role will be restricted if the idea is accepted that a person who is asleep can commit a continuing assault, so that s 271(2) applies to the killing: see 14.8.

14.22 It may be questioned why, if reasonable grounds are required for the belief that the action causing death is necessary for self-preservation, a partial defence should be all that is available. Restriction to a partial defence might make sense if the defence could be claimed simply on the basis of an honest belief in the necessity of the action. However, if there are reasonable grounds for believing the action is necessary for self-preservation, the person would surely be justified in taking the action. A complete defence like that established by s 271(2) would therefore be appropriate.

DEFENCE OF PERSONS IN WESTERN AUSTRALIA

14.23 In 2008, an amendment to the Criminal Code (WA) introduced a new, simplified, scheme for self-defence and the defence of other persons. Section 248(2) provides that '[a] harmful act done by a person is lawful if the act is done in self-defence …' Section 248(4) defines self-defence in this way:

> A person's harmful act is done in self-defence if –
> (a) the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and
> (b) the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and
> (c) there are reasonable grounds for those beliefs.

'Harmful act' is defined broadly in s 248(1) as meaning an act that is an element of an offence against the person other than an offence under Ch XXXV (offences relating to parental rights and duties, such as the offence of child stealing). This definition is applicable to both

what a person may do in self-defence or the defence of another and also what the person may defend against.

14.24 A harmful act is not done in self-defence if it is a response to a lawful act, such as a previous act of self-defence: s 248(5) (WA). The initiator of a fight has no right to commit a harmful act to resist a necessary and reasonable response.

It is expressly provided that a harmful act is not lawful merely because the person doing it is not criminally responsible for it: s 248(6) (WA). This means that a person can resist an attack for which there is no criminal liability because, for example, the assailant is operating under a mistake of fact or is insane.

14.25 It is expressly provided in s 248(4) that the harmful act against which defence is made need not be imminent. Thus, there need not be an assault in progress. Defence can be made against harm anticipated in the future. This may be particularly important for weaker parties in abusive domestic relationships. Where the other conditions of s 248(4) are met, they can take pre-emptive action rather than waiting for an assault to commence with its attendant dangers.

14.26 There are two safeguards against the misuse of defensive force under s 248(4):

1. the person must believe on reasonable grounds that it is necessary to use the force to defend against a harmful act.
2. the force used must be an objectively reasonable response in the circumstances as the person on reasonable grounds believes them to be.

14.27 Section 248(3) creates a partial defence to murder, reducing the offence to manslaughter. The defence is available in cases of excessive force, where the force used is not a reasonable response, in the circumstances as the person on reasonable grounds believes them to be, but the other conditions for self-defence are present.

DEFENCE OF PROPERTY

14.28 The Codes include a range of provisions authorising the use of force to defend possession of property: ss 267, 274–275 (Qld)/ss 244, 251–252 (WA). With some exceptions relating to defence of a dwelling, these provisions do not authorise lethal degrees of force.

14.29 Greater force can be used in defence of a dwelling than in defence of other kinds of property:

- Section 267 (Qld) authorises a person who is in peaceable possession of a dwelling to use such force as is believed on reasonable grounds to be necessary to prevent a person unlawfully entering or remaining in the dwelling with intent to commit an indictable offence in it.
- Section 244 (WA) grants a householder extensive rights in relation to 'home invasions'. It is lawful for a person who is in peaceable possession of a dwelling to use any force or do anything else that the occupant believes, on reasonable grounds, to be necessary for certain purposes:

  (i) to prevent a home invader from wrongfully entering the dwelling or an associated place;

(ii) to cause a home invader who is wrongfully in the dwelling or on or in an associated place to leave the dwelling or place;

(iii) to make effectual defence against violence used or threatened in relation to a person by a home invader who is attempting to wrongfully enter the dwelling or an associated place or wrongfully be in the dwelling or on or in an associated place; or

(iv) to prevent a home invader from committing, or make a home invader stop committing, an offence in the dwelling or on or in an associated place.

A person is a 'home invader' if the occupant believes, on reasonable grounds, that the person intends to commit an offence or is committing or has committed an offence in the dwelling or on or in an associated place. See *James v Sievwright* (14.34C), a case where the defence was unsuccessful because it was concluded that the force was not used for a permissible purpose.

14.30 Under Codes s 267 (Qld)/s 244 (WA), the defender of a dwelling can use whatever degree of force is believed, on reasonable grounds, to be necessary. Even killing is permitted if this is the only way to stop someone attempting to enter or remain in the dwelling with intent to commit an offence. In Queensland, the offence being prevented must be an indictable offence but there is no such limitation in Western Australia.

In *R v Cuskelly*, [2009] QCA 375, [30], Keane JA commented on the broad scope of the defence in Queensland:

> It is apparent that s 267 is informed by policy considerations different from the affirmation of the legitimacy of proportionate force in self-protection embodied in s 271 and s 272. Section 267 gives effect to a policy of the law which recognises the legitimate use of force to defend hearth and home …

In contrast, it is now widely accepted at common law that killing in defence of a dwelling is not justified: see D Omerod, *Smith and Hogan: Criminal Law*, 11th ed, Oxford University Press, 2005, p 340. See also 14.27 on the prohibition on intentionally inflicting death or 'really serious injury' in defence of any property for the purposes of Commonwealth offences.

14.31 Queensland and Western Australia both permit lethal traps to be set to defend dwellings:

- Queensland authorises the setting of a 'spring gun, mantrap or engine' at night in a dwelling to protect the dwelling: Code (Qld) s 327(3).
- In Western Australia, a person is not criminally responsible for an act or omission in respect of a dangerous thing set at night in a dwelling for the protection of the occupants: Code (WA) s 305(5).

14.32 With the exception of the provisions on dwellings, the provisions on defence of property adopt a common test: that is, that the force used should have been 'reasonably necessary', subject to a prohibition in Queensland on the infliction of 'grievous bodily harm', and in Western Australia on the use of force which is intended or likely to cause death or 'grievous bodily harm'. In *Greenbury v Lyon* [1957] St R Qld 433, the concept of reasonably necessary force in defence of property was equated with appropriate force.

- Codes ss 274–275 (Qld)/ss 251–252 (WA) authorise the use of some force to defend the possession of moveable property: s 274 (Qld)/s 251 (WA) concerns the use of force to defend peaceable (even if unlawful) possession against a trespasser; s 275 (Qld)/s 252 (WA)

concerns the use of force to defend possession under a claim of right (that is, a belief in entitlement to possession: see 13.7–13.10) against anyone, even someone who is actually entitled by law to possession. Both provisions extend the defence to any person acting on the authority of the person in possession of the property, and in Queensland also to persons lawfully assisting.

- Section 276 (Qld)/s 253 (WA) is entitled 'Defence of moveable property without claim of right' but is not concerned with the use of defensive force at all. It authorises the use of force in order to overcome resistance to the taking of lawful possession.
- Sections 277–278 (Qld)/ss 254–255 (WA) authorise the use of some force to defend possession or entitlement to control or management of real property or a vessel. The structure of these provisions parallels that of ss 274–275 (Qld)/ss 251–252 (WA) on the use of force to defend possession of moveable property. Sections 277(2) (Qld)/s 254(2)(c) (WA) also authorise the use of force to remove disorderly persons from property.

The Code (Qld) simply refers to causing grievous bodily harm rather than to intent to cause or to the likelihood of this result, but the defence of accident under s 23 will be available in the event that the harm was neither intended nor foreseeable: see 4.20–4.25.

MISTAKES

14.33 Three kinds of mistake can be made about the use of defensive force:

1. a mistake about the existence or nature of an attack or about the identity of the attacker;
2. a mistake about the necessity of a particular response;
3. a mistake about the reasonableness of a particular response.

14.34 A person using defensive force under a mistake of any kind receives some protection from the general common law doctrine that a person apparently under attack cannot be expected to measure the dimensions of the situation to a nicety. See, for example, *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 at 662–3; 71 ALR 641. The relevance of the common law doctrine to cases arising under the Code has been recognised in decisions such as *Greenbury v Lyon* [1957] St R Qld 433. Whatever tests are written into legislation therefore must be applied with a degree of flexibility. Allowance must be made for the pressures placed on someone who may be afraid and have little time for deliberation. Beyond recognising a margin of error as a basic principle, the law relating to mistakes becomes difficult.

14.35 Most cases concern mistakes about the necessity of using some measure of force. Such mistakes can be made either because of mistakes about the existence or nature of attacks, or because of mistakes about the necessity of particular responses. The law relating to these mistakes is exceedingly complicated under the Codes. It is complicated by differences between the structures of the various provisions and by questions concerning the relationship between these provisions and Codes s 24.

14.36 Some provisions on defensive force are framed in terms that have been interpreted to permit reasonable mistakes about the necessity of using force.

- Code s 271(2) (Qld) requires a 'reasonable apprehension' of death or grievous bodily harm and a belief held 'on reasonable grounds' that the force used is the only way of repelling the attack.
- Code s 248 (WA) requires reasonable grounds for believing the act is necessary for self-defence or the defence of another person.
- Sections 267 (Qld)/s 244 (WA) (defence of a dwelling) require a belief on reasonable grounds that the force used is necessary.

These provisions are sufficiently broad to encompass mistakes made on reasonable grounds: see *R v Muratovic* [1967] Qd R 15 at 19. There have also been suggestions that the general statement on mistakes of fact in Codes s 24 is relevant to these provisions on self-defence: see *Lean v R* (1989) 1 WAR 348. However, it is difficult to see any role for s 24 in relation to provisions which base a defence on reasonable belief in the necessity of force rather than actual necessity.

14.37 In contrast, other provisions on defensive force are framed in wholly objective terms, referring to actual necessity rather than any belief about necessity. See Code s 271(1) (Qld) (the use of force against an unprovoked assault) and also ss 274–278 (Qld)/ss 251–255 (WA) (defence of property). These provisions simply require that the force used be 'reasonably necessary' and make no reference to any belief about necessity.

The Codes s 24 could make the defences applicable despite mistakes made on reasonable grounds. An example is *White v Conway* (Qld CCA, No 37 of 1991, unreported) where it was held that s 24 excused the conduct of someone who mistook the identity of his attacker and therefore used defensive force against the wrong person. There is a question though whether s 24 completely covers the field for mistake. Section 24 expressly refers to mistakes about 'the existence of any state of things'. This clearly covers mistakes about the existence and nature of attacks. However, it can be argued that a mistake about whether or not a particular response is necessary to repel an attack is a mistake of judgment rather than a mistake of fact. See, for example, *Marwey v R* (1977) 138 CLR 630 at 637; 18 ALR 77, where Barwick CJ said: '… I take leave to question whether the necessity of doing the fatal act can properly be said to be a state of fact for the purpose of applying s 24'. His Honour did continue, however:

> Resort might, of course, be had to that section if the reasonable grounds for the necessary belief included the accused's erroneous understanding of some fact which, had it been as the accused understood, would have supported the existence of reasonable grounds.

For an example of this, see the case of *Lean*, above.

There are authorities both for and against including mistakes of judgment within the scope of s 24: see 12.11. If s 24 does not cover this kind of mistake, allowance for reasonable mistakes should be implied directly into the provisions on defensive force. In effect, they should be read as if they expressly referred to a reasonable belief in the necessity of using the force. Similar provisions in the Canadian Criminal Code have been read in this expansive way: see *R v Baxter* (1975) 27 CCC (2d) 96 at 111. It would be bizarre if a mistake about the existence or nature of an attack could provide a defence but a mistake about the degree of force necessary to repel it could not.

14.38 In cases where 'battered women' have killed their abusers, it has been contended on occasion that there could not have been a reasonable belief in the necessity to kill, because

the option of simply leaving the relationship would be available. It has now been accepted in some cases that expert psychiatric evidence is admissible in order to explain how prolonged abuse in a relationship may lead to a reduced capacity to perceive alternatives and take initiatives: see *Lavallee* (14.46C), and *Osland* (14.47C). What might be reasonable for an accused to believe is determined by reference to what might be reasonable for a person who has been psychologically damaged by abuse to believe.

Using psychiatric evidence in this way is more questionable than using it to determine whether an apprehension of violence was reasonable: see 14.11. When psychiatric evidence is used to determine the relevant capacities against which an accused should be judged, the objective test is being individualised. See the discussion of this problem in relation to the defence of accident and the concept of criminal negligence in 4.39 and in relation to the defence of mistake of fact in 6.22–6.25. In *Stingel v R* (1990) 171 CLR 312; 97 ALR 1 (15.33C), the High Court ruled against the individualisation of objective tests in relation to the defence of provocation, except in the matter of age. If it is now acceptable to adapt objective tests so as to take account of the impaired capacities of 'battered women', it may reflect a general weakening of the principle in *Stingel*: see further the discussion in 15.16–15.17. In *Mrzljak* (6.30C), Holmes J, at [85]–[85], drew on the authority of *Lavallee* and *Osland* as support for individualising the reasonableness test for the defence of mistake of fact.

14.39 In addition to mistakes about the necessity of using force, there can be mistakes about the reasonableness of responses. Neither the Codes nor the common law offer any support for defences based on such mistakes. Where matters of normative judgment are in issue in criminal law, the tests applied are usually wholly objective: see, for example, 7.21 on the concept of dishonesty. Moreover, the rule denying that ignorance of the law can be an excuse applies to the use of defensive force: s 22. Thus, for example, it cannot be a defence to murder that the accused believed killing to be justified in defence of moveable property.

EXCESSIVE FORCE

14.40 In some cases where a measure of defensive force would be lawful, the force actually used may be considered excessive. Codes s 283 (Qld)/s 260 (WA) provide that any such excessive force is unlawful. The person using excessive force can be liable for resulting injury or death as if no force had been justified at all. The only exception is where excessive force is inflicted under a reasonable belief in its necessity; then the rules relating to mistakes may still make a defence available: see 14.19–14.24. However, a genuine but unreasonable mistake cannot provide a defence.

At one time, the common law of Australia recognised a partial defence to murder in cases where excessive force was used under an unreasonably mistaken belief that it was necessary. The partial defence reduced the offence from murder to manslaughter. This common law doctrine was finally repudiated by the High Court in *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645; 71 ALR 64.

The partial defence of excessive force was never a part of the law on defensive force under the Codes. The courts have taken the view that there is no room for such a defence in light of the express provisions of s 283 (Qld)/s 260 (WA): see *R v Johnson* [1964] Qd R 1; *Aleksovski v R* [1979] WAR 1.

Western Australia, however, has now introduced a form of partial defence in s 248(3) (WA), which reduces the offence to manslaughter where the force used is not a reasonable response,

in the circumstances as the person on reasonable grounds believes them to be, but the other conditions for self-defence are present.

COMMONWEALTH OFFENCES

14.41 The defence created by the Criminal Code (Cth) s 10.4 is called 'self-defence' but applies to a person defending himself or herself or another person or defending property. Generally, a person is entitled to use such force as he or she believes is necessary for the purpose of defence and is a reasonable response in the circumstances as he or she perceives them: s 10.4(2). This general entitlement is qualified in relation to defence of property, where there is a prohibition on the use of force intended to inflict death or 'really serious injury': s 10.4(3).

The trigger for the use of defensive force is a belief in an unlawful attack: s 10.4(4). This means that the defence can be available despite a mistake of fact, even an unreasonable mistake. The defence is therefore phrased in the language of an excuse ('a person is not criminally responsible for …') rather than the language of justification used in some provisions of the state Codes.

EVIDENTIARY AND PERSUASIVE BURDENS

14.42 There must be some evidence supporting a defence before it will be put to the jury for consideration. Nevertheless, once there is some evidence supporting a defence, the burden lies on the prosecution to disprove the defence beyond reasonable doubt. In other words, the accused carries the evidentiary burden to put the defence in issue if the case for the prosecution has not already done so; the prosecution then assumes the persuasive burden to exclude the defence: see Chapter 2. In *Muratovic* [1967] Qd R 15 at 17–18, Gibbs J held:

> [It] is now established contrary to earlier decisions … that the onus is never on an accused person to establish a plea of self defence; the onus throughout remains on the prosecution to establish the guilt of the accused … If there is any evidence on which a jury, acting reasonably, would be entitled to find that the killing (if the charge is homicide) was done in self defence or to entertain a doubt as to whether it was done in self defence the issue of self defence should be left to the jury.

14.43C **R v Prow**
(1989) 42 A Crim R 343
Queensland Court of Criminal Appeal

Thomas J: This is an appeal against a conviction of manslaughter. It raises the question whether self defence under the first limb of s 271 of the Criminal Code (Qld) is an available defence to such a charge.

The present matter arose from an incident that led to a fight between the appellant and one Lister (the deceased). It is enough for present purposes to record that although conflicting versions were given of relevant details, there was evidence that the appellant had refused to remove himself from the rear of a utility, that after a verbal interchange Lister had pulled him out, that a fist fight had ensued between the two men, that the appellant 'got in a good one'

to Lister's jaw, that Lister 'went down', and that the appellant continued punching and later kicking Lister when he was on the ground.

Lister died as the result of injuries inflicted by the appellant. However the evidence of those who performed the post-mortem (including Dr Naylor) was to the effect that the direct cause of death (subarachnoid haemorrhage) was most likely the result of the injury to the jaw. In other words, the evidence was not sufficient to enable a jury to conclude that death was caused by the later acts of kicking.

The case at the end of the day was that the appellant caused the death by a blow in the course of a fist fight while both men were still on their feet.

Conflicting evidence existed as to the first physical contact, and as to the allegedly provocative words of each man preceding this. There was however at least some evidence raising the question whether the appellant had been unlawfully assaulted without having provoked the assault. The learned trial judge seems to have taken this view, because he allowed the defence which is recognised in the second limb of s 271 to go to the jury. His Honour however refused to allow the jury to consider a defence under the first limb, contrary to the request of defence counsel …

… The jury, on one view of the facts could conclude that Lister's assault led to the fist fight, that the appellant delivered a blow of moderate severity, and that there was an unexpected death. Such circumstances afford a good example of an accused who would have considerable difficulty in supporting a defence under the second limb but who may have quite a viable defence under the first limb if it is available to him. Of course the jury may find that the preliminaries (whether the appellant was unlawfully assaulted and did not provoke the assault) are excluded, in which case the defence would be excluded under both limbs. But there is evidence to go to the jury on both limbs if the defence is legally open on a charge of manslaughter.

…

Section 271 needs to be seen in its context within Ch 26 of the Code which is concerned with 'justification and excuse' in relation to assaults and violence to the person generally. Within the 40 sections in that chapter there are 28 instances where the formula 'it is lawful for …' is used, (ss 247, 248, 249, 254, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 270, 271 (first limb), 271 (second limb), 273, 274, 275, 276, 277, 278, 279, 280 and 281); and there are six instances in which the formula 'a person … is not criminally responsible for …' is used, (ss 251, 252, 253, 269, 272 and 282). The former may be taken to afford justification and the latter excuse in favour of a person in respect of acts which would otherwise carry criminal liability. The distinction no doubt allows certain consequences to ensue in civil law, but for the purposes of the criminal law it is clear enough that both formulae afford protection of an accused person against criminal liability in respect of the specified acts.

Section 271 (first limb) says nothing about the results of the force that it declares lawful to use. There is no requirement that it does not cause death, but rather that it is not intended and is not likely to do so. Counsel for the appellant submitted that in order to see the defence as inapplicable in a case such as the present, one is forced to read in additional words such as 'and does not in fact' before the words 'cause death or grievous bodily harm'. This is true. But so is the observation of counsel for the Crown that additional words need to be read into s 291, such as 'the acts which cause' before 'such killing' in order to displace its prima facie meaning.

In the absence of binding authority on this question this court is free to reach its own conclusion. Having regard to the structure of the code I find it very difficult to understand how

a man can be convicted of manslaughter for delivering a blow which the code declares to be lawful. It is true that the criminal law does not always confine itself to punishing the specific acts of the offender. It frequently prohibits the causing of a particular result. 'Thou shalt not kill' is the original absolute prohibition in this context. But as society evolved the law-makers identified exceptions whereunder some types of killing should be less punishable than others, and some killings where a person should not be punishable at all under the criminal law. Thus the category of manslaughter was identified; and in certain cases of self defence it was recognised that the acts of the offender ought not to be punishable even though the dire consequence of death had resulted from his acts. Various formulae were identified through the combined efforts of common law judges and juries. They were very much the product of the natural common-sense questions — Who started it? Did he go too far? and, should he be punished? Ultimately the tests were summarised and restated in ss 271 and 272 of the Code. It makes nonsense of the criminal law, and of the Code to say:

> Here are ss 271 and 272. These are the categories of self defence where the law recognises that a man may defend himself and that if he does so his conduct will be lawful. These categories can all be used to justify a killing except the least serious one where he neither intends to kill nor uses force that is likely to cause death; that one will not apply if death results.

To convict a man of a crime for the consequence of his lawful act is prima facie obnoxious to the nature and purpose of the criminal law, and such a result should ensue only from the clearest possible language …

Finally, it is impossible to see any good reason why self defence against unprovoked assault should be confined to cases where the accused entertains, inter alia, a reasonable apprehension of death or grievous bodily harm, and in particular why he should be deprived of the defence when, in the course of using such force as is reasonably necessary to make effectual defence against the other man's assault, he uses force that turns out to be fatal but which was not intended or likely to be so.

It follows that provided there is evidence which is capable of raising the necessary issues, both limbs of s 271 are available to an accused by way of defence to a charge of manslaughter …

The appeal should be allowed and the conviction set aside …

[**Williams and Shepherdson JJ** concurred with **Thomas J** in allowing the appeal and ordering a new trial. **Williams J** noted that in determining the meaning of 'provoked' in ss 271 and 272, the meaning of provocation in s 268 was to be used. In coming to this decision his Honour noted the approach adopted by **Hanger CJ** in *R v Kaporonowski* [1972] Qd R 465 at 480; **Gibbs CJ** in *Kaporonovski v R* (1973) 133 CLR 209 at 237; and **Hart J** in *R v Muratovic* [1967] Qd R 15 at 27.]

14.44C

R v Gray

(1998) 98 A Crim R 589
Queensland Court of Appeal

McPherson JA: The appellant was brought to trial in the Supreme Court on an indictment charging him in count 1 with the murder of Phillip Goatley; in count 2, with doing grievous bodily harm to Rohan Tidswell with intent to do grievous bodily harm; and, in count 3, with unlawfully wounding Keith Jealous. He was found not guilty of the offence charged in count 3 and those charged in counts 1 and 2; but guilty on count 1 of the manslaughter of Goatley and on count 2 of doing grievous bodily harm to Tidswell. In substance, therefore, the jury acquitted the appellant of the offences in the first two counts involving in each case an element of intention. As to count 3, it is a permissible inference from the evidence at the trial, that the jury were left in doubt whether or not the wounding in question might not have been an accident within the meaning of s 23 of the Criminal Code.

The substantial defence raised by the appellant at his trial was one of self defence within the meaning of s 271 of the Code of himself and his family. The complainants named in each of the counts were members of a local 'bikie' group known as the Rebels Club. There was a history of mutual animosity, stretching back some months before the date of the alleged offences on 26 June 1996, between the appellant and members of the Rebel group. The appellant is a retired former employee of the Department of Defence, almost 54 years of age at the time in question, who lived with his wife, children and grandchildren at a rented house at 343 East Street, Rockhampton. He is an Aboriginal, and there is little doubt that racial disharmony played a part in bringing about the incident giving rise to these charges. Insults had from time to time been traded between him and members of the Rebels Club. He condemned them as 'white trash', and they, or some of them, used epithets in which his racial origins figured prominently. There was evidence of threats against him and his family, including one that the house in which his daughter was living would be burnt down, and that the appellant's throat would be cut. Various encounters in the streets were marked by reciprocal insults, hostility and threats of retaliation.

It is not for present purposes necessary to investigate in precise detail the regrettable state of affairs leading up to the incident on 26 June 1996 or even the tragic events of that day. Suffice to say that on the morning of that day the three persons mentioned in the indictment arrived by vehicles, which included a utility and a motor cycle, which they parked in the street in front of the appellant's house. Some of them were said to have been armed with baseball bats, pick handles, or the like, and, according to some of the evidence, threats were made to fix the appellant 'once and for all' by killing him. Those persons were joined by other associates including two women, who, according to one version of events, added to the atmosphere of the occasion by beating with sticks on the fence rail around the house. Rocks, bricks or pieces of concrete were thrown at the house and a louvre was broken. One of the missiles was thrown by Goatley, who was the man killed, who appears to have made his way into the neighbouring yard to a vantage point under a balcony from which to carry out the attack.

The appellant was, or so he claimed, acutely aware of the imminent personal danger to himself and to the children, ranging in age from about two to 12 years, who were in or about his house. He armed himself with a .22 semi-automatic rifle which he kept in the house. His first shot was aimed at and struck the tyre of the utility and succeeded in deflating it. Another bullet struck Jealous in the leg, possibly as the result of a ricochet off something more solid. Having become aware of Goatley's actions, he fired a shot, which struck him in

the head and ultimately caused his death. Tidswell was shot in the leg, when according to the appellant's account, he charged at the appellant in a threatening manner.

There is little doubt that, according to the appellant's account, which was supported in some respects by evidence of other witnesses at the trial, circumstances existed that were capable of giving rise on his part to a claim of self defence under s 271 of the Criminal Code. It is, however, by no means certain that the jury accepted the evidence to that effect. If they did, or (because the onus lay on the Crown) if they were left with a reasonable doubt about that question, the appellant ought to have been acquitted under that section. As has already been mentioned, however, the substantial effect of the verdicts was that the appellant was found not guilty only of those offences in which intention formed an element, or, in the case of Jealous, where the offence might have been the result of accident within the meaning of s 23.

On appeal, it was submitted by Mr Butler SC, who appeared for the appellant before this court, that the learned judge had misdirected the jury on the law relating to self defence under s 271, and that, in consequence, the appellant had been wrongly deprived of a fair chance of acquittal at the trial. In the course of summing up, the matter of self defence was put to the jury for their consideration on no fewer than six occasions, of which two were given in redirections. In some of those instances the terms in which the direction was given diverged in certain respects from its form in other instances; but the complaint on appeal is directed particularly to those occasions (of which there was more than one) on which the learned judge included, as a distinct or additional element in the direction, a requirement that the use of force should have been 'necessary', suggesting by that objectively necessary apart from the existence of any state of actual belief on the appellant's part, based on reasonable grounds, as to the need for such force. As an example, after referring to the terms of s 271(2) of the Code, his Honour at one point in the summing up explained to the jury:

> Now, there are then those three things that have to be considered, but if the Crown proves beyond reasonable doubt that one of those did not exist, well, then, the defence falls. So, if the Crown can prove that nothing was done that could cause reasonable apprehension of grievous bodily harm to the accused or the members of his family, or if the Crown proves that there was no reasonable grounds for the accused to believe that what he was doing was necessary to preserve those people, or if the Crown can prove that it was not necessary to use the force he used in order to defend himself, but proves any of those, then it is proved that what was done was unlawful.

In these circumstances, it was submitted on behalf of the appellant that the jury might, erroneously in law, have concluded that objectively one or more of the actions of the appellant were not necessary, although they were in fact not satisfied (or were left in reasonable doubt) that the appellant reasonably believed the force used was necessary to preserve himself or another.

...

As has been said on more than one occasion in the past, the provisions of s 271 are by no means a model of clarity or simplicity. In dealing with a case falling within the terms of s 271(2), there is a tendency, observable in some of the reported cases, to read s 271(1) as laying down a series of conditions which are to be treated as cumulative upon those specified in s 271(2). Thus, for example, in *Marwey v R* (1977) 138 CLR 630, at 633, the learned trial judge directed the jury that a 'critical question is what is reasonably necessary ... whether

he [the accused] went beyond what was reasonably necessary in all the circumstances'. The expression 'reasonably necessary' appears only in s 271(1), which suggests that it was being incorporated in the direction under s 271(2), where it is not mentioned. Likewise in the present case, there was a point in the summing up where the learned judge referred to the question whether it was 'necessary for effectual defence' for the appellant to have fired a shot at Tidswell. The expression 'necessary to make effectual defence' appears in s 271(1), but it forms no part of s 271(2).

It is not difficult to understand how these requirements, or some of them, of s 271(1) may sometimes be carried over into the summing up in s 271(2). Because at the time of summing up it is not known whether or not the jury is disposed to find that the first condition in s 271(2) is satisfied, a trial judge is sometimes bound to give directions relating to the application of both subsections. Generally speaking, it is only where death or grievous bodily harm has in fact been caused that an issue arises whether the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm within the meaning of s 271(2); but a case may be complicated by the need to refer to elements deriving from s 271(1) where there is also a separate charge of a distinct offence in which the force used was alleged to have caused an injury falling short of grievous bodily harm, and was not intended or likely to do so.

What is clear about subss 271(1) and (2) is that, although their provisions share some common elements, the conditions for self defence that are prescribed by each of those subsections are differently stated and, for the purpose of applying s 271(2), ought not to be combined or treated as imposing requirements that are cumulative. The only ground common to both subsections is that described in the opening words of s 271(1), which are 'When a person is unlawfully assaulted, and has not provoked the assault …'. That element is also made a pre-condition for the application of s 271(2) by the introductory words, which are: 'If the nature of the assault is such as to cause reasonable apprehension …'. The reference to 'assault' in s 271(2) must mean such an assault as predicated in s 271(1), and so is to be regarded as importing the same initial requirement as prescribed in that subsection, which is that there be an unlawful assault that was not provoked by the person against whom it was directed.

Beyond that point, however, the two subsections diverge in specifying the conditions under which self defence is made available to the accused as a defence to a charge arising from the use of force to repel the assault. The point of divergence is marked in each subsection by the presence of the expression 'it is lawful …', which is the relevant part of the provision that in each instance operates to make self defence available in answer to the charge. In the case of s 271(1), three conditions are specified. They are that the force used (1) must be 'reasonably necessary to make effectual defence against the assault'; and (2) that it must not be intended; and (3) must not be such as is likely to, cause death or grievous bodily harm.

None of those three conditions is repeated in s 271(2). Assuming an unlawful and unprovoked assault, only two conditions need be satisfied for self defence to be available under that subsection. The first is (1) that the nature of the assault must be 'such as to cause reasonable apprehension of death or grievous bodily harm'; the second is that the person using force by way of defence must be someone who (2) 'believes on reasonable grounds' that he or she 'cannot otherwise preserve' the person being defended from death or grievous bodily harm. If those two requirements are satisfied (or, more accurately, if the prosecution fails to disprove them beyond reasonable doubt), then the accused is entitled to be acquitted.

In substance, therefore, a person is, by virtue of s 271(2), justified in killing or doing grievous bodily harm to an assailant if he [or she] reasonably believes that doing so is the only way in which he [or she] can save himself [or herself] or someone else from an unprovoked and life-threatening assault by that assailant.

Approached in this way, there is plainly a difference between the mental condition predicated of a defender under s 271(1) and under s 271(2). In the case of s 271(1), the degree of force used must be 'reasonably necessary' to make 'effectual defence' against the assault. The criterion in that instance is objective and does not concern itself with the defender's actual state of mind. In the case of s 271(2), it is, at least in part, subjective. The defender must believe that what he is doing is the only way he can save himself or someone else from the assault. He must hold that belief 'on reasonable grounds'; but it is the existence of an actual belief to that effect that is the critical or decisive factor. There is no additional requirement that the force used to save himself or someone else must also be, objectively speaking, 'necessary' for the defence.

If this has the effect of writing out of s 271(2), by excluding from it any requirement which at first sight appears to be imposed by, the words 'necessary for defence' in that subsection, then it is a result that is dictated by authority which is binding on this court. In *R v Muratovic* [1967] Qd R 15, 19, in giving a judgment with which Lucas J agreed, Gibbs J said:

> Moreover, if the nature of an assault was such as to cause reasonable apprehension of death or grievous bodily harm, and the accused believed (which must mean honestly believed) on reasonable grounds that he could not preserve the person defended from death or grievous bodily harm otherwise than by using the force that he did in fact use, it must follow that the force in fact used was no more than the accused honestly and reasonably believed to be necessary for defence. In other words, if the jury consider that the nature of the assault was such as to cause reasonable apprehension of death or grievous bodily harm, and that the accused believed, on reasonable grounds, that he could not otherwise preserve the person defended from death or grievous bodily harm, or if they are left in doubt on those matters, the issue must be decided in favour of the accused and a verdict of acquittal must be entered, since on that hypothesis the jury could not be satisfied that the force used was more than the accused reasonably believed to be necessary to preserve the person defended from death or grievous bodily harm.

His Honour's statement in *Muratovic* of the effect of s 271(2) (or, as it then was, the second paragraph of s 271) was, with a qualification or exception which is not material here, adopted and approved by Barwick CJ in *Marwey v R* (1977) 138 CLR 630, at 636–637. In explaining his own reasons for arriving at that conclusion, his Honour proceeded (138 CLR 630, 637):

> Further, what the second paragraph of s 271 calls for is the actual belief by the accused on reasonable grounds of the necessity of the fatal act for his own preservation. That paragraph, it seems to me, when the occasion is appropriate makes the belief of the accused the definitive circumstance. As that belief must be based on reasonable grounds, there is no point in repeating the word 'reasonably' before the word 'necessary'. That word — necessary — in the context of s 271 bears the sense ascribed to it by the *Shorter Oxford English Dictionary* of 'requisite' or 'needful'. What the second paragraph requires is that the accused believes on reasonable grounds when he does the fatal act that it must be done if he is to survive the assault made upon him. The element of reasonableness is supplied by the need for the belief to be founded on reasonable grounds. If there are such

reasonable grounds — a matter for the determination of the jury — the self defence will itself have been reasonable.

Aickin J agreed with the reasons for judgment of Barwick CJ. After referring to *R v Muratovic* [1967] Qd R 15, 18–19, both Mason J and Jacobs J in their reasons in *Marwey* (138 CLR 630, 642, 643) also said that in that case Gibbs J had correctly stated the effect of what is now s 271(2).

It follows from this that, as Barwick CJ said, when the occasion is appropriate, 'the belief of the accused is the definitive circumstance' under s 271(2). There is, as is shown by the passage in his Honour's reasons from which that excerpt is taken, no separate or independent requirement in s 271(2) that the killing or grievous bodily harm done by the accused should have been 'necessary' for defence when tested by objective standards. What his Honour said is that s 271(2) requires that 'the accused believes on reasonable grounds when he does the fatal act that it must be done if he is to survive the assault upon him'. It is, of course, essential in that context that there be reasonable grounds for that belief; but that is not the same as saying that doing the act that causes death or grievous bodily harm must be objectively necessary …

No doubt the distinction between these two competing concepts of s 271(2) will in practical terms not always be significant; but it is nevertheless essential that the jury be directed in conformity with the requirements of the provision as it has been authoritatively interpreted by the High Court in *Marwey v R*. In the present case there is, at the very least, a serious question whether throughout the summing up his Honour did consistently direct the jury in those terms; or, what is perhaps more important, whether the impact of the decision in *Marwey* was brought home to them in sufficiently clear terms to ensure that they fully appreciated that it was the appellant's actual state of belief, based on reasonable grounds, that was critical. On a question so fundamental to the proof of guilt, the fact that no specific redirection was sought by counsel at the trial cannot be regarded as decisive against the appellant or against his appeal in this case.

It follows that the convictions must be set aside and a new trial ordered …

[**Davies JA** and **Fryberg J** concurred.]

Notes

14.45 The decision of the Queensland Court of Appeal in *Gray* (14.44C) was further considered, with some reservation, in *Vidler* [2000] QCA 63; (2000) 110 A Crim R 77 at 82, where McMurdo P, Pincus and Thomas JJA made the following comments:

> … The next objection is that the statement first quoted above also contains the now allegedly objectionable words 'such force as is necessary to defend'. Inasmuch as those words restate precisely the words of s 271(2) the objection seems strange. However it is founded upon *Gray*,[2] a decision in this court. The vice identified in *Gray* is the imposition of an additional objective requirement over and above that of the appellant's actual belief based on reasonable grounds.
>
> That statutory requirement ('lawful to use such force as is necessary for defence') is treated in *Gray* as covered by the earlier requirement in s 271(2) that the defender must

believe that the force he uses is the only way he can save himself from the assault. *Gray* did not shrink from the fact that this produces the effect of writing out from s 271(2) the requirement of 'such force … as is necessary for defence'. In effect it has replaced those words with 'such force … as the defender actually used'.

The effect of *Gray* is that the critical point for the jury to consider is whether the defender's actual state of belief, based on reasonable grounds, was that the defender could not preserve himself otherwise than by doing what he did. If that is made clear to the jury, *Gray* considers that further directions on the question whether the force was necessary for defence are otiose, and worse still, positively erroneous if they are seen as creating a further requirement of objective necessity. Other contrary views had earlier been expressed in this court[3] which were acknowledged in *Gray*. Mr Martin, for the Crown, submitted that there remains in s 271(2) an element of objective necessity. At this point it is enough to say that other views than that taken in *Gray* are reasonably open[4] and that reconsideration of *Gray* may be desirable. In the meantime however it should be recognised that the ratio in *Gray* is binding …

Footnotes

2. (1998) 98 A Crim R 589.
3. *Allwood* (CA No 151 of 1997, 22 August 1997).
4. Cf *Julian* (1998) 100 A Crim R 430.

14.46C **Lavallee v R**

[1990] 1 SCR 852; 55 CCC (3d) 97
Supreme Court of Canada

The accused was charged with the murder of a man (Rust) with whom she had been living for 3–4 years. The deceased was killed by a gunshot fired by the accused into the back of his head as he was leaving the room. In a statement made by the accused to the police on the night of the shooting, the accused admitted the shooting, indicating that the deceased had threatened to kill her when other visitors had left the house and that she was fearful for her life. At her trial, the accused relied on the defence of self-defence. Evidence indicated that the accused's relationship with the deceased was volatile, with frequent episodes of violence by the deceased towards the accused. On numerous occasions the accused required medical attention for injuries inflicted by the deceased, including severe bruises, a fractured nose, multiple contusions and a black eye. The defence led evidence from a psychiatrist with respect to the 'battered woman syndrome' so as to justify the defensive action allegedly taken by the accused in killing the deceased. The accused was acquitted at trial. An appeal by the Crown to the Manitoba Court of Appeal was upheld and a new trial ordered on the basis that the trial judge failed to adequately instruct the jury on the psychiatric evidence. The accused appealed to the Supreme Court of Canada.

Wilson J: The narrow issue raised on this appeal is the adequacy of a trial judge's instructions to the jury regarding expert evidence. The broader issue concerns the utility of expert evidence in assisting a jury confronted by a plea of self defence to a murder charge by a common law wife who had been battered by the deceased …

The expert evidence which forms the subject matter of the appeal came from Dr Fred Shane, a psychiatrist with extensive professional experience in the treatment of battered wives. At the request of defence counsel Dr Shane prepared a psychiatric assessment of the appellant. The substance of Dr Shane's opinion was that the appellant had been terrorised by Rust to the point of feeling trapped, vulnerable, worthless and unable to escape the relationship despite the violence. At the same time, the continuing pattern of abuse put her life in danger. In Dr Shane's opinion the appellant's shooting of the deceased was a final desperate act by a woman who sincerely believed that she would be killed that night:

> I think she felt, she felt in the final tragic moment that her life was on the line, that unless she defended herself, unless she reacted in a violent way that she would die. I mean he made it very explicit to her, from what she told me and from the information I have from the material that you forwarded to me, that she had, I think, to defend herself against his violence.

…

Where expert evidence is tendered in such fields as engineering or pathology, the paucity of the lay person's knowledge is uncontentious. The long-standing recognition that psychiatric or psychological testimony also falls within the realm of expert evidence is predicated on the realization that in some circumstances the average person may not have sufficient knowledge of or experience with human behaviour to draw an appropriate inference from the facts before him or her …

The need for expert evidence in these areas can, however, be obfuscated by the belief that judges and juries are thoroughly knowledgeable about 'human nature' and that no more is needed. They are, so to speak, their own experts on human behaviour. This, in effect, was the primary submission of the Crown to this court.

The bare facts of this case, which I think are amply supported by the evidence, are that the appellant was repeatedly abused by the deceased but did not leave him (although she twice pointed a gun at him), and ultimately shot him in the back of the head as he was leaving her room. The Crown submits that these facts disclose all the information a jury needs in order to decide whether or not the appellant acted in self defence. I have no hesitation in rejecting the Crown's submission.

Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalisation? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called 'battered wife syndrome'. We need help to understand it and help is available from trained professionals.

The gravity, indeed, the tragedy of domestic violence can hardly be overstated. Greater media attention to this phenomenon in recent years has revealed both its prevalence and its horrific impact on women from all walks of life. Far from protecting women from it the law historically sanctioned the abuse of women within marriage as an aspect of the husband's ownership of his wife and his 'right' to chastise her. One need only recall the centuries-old law that a man is entitled to beat his wife with a stick 'no thicker than his thumb'.

Laws do not spring out of a social vacuum. The notion that a man has a right to 'discipline' his wife is deeply rooted in the history of our society. The woman's duty was to serve her husband and to stay in the marriage at all costs 'till death do us part' and to accept as her due any 'punishment' that was meted out for failing to please her husband. One consequence of this attitude was that 'wife battering' was rarely spoken of, rarely reported, rarely prosecuted, and even more rarely punished. Long after society abandoned its formal approval of spousal abuse, tolerance of it continued and continues in some circles to this day.

Fortunately, there has been a growing awareness in recent years that no man has a right to abuse any woman under any circumstances. Legislative initiatives designed to educate police, judicial officers and the public, as well as more aggressive investigation and charging policies all signal a concerted effort by the criminal justice system to take spousal abuse seriously. However, a woman who comes before a judge or jury with the claim that she has been battered and suggests that this may be a relevant factor in evaluating her subsequent actions still faces the prospect of being condemned by popular mythology about domestic violence. Either she was not as badly beaten as she claims or she would have left the man long ago. Or, if she was battered that severely, she must have stayed out of some masochistic enjoyment of it …

[Her Honour upheld the admissibility of expert evidence on the psychological effects of battering for the purpose of a plea of self-defence. She then proceeded to examine the effect of that evidence on a plea of self-defence under s 34(2) of the Canadian Criminal Code, a provision substantially the same as Codes s 271(2) (Qld)/s 248, second para (WA):]

In my view, there are two elements of the defence under s 34(2) of the Code which merit scrutiny for present purposes. The first is the temporal connection in s 34(2)(a) between the apprehension of death or grievous bodily harm and the act allegedly taken in self defence. Was the appellant 'under reasonable apprehension of death or grievous bodily harm' from Rust as he was walking out of the room? The second is the assessment in s 34(2)(b) of the magnitude of the force used by the accused. Was the accused's belief that she could not 'otherwise preserve herself from death or grievous bodily harm' except by shooting the deceased based 'on reasonable grounds'?

…

If it strains credulity to imagine what the 'ordinary man' would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do however. The definition of what is reasonable must be adapted to stances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man'.

I find the case of *State v Wanrow* 559 P 2d 548 (1977) helpful in illustrating how the factor of gender can be germane to the assessment of what is reasonable. In *Wanrow*, the Washington Supreme Court addressed the standard by which a jury ought to assess the reasonableness of the female appellant's use of a gun against an unarmed intruder. The court pointed out that the appellant had reason to believe that the intruder had molested her daughter in the past and was coming back for her son. The appellant was a 5 ft, 4 in, woman with a broken leg. The assailant was 6 ft, 2 in, and intoxicated. The court first observed, at 558, that 'in our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons'. Later it found that the trial judge erred in his instructions to the jury by creating the impression that the objective standard of reasonableness to be applied to the accused was that of an altercation between two men. At 559, the court makes the following remarks which I find apposite to the case before us:

> The respondent was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's 'long and unfortunate history of sex discrimination'. Until such time as the effects of that history are eradicated, care must be taken to assure that our self defence instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.

I turn now to a consideration of the specific components of self defence under s 34(2) of the Criminal Code.

Reasonable apprehension of death

Section 34(2)(a) requires that an accused who intentionally causes death or grievous bodily harm in repelling an assault is justified if he or she does so 'under reasonable apprehension of death or grievous bodily harm'. In the present case, the assault precipitating the appellant's alleged defensive act was Rust's threat to kill her when everyone else had gone.

It will be observed that s 34(2)(a) does not actually stipulate that the accused apprehend *imminent* danger when he or she acts. Case law has, however, read that requirement into the defence: see *Reilly v R*, supra; *R v Baxter* (1975) 27 CCC (2d) 96; 33 CRNS 22 (Ont CA); *R v Bogue* (1976) 30 CCC (2d) 403; 70 DLR (3d) 603; 13 OR (2d) 272 (Ont CA). The sense in which 'imminent' is used conjures up the image of 'an uplifted knife' or a pointed gun. The rationale for the imminence rule seems obvious. The law of self defence is designed to ensure that the use of defensive force is really necessary. It justifies the act because the defender reasonably believed that he or she had no alternative but to take the attacker's life. If there is a significant time interval between the original unlawful assault and the accused's response, one tends to suspect that the accused was motivated by revenge rather than self defence. In the paradigmatic case of a one-time bar-room brawl between two men of equal size and strength, this inference makes sense. How can one feel endangered to the point of firing a gun at an unarmed man who utters a death threat, then turns his back and walks out of the room? One cannot be certain of the gravity of the threat or his capacity to carry it out. Besides, one can always take the opportunity to flee or to call the police. If he comes back and raises his fist, one can respond in kind if need be. These are the tacit assumptions that underlie the imminence rule.

All of these assumptions were brought to bear on the respondent in *R v Whynot* (1983) 9 CCC 449; 37 CR (3d) 198; 61 NSR (2d) 33 (CA). The respondent, Jane Stafford, shot her sleeping common law husband as he lay passed out in his truck. The evidence at trial indicated that the deceased 'dominated the household and exerted his authority by striking and slapping the various members and from time to time administering beatings to Jane Stafford and the others' (at 452). The respondent testified that the deceased threatened to kill all of the members of her family, one by one, if she tried to leave him. On the night in question he threatened to kill her son. After he passed out the respondent got one of the many shotguns kept by her husband and shot him. The Nova Scotia Court of Appeal held that the trial judge erred in leaving s 37 (preventing assault against oneself or anyone under one's protection) with the jury …

The implication of the court's reasoning is that it is inherently unreasonable to apprehend death or grievous bodily harm unless and until the physical assault is actually in progress, at which point the victim can presumably gauge the requisite amount of force needed to repel the

attack and act accordingly. In my view, expert testimony can cast doubt on these assumptions as they are applied in the context of a battered wife's efforts to repel an assault.

The situation of the appellant was not unlike that of Jane Stafford in the sense that she too was routinely beaten over the course of her relationship with the man she ultimately killed. According to the testimony of Dr Shane these assaults were not entirely random in their occurrence. The following exchange during direct examination elicited a discernible pattern to the abuse:

> Q. How did they react during the tension that preceded the beatings? How would her …
> A. Well, typically before a beating there's usually some verbal interchange and there are threats and typically she would feel, you know, very threatened by him and for various reasons.
> He didn't like the way she dressed or if she — didn't like the way she handled money or she wasn't paying him enough attention or she was looking at other men, all sorts of reasons, and she would be defending herself, trying to placate him, which was typical, saying, you know, trying to calm him down, trying to soothe him, you know, so nothing violent would happen and sometimes it would work. You know, as people's experiences indicated or as people who write about this process, if you will, have indicated.
> But often, as reflected by what she has told me, and the information I have from other people, such as her mother, often it would fail and she would end up being beaten and assaulted.
> Q. And that would be followed by this forgiveness state?
> A. It typically would be followed by, you know, this make-up period.

Earlier in his testimony Dr Shane explained how this 'make-up' period would be characterized by contrite and affectionate behaviour by Rust:

> In this particular case she documented many times, after he would beat her, he would send her flowers and he would beg her for forgiveness and he would love her and then the relationship would come back to a sense of equilibrium, if you will … But then, because of the nature of the personalities, it would occur again.

The cycle described by Dr Shane conforms to the Walker Cycle Theory of Violence named for clinical psychologist Dr Lenore Walker, the pioneer researcher in the field of the battered-wife syndrome …

Dr Walker defines a battered woman as a woman who has gone through the battering cycle at least twice. As she explains in her introduction to *The Battered Woman*, at p xv: 'Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman.'

Given the relational context in which the violence occurs, the mental state of an accused at the critical moment she pulls the trigger cannot be understood except in terms of the cumulative effect of months or years of brutality. As Dr Shane explained in his testimony, the deterioration of the relationship between the appellant and Rust in the period immediately preceding the killing led to feelings of escalating terror on the part of the appellant:

> But their relationship some weeks to months before was definitely escalating in terms of tension and in terms of the discordant quality about it. They were sleeping in separate bedrooms. Their intimate relationship was lacking and things were building and building and to a point, I think, where it built to that particular point where she couldn't — she

> felt so threatened and so overwhelmed that she had to — that she reacted in a violent way because of her fear of survival and also because, I think because of her, I guess, final sense that she was — that she had to defend herself and her own sense of violence towards this man who had really desecrated her and damaged her for so long.

Another aspect of the cyclical nature of the abuse is that it begets a degree of predictability to the violence that is absent in an isolated violent encounter between two strangers. This also means that it may in fact be possible for a battered spouse to accurately predict the onset of violence before the first blow is struck, even if an outsider to the relationship cannot. Indeed, it has been suggested that a battered woman's knowledge of her partner's violence is so heightened that she is able to anticipate the nature and extent (though not the onset) of the violence by his conduct beforehand. In her article 'Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill', 9 *Women's Rights Law Reporter* 227 (1986), psychologist Julie Blackman describes this characteristic at p 229:

> Repeated instances of violence enable battered women to develop a continuum along which they can 'rate' the tolerability or survivability of episodes of their partner's violence. Thus, signs of unusual violence are detected. For battered women, this response to the ongoing violence of their situations is a survival skill. Research shows that battered women who kill experience remarkably severe and frequent violence relative to battered women who do not kill. They know what sorts of danger are familiar and which are novel. They have had myriad opportunities to develop and hone their perceptions of their partner's violence. And, importantly, they can say what made the final episode of violence different from the others: they can name the features of the last battering that enabled them to know that this episode would result in life-threatening action by the abuser.

At p 236, Dr Blackman relates the role of expert testimony in cases where a battered woman kills her batterer while he is sleeping (or not actively posing a threat to her) and pleads self defence:

> Perhaps the single most important idea conveyed by expert testimony in such a case pertains to the notion that a battered woman, because of her extensive experience with her abuser's violence, can detect changes or signs of novelty in the pattern of normal violence that connote increased danger. Support for this assertion must come from the woman herself, in her spontaneous, self-initiated description of the events that precede her action against the abuser. Only then can testimony from an expert offer scientific support for the idea that such a danger detection process can occur and can be expected to be as accurate as the 'reasonable man' standard would imply.

Of course, as Dr Blackman points out, it is up to the jury to decide whether the distinction drawn between 'typical' violence and the particular events the accused perceived as 'life threatening' is compelling. According to the appellant's statement to police, Rust actually handed her a shotgun and warned her that if she did not kill him, he would kill her. I note in passing a remarkable observation made by Dr Walker in her 1984 study, *The Battered Woman Syndrome*. Writing about the 50 battered women she interviewed who had killed their partners, she comments at p 40:

> Most of the time the women killed the men with a gun; usually one of — several that belonged to him. *Many of the men actually dared or demanded the woman use the gun on him first, or else he said he'd kill her with it.* (Emphasis added.)

Where evidence exists that an accused is in a battering relationship, expert testimony can assist the jury in determining whether the accused had a 'reasonable' apprehension of death — when she acted by explaining the heightened sensitivity of a battered woman to her partner's acts. Without such testimony I am skeptical that the average fact-finder would be capable of appreciating why her subjective fear may have been reasonable in the context of the relationship. After all, the hypothetical 'reasonable man' observing only the final incident may have been unlikely to recognise the batterer's threat as potentially lethal. Using the case at bar as an example the 'reasonable man' might have thought, as the majority of the Court of Appeal seemed to, that it was unlikely that Rust would make good on his threat to kill the appellant that night because they had guests staying overnight.

The issue is not, however, what an outsider would have reasonably perceived but what the accused reasonably perceived, given her situation and her experience.

Even accepting that a battered woman may be uniquely sensitised to danger from her batterer, it may yet be contended that the law ought to require her to wait until the knife is uplifted, the gun pointed or the fist clenched before her apprehension is deemed reasonable. This would allegedly reduce the risk that the woman is mistaken in her fear, although the law does not require her fear to be correct, only reasonable. In response to this contention, I need only point to the observation made by Huband JA that the evidence showed that when the appellant and Rust physically fought, the appellant 'invariably got the worst of it'. I do not think it is an unwarranted generalisation to say that due to their size, strength, socialisation and lack of training, women are typically no match for men in hand-to-hand combat. The requirement imposed in *Whynot* that a battered woman wait until the physical assault is 'underway' before her apprehensions can be validated in law would, in the words of an American court, be tantamount to sentencing her to 'murder by installment': *State v Gallegos*, 719 P 2d 1268 at 1271 (1986) (NM). I share the view expressed by M J Willoughby in 'Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer' (1989), 38 *Kan L Rev* 169 at 184 (1989), that 'society gains nothing, except perhaps the additional risk that the battered woman will herself be killed, because she must wait until her abusive husband instigates another battering episode before she can justifiably act'.

Lack of alternatives to self-help

Section 34(2) requires an accused who pleads self defence to believe 'on reasonable grounds' that it is not possible to otherwise preserve him or herself from death or grievous bodily harm. The obvious question is if the violence was so intolerable, why did the appellant not leave her abuser long ago? This question does not really go to whether she had an alternative to killing the deceased at the critical moment. Rather, it plays on the popular myth already referred to that a woman who says she was battered yet stayed with her batterer was either not as badly beaten as she claimed or else she liked it. Nevertheless, to the extent that her failure to leave the abusive relationship earlier may be used in support of the proposition that she was free to leave at the final moment, expert testimony can provide useful insights. Dr Shane attempted to explain in his testimony how and why, in the case at bar, the appellant remained with Rust:

> She had stayed in this relationship, I think, because of the strange, almost unbelievable, but yet it happens, relationship that sometimes develops between people who develop this very disturbed, I think, very disturbed quality of a relationship. Trying to understand it, I think, isn't always easy and there's been a lot written about it recently, in the recent years, in psychiatric literature. But basically it involves two people who are involved in

what appears to be an attachment which may have sexual or romantic or affectionate overtones.

And the one individual, and it's usually the women in our society, but there have been occasions where it's been reversed, but what happens is the spouse who becomes battered, if you will, stays in the relationship probably because of a number of reasons.

One is that the spouse gets beaten so badly — so badly — that he or she loses the motivation to react and becomes helpless and becomes powerless. And it's also been shown sometimes, you know, in — not that you can compare animals to human beings, but in laboratories, what you do if you shock an animal, after a while it can't respond to a threat of its life. It becomes just helpless and lies there in an amotivational state, if you will, where it feels there's no power and there's no energy to do anything.

So in a sense it happens in human beings as well. It's almost like a concentration camp, if you will. You get paralysed with fear.

The other thing that happens often in these types of relationships with human beings is that the person who beats or assaults, who batters, often tries — he makes up and begs for forgiveness. And this individual, who basically has a very disturbed or damaged self-esteem, all of a sudden feels that he or she — we'll use women in this case because it's so much more common — the spouse feels that she again can do the spouse a favour and it can make her feel needed and boost her self-esteem for a while and make her feel worthwhile and the spouse says he'll forgive her and whatnot.

Apparently, another manifestation of this victimisation is a reluctance to disclose to others the fact or extent of the beatings. For example, the hospital records indicate that on each occasion the appellant attended the emergency department to be treated for various injuries she explained the cause of those injuries as accidental. Both in its address to the jury and in its written submissions before this court the Crown insisted that the appellant's injuries were as consistent with her explanations as with being battered and, therefore, in the words of Crown counsel at trial: 'The myth is, in this particular case, that Miss Lavallee was a battered spouse.' In his testimony Dr Shane testified that the appellant admitted to him that she lied to hospital staff and others about the cause of her injuries. In Dr Shane's opinion this was consistent with her over-all feeling of being trapped and helpless:

… she would never say that she'd been abused by the man with whom she was living and that usually happened because of this whole process. He would beg her. I mean she would tell me that on occasions he would beat her and then the police would be called by, I think, on one occasion a neighbour and he got down on his knees and he begged forgiveness and he loved her and he felt so terrible about it. And so this would be a typical scenario. Whenever she would go to the hospital, that he would attempt to, I think, attempt to have her forgive him and he would love her so much more.

Again she would feel so needed and this would start the whole cycle over again.

And he would also blackmail her on occasions. She had an abortion when she was in the early part of their relationship and he would blackmail her saying, 'You know, I will tell your parents that you were a baby killer', et cetera.

But basically the manner in which, I think, she would be prevented from telling the doctors or other people about the beatings was related to the fact that this whole process would repeat itself. He would want forgiveness and tell her he would love her and it would never happen again and she would feel grateful. She would feel a little loved. It would help her self-esteem again and she would feel a little safer for a while too. It would allow

her to have a sense, a window of security for a period because she felt so trapped in this relationship.

The account given by Dr Shane comports with that documented in the literature. Reference is often made to it as a condition of 'learned helplessness', a phrase coined by Dr Charles Seligman, the psychologist who first developed the theory by experimenting on animals in the manner described by Dr Shane in his testimony. A related theory used to explain the failure of women to leave battering relationships is described by psychologist and lawyer, Charles Patrick Ewing, in his book, *Battered Women Who Kill*, 1987. Ewing describes a phenomenon labelled 'traumatic bonding' that has been observed between hostages and captors, battered children and their parents, concentration camp prisoners and guards, and batterers and their spouses. According to the research cited by Ewing there are two features common to the social structure in each of these apparently diverse relationships. At pp 19–20, he states:

> The first of these common features is an imbalance of power 'wherein the maltreated person perceives himself or herself to be subjugated or dominated by the other'. The less powerful person in the relationship whether battered woman, hostage, abused child, cult follower, or prisoner — becomes extremely dependent upon, and may even come to identify with, the more powerful person. In many cases, the result of such dependency and identification is that the less powerful, subjugated persons become 'more negative in their self-appraisal, more incapable of fending for themselves, and thus more in need of the high power person'. As this 'cycle of dependency and lowered self-esteem' is repeated over time, the less powerful person develops a 'strong affective bond' to the more powerful person in the abusive relationship.
>
> The second feature common to the relationships between battered woman and batterer, hostage and captor, battered child and abusive parent, cult follower and leader, and prisoner and guard is the periodic nature of the abuse. In each relationship, the less powerful person is subjected to intermittent periods of abuse, which alternate with periods during which the more powerful, abusive person treats the less powerful person in a 'more normal and acceptable fashion'.
>
> … Given the clear power differential between battered women and their batterers and the intermittent nature of physical and psychological abuse common to battering relationships, it seems fair to conclude … that many battered women are psychologically unable to leave their batterers because they have developed a traumatic bond with them. (Citations omitted.)

This strong 'affective bond' may be helpful in explaining not only why some battered women remain with their abusers but why they even profess to love them. Of course, as Dr Ewing adds, environmental factors may also impair the woman's ability to leave — lack of job skills, the presence of children to care for, fear of retaliation by the man, etc, may each have a role to play in some cases.

This is not to say that in the course of a battering relationship a woman may never attempt to leave her partner or try to defend herself from assault. In *The Battered Woman Syndrome*, Dr Walker notes at p 30 that women may sometimes 'react to men's violence against them by striking back, but their actions are generally ineffective at hurting or stopping the men. They may be effective in controlling the level of the man's violence against them'. In the case at bar, Dr Shane was aware that the appellant had pointed a gun at Rust in the past. In direct examination he stated:

> And what would also happen from time to time is that there would be moments where she would attempt to hit back to defend herself or she may take a weapon to defend herself in order to prevent herself from being harmed or even, when the underlying rage may accumulate, if you will, the feeling that she had to do something to him in order to survive, in order to defend herself.

The same psychological factors that account for a woman's inability to leave a battering relationship may also help to explain why she did not attempt to escape at the moment she perceived her life to be in danger. The following extract from Dr Shane's testimony on direct examination elucidates this point:

> Q. Now, we understand from the evidence that on this night she went — I think you've already described it in your evidence — and hid in the closet?
> A. Yes.
> Q. Can you tell the jury why she, for instance, would stay in that house if she had this fear? Why wouldn't she so [sic] someplace else? Why would she have to hide in the closet in the same house?
> A. Well, I think this is a reflection of what I've been talking about, this ongoing psychological process, her own psychology and the relationship, that she felt trapped. There was no out for her, this learned helplessness, if you will, the fact that she felt paralysed, she felt tyrannised. She felt, although there were obviously no steel fences around, keeping her in, there were steel fences in her mind which created for her an incredible barrier psychologically that prevented her from moving out. Although she had attempted on occasion, she came back in a magnetic sort of a way. And she felt also that she couldn't expect anything more. Not only this learned helplessness about being beaten, beaten, where her motivation is taken away, but her whole sense of herself. She felt this victim mentality, this concentration camp mentality if you will, where she could not see herself be in any other situation except being tyrannised, punished and crucified physically and psychologically.

I emphasise at this juncture that it is not for the jury to pass judgment on the fact that an accused battered woman stayed in the relationship. Still less is it entitled to conclude that she forfeited her right to self defence for having done so. I would also point out that traditional self defence doctrine does not require a person to retreat from her home instead of defending herself: *R v Antley* [1964] 2 CCC 142; [1964] 1 OR 545; 42 CR 384 (CA). A man's home may be his castle but it is also the woman's home even if it seems to her more like a prison in the circumstances.

If, after hearing the evidence (including the expert testimony), the jury is satisfied that the accused had a reasonable apprehension of death or grievous bodily harm and felt incapable of escape, it must ask itself what the 'reasonable person' would do in such a situation. The situation of the battered woman as described by Dr Shane strikes me as somewhat analogous to that of a hostage. If the captor tells her that he will kill her in three days' time, is it potentially reasonable for her to seize an opportunity presented on the first day to kill the captor or must she wait until he makes the attempt on the third day? I think the question the jury must ask itself is whether, given the history, circumstances and perceptions of the appellant, her belief that she could not preserve herself from being killed by Rust that night except by killing him first was reasonable. To the extent that expert evidence can assist the jury in making that determination, I would find such testimony to be both relevant and necessary.

In light of the foregoing discussion I would summarise as follows the principles upon which expert testimony is properly admitted in cases such as this:

1. Expert testimony is admissible to assist the fact-finder in drawing inferences in areas where the expert has relevant knowledge or experience beyond that of the lay person.
2. It is difficult for the lay person to comprehend the battered-wife syndrome. It is commonly thought that battered women are not really beaten as badly as they claim; otherwise they would have left the relationship. Alternatively, some believe that women enjoy being beaten, that they have a masochistic strain in them. Each of these stereotypes may adversely affect consideration of a battered woman's claim to have acted in self defence in killing her mate.
3. Expert evidence can assist the jury in dispelling these myths.
4. Expert testimony relating to the ability of an accused to perceive danger from her mate may go to the issue of whether she 'reasonably apprehended' death or grievous bodily harm on a particular occasion.
5. Expert testimony pertaining to why an accused remained in the battering relationship may be relevant in assessing the nature and extent of the alleged abuse.
6. By providing an explanation as to why an accused did not flee when she perceived her life to be in danger, expert testimony may also assist the jury in assessing the reasonableness of her belief that killing her batterer was the only way to save her own life.

Quite apart from Dr Shane's testimony there was ample evidence on which the trial judge could conclude that the appellant was battered repeatedly and brutally by Kevin Rust over the course of their relationship. The fact that she may have exhibited aggressive behaviour on occasion or tried (unsuccessfully) to leave does not detract from a finding of systematic and relentless abuse. In my view, the trial judge did not err in admitting Dr Shane's expert testimony in order to assist the jury in determining whether the appellant had a reasonable apprehension of death or grievous bodily harm and believed on reasonable grounds that she had no alternative but to shoot Kevin Rust on the night in question.

Obviously the fact that the appellant was a battered woman does not entitle her to an acquittal. Battered women may well kill their partners other than in self defence. The focus is not on who the woman is, but on what she did. In 'The Meaning of Equality for Battered Women Who Kill Men in Self-Defense', 8 *Harv Women's LJ* 121 at p 149 (1985), Phyllis Crocker makes the point succinctly:

> The issue in a self defence trial is not whether the defendant is a battered woman, but whether she justifiably killed her husband. The defendant introduces testimony to offer the jury an explanation of reasonableness that is an alternative to the prosecution's stereotypic explanations. It is not intended to earn her the status of a battered woman, as if that would make her not guilty.

The trial judge, to his credit, articulated the same principle when introducing Dr Shane's testimony in the course of his instructions to the jury. After referring to 'the so-called battered-spouse syndrome', he cautions:

> Let me say at the outset that I think it is better that we try not to attach labels to this. It doesn't matter what we call it. What is important is the evidence itself and how it impacts on the critical areas of the intent of the accused and the issue of self defence.

Ultimately, it is up to the jury to decide whether, in fact, the accused's perceptions and actions were reasonable. Expert evidence does not and cannot usurp that function of the jury. The jury is not compelled to accept the opinions proffered by the expert about the effects of battering on the mental state of victims generally or on the mental state of the accused in particular. But fairness and the integrity of the trial process demand that the jury have the opportunity to hear them …

[Her Honour reviewed the trial judge's warning to the jury with respect to the weight to be attributed to the expert evidence. She found it to be adequate and consequently upheld the appeal and restored the acquittal. **Dickson CJ, Lamer, L'Heureux-Dubé, Gonthier** and **McLachlin JJ** concurred with **Wilson J. Sopinka J** concurred in the result.]

14.47C Osland v R

[1998] HCA 75; (1998) 197 CLR 316; 159 ALR 170
High Court of Australia

The facts of the case were summarised in the judgment of **Gaudron** and **Gummow JJ** as follows.

Gaudron and **Gummow JJ:**

1 Mrs Heather Osland and her son, David Albion, stood trial in the Supreme Court of Victoria charged with a single count of murder. They were charged that, on 30 July 1991, they murdered Frank Osland, Mrs Osland's husband and David Albion's stepfather. The jury was unable to reach a verdict with respect to David Albion but convicted Mrs Osland of murder.

2 Mrs Osland appealed unsuccessfully to the Victorian Court of Appeal.[1] By the time of her appeal, David Albion had been retried and acquitted. Mrs Osland now appeals to this Court. One aspect of her appeal relates to the failure of the jury to convict her son. On the prosecution case, it was he, alone, who struck the blow or blows that caused Mr Osland's death.

3 The prosecution case was that Mrs Osland and David Albion together planned to murder Mr Osland. It was put that, in furtherance of their plan, they dug a grave for their intended victim during the day of 30 July 1991. Later, on the evening of the same day and in furtherance of the plan alleged, Mrs Osland mixed sedatives[2] in with Mr Osland's dinner in sufficient quantity to induce sleep within an hour. According to the prosecution case, David Albion carried the plan to finality after Mr Osland went to bed by fatally hitting him over the head with an iron pipe in the presence of Mrs Osland. And later, he and Mrs Osland buried Mr Osland in the grave they had earlier prepared.

4 Mrs Osland and David Albion both gave evidence at the trial. Neither disputed that they dug a grave, although they called it 'a hole'; that Mrs Osland mixed sedatives into her husband's dinner; that David Albion struck the blow or blows that killed Mr Osland; that they buried his body in 'the hole' and, thereafter, acted as though he had simply disappeared. Neither denied that they then took various steps to make it appear that Mr Osland had left the area without communicating with anyone. To this end, Mrs Osland engaged in a series of deceptions, including reporting Mr Osland as a missing person. Another aspect of the appeal involves a complaint that, although not requested to do so by counsel for Mrs Osland, the trial judge should have instructed the jury as to the use it might properly make of the lies that she told in connection with her husband's 'disappearance'.

5 Mrs Osland and David Albion each relied on self-defence and provocation. Those defences were raised against an evidentiary background of tyrannical and violent behaviour by Mr Osland over many years but, according to evidence given by Mrs Osland and her son, escalating in the days prior to his death. The prosecution accepted that Mr Osland had been violent and abusive towards Mrs Osland in the past but contended that that behaviour had ceased well before his murder. That contention was made on the basis of certain intercepted telephone conversations to which Mrs Osland was a party. In those conversations, which took place well after Mr Osland's death, Mrs Osland made statements to the effect that his violence had ceased some years before his 'disappearance'. …

6 Mrs Osland's evidence was that Mr Osland's violence, and her fear of it, continued up until the day of his death. She and her son both gave evidence that, in the days prior to his death, Mr Osland ordered David Albion out of the house and said he would kill him if he did not go. David Albion gave evidence that he thought of leaving, but feared for his mother's life if he did. And in support of Mrs Osland's case, expert evidence was led of 'the battered wife syndrome'. The use of that evidence and its relationship with self-defence and provocation are also in issue in this appeal.

7 In his evidence, David Albion claimed that he and his mother dug the hole on 30 July 1991 without any intention, at that stage, of killing Mr Osland. Mrs Osland's evidence, although less clear, was to the same effect. Mrs Osland and David Albion each gave different, but not necessarily inconsistent, accounts of what happened when Mr Osland came home that evening. Mrs Osland said there was verbal abuse but added, in the course of her evidence, 'I can't hear his words.' She said she later mixed the sedatives into Mr Osland's dinner to quieten him down.

8 On the other hand, David Albion recalled Mr Osland yelling at his mother, holding her against a wall and standing over her. When he, David intervened, Mr Osland said he was going to kill him and hit him on the side of the head causing him to fall to the floor. After that altercation, the atmosphere quietened somewhat. A little later, according to David Albion, Mrs Osland said that she would 'calm [Mr Osland] down' Mr Osland, Mrs Osland and David Albion then had dinner together, although not harmoniously. David Albion gave evidence that he thought Mrs Osland put the sedatives in Mr Osland's coffee.

9 Both Mrs Osland and David Albion gave evidence that, when Mr Osland went to bed, they became afraid as to what he would do in the morning when he realised he had been drugged. They feared they would both be killed. There was some discussion as to what they should do. They apparently agreed to hit Mr Osland with a weapon of some kind. David Albion got a piece of pipe. Having told his mother that she was not strong enough to do it, David Albion then struck the fatal blow or blows in her presence. The medical evidence was that Mr Osland's death resulted from gross fractures to his skull. The case seems to have been conducted on the basis that death was instantaneous. Mrs Osland gave evidence that, after the blow or blows were struck, she held Mr Osland's body down to stop it twitching.

…

[Before the High Court, the principal issue was whether the conviction of Heather Osland should be quashed because of inconsistencies with the verdicts respecting her son. The High Court held 3:2 that the conviction should stand. Another issue was whether the trial judge had instructed the jury inadequately on the relevance of evidence of 'battered woman syndrome' to the defences of provocation and self-defence. The High Court held unanimously that the

instructions given had been adequate. Relevant passages from the judgments of **Gaudron** and **Gummow JJ** and of **Kirby J** are included here.]

Gaudron and **Gummow JJ:**

…

Battered wife syndrome, provocation and self-defence

50 Evidence as to what has come to be known as 'the battered wife syndrome' was given by Dr Kenneth Byrne, a clinical and forensic psychologist. That evidence was led without objection. Dr Byrne deposed as to characteristic patterns of behaviour in relationships involving physical, psychological or sexual abuse and characteristic reactions on the part of women in those relationships. Dr Byrne, who interviewed Mrs Osland on a number of occasions, read the transcript of her evidence-in-chief and was present in court when she was cross-examined, also testified that her evidence of her relationship with her husband was consistent with it having been a battering relationship. And he expressed the opinion that Mrs Osland fitted within the battered wife syndrome.

51 It is important to note some matters which, according to Dr Byrne's evidence, are characteristic of battered women, but not necessarily present in all cases:

1. they are ashamed, fear telling others of their predicament and keep it secret.
2. they tend to relive their experiences and, if frightened or intimidated, their thinking may be cloudy and unfocused.
3. they have an increased arousal and become acutely aware of any signal of danger from their partner.
4. they may stay in an abusive relationship because they believe that, if they leave, the other person will find them or take revenge on other members of the family.
5. in severe cases, they may live with the belief that one day they will be killed by the other person.

Dr Byrne also gave evidence that abusive relationships are not likely to change without outside help.

52 Counsel for Mrs Osland contended that the trial judge should have related Dr Byrne's evidence to the law of provocation. Additionally, it was argued that, self-defence having been raised, the jury should have been instructed that the 'evidence may be of use in understanding … why an abused woman might remain in an abusive relationship … the nature and extent of the violence that may exist in a battering relationship … the accused's ability to perceive danger from her abuser, and … whether the accused believed on reasonable grounds that she could not otherwise preserve herself from death or grievous bodily harm'.[62]

…

57 Given that the ordinary person is likely to approach the evidence of a battered woman without knowledge of her heightened perception of danger, the impact of fear on her thinking, her fear of telling others of her predicament and her belief that she can't escape from the relationship, it must now be accepted that the battered wife syndrome is a proper matter for expert evidence. Such evidence has been received in South Australia, New South Wales, Tasmania, the Northern Territory, as well as in New Zealand, England and the United States of America.[68] And in *R v Lavallee* the Supreme Court of Canada accepted that the battered wife syndrome was a proper matter for expert evidence.[69]

58 As with expert evidence generally, a trial judge should direct the jury that it should decide whether it accepts evidence given with respect to the battered wife syndrome. As was pointed out in *R v Lavallee*, however, the issue is not simply whether the accused is a battered woman.[70] Rather, the issue is usually whether she acted in self-defence and, if not, whether she acted under provocation. They are issues which arise in the factual context of the particular case. If it is not otherwise obvious as to how the evidence of battered wife syndrome may be used, it should be related to those issues in the factual context in which they occur.

59 It does not follow from what has been said that the argument for Mrs Osland with respect to Dr Byrne's evidence should be accepted. In the first place, it is likely that the significance of the expert evidence as it related to the credibility of Mrs Osland's account of her relationship with her husband was obvious to the jury. Moreover, that question was not the subject of detailed submissions in this Court. Of greater significance to the argument put in this Court is that much of Dr Byrne's evidence was given in general terms and not linked to Mrs Osland's actions, to the events which were said to raise provocation and self-defence or to the issues raised by those defences.

60 It need hardly be said that there is an obligation on counsel to make clear to the jury and the trial judge the precise manner in which they seek to rely on expert evidence of battered wife syndrome and to relate it to the other evidence and the issues in the case. In circumstances where evidence of battered wife syndrome is given in general terms, is not directly linked to the other evidence in the case or the issues and no application is made for any specific direction with respect to that evidence, it cannot be concluded that the trial judge erred in not giving precise directions as to the use to which that evidence might be put.

…

Kirby J:

…

Abusive relationships

158 *Avoiding stereotypes:* Care needs to be taken in the use of language and in conceptualising the problem presented by evidence tendered to exculpate an accused of a serious crime on the ground of a pre-existing battering or abusive relationship. As evidence of the neutrality of the law it should avoid, as far as possible, categories expressed in sex specific or otherwise discriminatory terms.[181] Such categories tend to reinforce stereotypes. They divert application from the fundamental problem which evokes a legal response to what is assumed to be the typical case.

…

160 There are particular reasons why 'battered wife syndrome' is a complete misnomer. In my view that expression should not be used. Many women subjected to long-term battering are not wives. Although in an individual case a relationship of marriage might reinforce an abuser's notions of dominance, control and justification, the problem described in the literature extends beyond married couples. In the present case, for example, according to the appellant's evidence, it existed in her relationship with the deceased before their marriage. However understandable it may be, in its provenance and typical manifestations, to confine the notion involved in BWS to women in general, and to wives in particular, it is erroneous from the point of view of legal principle. What is relevant is not the sex or marital status of the victim of long-term abuse. Nor whether that abuse has been physical (battering) or otherwise. It is whether admissible evidence establishes that such a victim is suffering from symptoms or characteristics[191] relevant in the particular case to the legal rules applicable to that case.

161 To this extent, I have sympathy for the appellant's criticism of the word 'syndrome' in BWS. On analysis, it appears to be an 'advocacy driven construct'[192] designed to 'medicalise'[193] the evidence in a particular case in order to avoid the difficulties which might arise in the context of a criminal trial from a conclusion that the accused's motivations are complex and individual: arising from personal pathology and social conditions rather than a universal or typical pattern of conduct sustained by scientific data.[194] As a construct, BWS may misrepresent many women's experiences of violence.[195] It is based largely on the experiences of caucasian women of a particular social background.[196] Their 'passive' responses may be different from those of women with different economic or ethnic backgrounds.[197] This was recognised by the Supreme Court of Canada in *R v Malott*:[198]

> It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance, women who have demonstrated too much strength or initiative, women of colour, women who are professionals, or women who might have fought back against their abusers on previous occasions, should not be penalized for failing to accord with the stereotypical image of the archetypal battered woman.

Similarly, Suzanne Beri has observed that:[199]

> BWS evidence interacts with cultural, gender stereotypes with the result that women, who kill abusers, now have to fit within an 'abused woman' straightjacket. This corresponds to a stereotype of a white, middle-class woman and stresses passivity, docility and helplessness. It excludes the experience of Maori women … whose experience of abuse is also shaped by racism.

162 These observations suggest that, in each case, where it is alleged that an accused's action can be explained by reference to BWS or its gender neutral equivalent, the court should focus its attention upon the relevance, if any, to the conduct of the particular accused of evidence explaining commonly observed responses of people living in an abusive relationship of dependency.

…

164 *Need for reliable evidence:* A second consideration is the controversy which surrounds the reliability of the 'syndrome' and its relevance for legal purposes. Critics of the scientific foundation of BWS have described it as having 'no medical legitimacy',[201] as failing to meet established criteria for 'scientific reliability',[202] as being an 'unsubstantial concept' increasingly doubted in United States courts where it originated[203] and likely soon to 'pass from the American legal scene'.[204] Such critics argue that the pressure to 'medicalise' the response of a victim in a prolonged violent relationship, and to attribute that response to the manifestation of an established psychological or psychiatric disorder, distracts attention from conduct which may constitute a perfectly reasonable response to extreme circumstances. BWS denies the rationality of the victim's response to prolonged abuse and instead presents the victim's conduct as irrational and emotional[205]…

165 I record these controversies as a warning of the need for caution in the reception of testimony concerning BWS. It is not a universally accepted and empirically established scientific phenomenon. Least of all does the mere raising of it, in evidence or argument, cast a protective cloak over an accused, charged with homicide, who alleges subjection to a long-term battering or other abusive relationship. No civilised society removes its protection to human

life simply because of the existence of a history of long-term physical or psychological abuse. If it were so, it would expose to unsanctioned homicide a large number of persons who, in the nature of things, would not be able to give their version of the facts.[209] The law expects a greater measure of self-control in unwanted situations where human life is at stake. It reserves cases of provocation and self-defence to truly exceptional circumstances. Whilst these circumstances may be affected by contemporary conditions and attitudes, there is no legal *carte blanche*, including for people in abusive relationships, to engage in premeditated homicide.[210] Nor in my view should there be. To the extent that evidence about BWS is tendered in a trial to sustain that conclusion, judges must firmly bring the jury back to the limited use to which such evidence may be put. This is, and is only, as it bears upon the legal issues in the trial such as self-defence and provocation. …

[**Kirby J** agreed with **Gaudron** and **Gummow JJ** in finding that expert evidence of BWS could be admissible if relevant, but that the evidence of BWS in this case had not been related to the issues of provocation and self-defence and thus there had been no errors in the trial judge's directions to the jury. **McHugh** and **Callinan JJ** gave separate judgments, agreeing that the trial judge's directions had been adequate.]

Footnotes

1. *R v Osland* [1998] 2 VR 636.
2. At trial, Dr Olaf Drummer testified to having found traces of the sedative Dothiepin, in the form of the prescription product Prothiaden, in the remains of the deceased. …

62. Quoting the headnote to R v Malott (1998) 155 DLR (4th) 513. The quoted part of the headnote summarises the judgment of Major J (with whom Lamer CJC, Cory, McLachlin and Iacobucci JJ agreed) at 521–2.
68. South Australia: R v Runjanjic; R v Kontinnen (1991) 56 SASR 114; New South Wales: R v Chhay (1994) 72 A Crim R 1; Tasmania: R v Gunnarsson-Wiener unreported, Supreme Court of Tasmania, 13 August 1992 at pars 104–5 per Zeeman J; Northern Territory: R v Secretary (1996) 107 NTR 1; New Zealand: R v Oakes [1995] 2 NZLR 673; Ruka v Department of Social Welfare [1997] 1 NZLR 154; England: R v Thornton (No 2) [1996] 1 WLR 1174; [1996] 2 All ER 1023; United States: see survey of United States Courts which have accepted evidence of battered woman's syndrome, collected in Bechtel v State 840 P 2d 1 at 7, fn 5 (Oklahoma 1992); see also Fennell v Goolsby 630 F Supp 451 (Pennsylvania 1985); People v Torres 488 NYS 2d 358 (New York 1985); State v Gallegos 719 P 2d 1268 (New Mexico 1986); Arcoren v US 929 F 2d 1235 (8th Cir 1991); US v Simpson 979 F 2d 1282 (8th Cir 1992); US v Johnson 956 F 2d 894 (9th Cir 1992); Knock v Knock 621 A 2d 267 (Connecticut 1993); Soutiere v Soutiere 163 Vt 265 (Vermont 1996).
69. [1990] 1 SCR 852. See also R v Malott (1998) 155 DLR (4th) 513 at 521 per Major J.
70. [1990] 1 SCR 852 at 890–1 per Wilson J.
181. See, for example, the recent decision of the Supreme Court of the United States in which sexual harassment, which began as a phenomenon of male conduct addressed to women, has been held applicable to same-sex harassment: Oncale v Sundowner Offshore Services Inc et al 118 S Ct 998 (1998) discussed Tinaglia, 'Same-Sex Harassment in Illinois after Oncale v Sundowner Offshore Services', (1998) 86 Illinois Bar Journal 310; cf Garcia v National Australia Bank Ltd (1998) 72 ALJR 1243 at 1246, 1247, 1256–61; 155 ALR 614 at 619, 620, 633–9.
182. The working hypothesis of the battered woman syndrome was first introduced in Lenore Walker's 1979 book, The Battered Woman.
191. Ruka v Department of Social Welfare [1997] 1 NZLR 154 at 173–4.

192. Goodyear-Smith, 'Re Battered Woman's Syndrome [1997] NZLJ 436–438', (1998) New Zealand Law Journal 39.
193. McDonald, 'Battered Woman Syndrome', (1997) New Zealand Law Journal 436 at 437.
194. Budrikis, 'Note on Hickey: The Problems with a Psychological Approach to Domestic Violence', (1993) 15 Sydney Law Review 365.
195. Stubbs and Tolmie, 'Race, Gender, and the Battered Woman Syndrome: An Australian Case Study', (1995) 8 Canadian Journal of Women and the Law 122; Faigman and Wright, 'The Battered Woman Syndrome in the Age of Science', (1997) 39 Arizona Law Review 67 at 111–13; Shaffer, 'The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After R v Lavallee', (1997) 47 University of Toronto Law Journal 1 at 13–14, 25–33.
196. Stubbs and Tolmie, 'Race, Gender, and the Battered Woman Syndrome: An Australian Case Study', (1995) 8 Canadian Journal of Women and the Law 122.
197. Schneider, 'Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering', (1986) 9 Women's Rights Law Reporter 195; Freckelton, 'Battered Woman Syndrome', (1992) 17 Alternative Law Journal 39; Volpp, '(Mis)Identifying Culture: Asian Women and the "Cultural Defense"', (1994) 17 Harvard Women's Law Journal 57 at 93; Moore, 'Battered Woman Syndrome: Selling the Shadow to Support the Substance', (1995) 38 Howard Law Journal 297.
198. (1998) 155 DLR (4th) 513 at 528.
199. Beri, 'Justice for Women Who Kill: A New Way?', (1997) 8 Australian Feminist Law Journal 113 at 123.
201. Goodyear-Smith, 'Re Battered Woman's Syndrome [1997] NZLJ 436–438', (1998) New Zealand Law Journal 39.
202. Goodyear-Smith concludes that BWS fails to meet the Daubert test for scientific reliability in the United States law courts: scientific testability; error criteria; support in peer review journal publications; and general scientific acceptance. She concludes that while BWS might be considered valid by clinical psychologists who work in the field of domestic violence and hence have an interest, there would be 'few experimental psychologists who would consider it a valid entity': Goodyear-Smith, 'Re Battered Woman's Syndrome [1997] NZLJ 436–438', (1998) New Zealand Law Journal 39. See also Faigman and Wright, 'The Battered Woman Syndrome in the Age of Science', (1997) 39 Arizona Law Review 67 at 107–11.
203. Faigman and Wright, 'The Battered Woman Syndrome in the Age of Science', (1997) 39 Arizona Law Review 67.
204. Goodyear-Smith, 'Re Battered Woman's Syndrome [1997] NZLJ 436–438', (1998) New Zealand Law Journal 39.
205. Shaffer, 'R v Lavallee: A Review Essay', (1990) 22 Ottawa Law Review 607; Grant, 'The "Syndromization" of Women's Experience' in Martinson et al, 'A Forum on Lavallee v R: Women and Self Defence', (1991) 25 University of British Columbia Law Review 23 at 53–4; Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation', (1991) 90 Michigan Law Review 1 at 42; Yeo, 'Resolving Gender Bias in Criminal Defences', (1993) 19 Monash University Law Review 104 at 111; Manning, 'Self Defence and Provocation: Implications for battered women who kill and for homosexual victims', NSW Parliamentary Library Research Service (Briefing Paper No 33/96), December 1996 at 19–20; Shaffer, 'The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After R v Lavallee', (1997) 47 University of Toronto Law Journal 1.
209. Cf Green v The Queen (1997) 191 CLR 334 at 393.
210. Green v The Queen (1997) 191 CLR 334 at 407.

14.48C

James v Sievwright

[2003] WASCA 251
Western Australia Supreme Court

Barker J:

Introduction

1 This is an appeal by the appellant under the Justices Act 1902 (WA) against his conviction in the Court of Petty Sessions at Perth on 30 April 2003 for assault occasioning bodily harm contrary to s 317(1) of the Criminal Code.

2 The appellant was charged that on 22 December 2001 at Marangaroo he unlawfully assaulted Aaron Alexander Stuart Owens and thereby did him bodily harm contrary to s 317(1) of the Criminal Code.

3 The matter proceeded to hearing in the Court of Petty Sessions before Mr G Calder SM on 26 and 27 June and 6 August 2002. The evidence led suggested the appellant had bitten off part of one of Owens' ears and his Worship so found. As a result, his Worship found the appellant guilty as charged.

4 The appellant then successfully appealed to this Court against that conviction: *James v Sievwright* [2002] WASCA 343. McKechnie J found that the learned Magistrate had failed to consider the 'defence' against home invasion created by s 244 of the Criminal Code and remitted that matter to the Magistrate for consideration.

5 The matter came on again before the learned Magistrate on 30 January 2003. His Worship then heard detailed submissions from both parties before reserving his decision. He delivered written reasons for decision dated 30 April 2003, in which he concluded that:

> The action of the defendant in biting off a part of Owens' ear was not made lawful by the provisions of s 244 of the Code.

It is from that decision that the appellant now appeals.

Section 244 of the Criminal Code

6 … Suffice it to say that the events in question arose from an altercation which occurred at the appellant's house during the course of a Christmas party. Questions of self-defence, provocation and defence against home invasion were raised before the learned Magistrate.

7 In particular, the Magistrate at the initial hearing held that the provisions of s 244 of the Criminal Code dealing with 'defence against home invasion' had no application. On the appeal before McKechnie J, the respondent conceded and his Honour held that s 244 of the Code was capable of applying to the facts before the learned Magistrate.

…

9 Before McKechnie J the respondent argued that there was no evidence of belief. McKechnie J rejected this submission and, at [25], noted as follows:

> The respondent argues there was no evidence of belief. The evidence, such as it is, appears from the appellant. He described how he heard a growl and then was hit by Mr Owens on

the side of the head with a chain. He threw the chain away and to Mr Owens said: 'You're going to fight like a bitch. I'll teach you how to fight like a bitch.' He then said:
He was doing the growling thing, and carrying on. He just — honestly, I believe he just lost the plot. I really do. And I just grabbed him down and threw him down on the ground, and I come down on top of him. He was on his back, and he was scratching up at me, and I was grabbing him, and that's when — before then Rod had charged through the gate and shut the gate behind him, very hard, and he was leaning over and punching me, and I bit Aaron in the ear.
MR PRIMERANO: All right. Why did you grab him and throw him to the ground? — Because he hit me with the chain more than anything, and he still was still coming at me. So —
Right. Were you — what type of emotion were you experiencing at that time? — I was very upset. I couldn't be totally accurate. I'd say I was probably furious.
All right. So your evidence was you were on the ground? — Yes. Aaron was on his back, facing up at me. I was on top of Aaron.
Right? — Pretty much like on my knees and over the top of Aaron, grappling with Aaron, and Rod, he jumped in. He was just like pounding the shit out of my head — like hitting pretty hard — and, yeah, and there, that's when I bit Aaron in the ear. I'm not denying biting him. I definitely bit him. Yes.
All right. So Rod was hitting you, and again can you explain what Aaron was doing? — He was like reaching up at me, sort of making those growling noises, and like scratching at me and grabbing at me, pulling at me. And, yes, just — I don't know what you could call it, what way you could call it fighting, because it wasn't like throwing punches or anything.
All right. What happened next? — Well, Rod was hitting me and I was like grappling with Aaron, and how I bit him I don't know. I just know I did bite his ear. I can remember biting his ear. I certainly didn't bite it off, but I can remember biting it. Because he was trying to bite me, and I just went —
He was trying to bite at you? —Yes.
Can you explain that? — And I know … (indistinct) … Well, he was trying to reach up, grabbing at me and all of that, and he was like scratching and trying to bite like he was on my back before.
When he was doing that, how far away were you from his face? — Probably there.
How many centimetres would you — ? — Probably six inches.
Six inches away from his face? — Yes.
And he was trying to bite you? —Yes.
So then what did you do? — When Aaron, I was on top of him, like getting hit, like ducking, trying to dodge — Rod hit me from behind — and I know I just bit his ear. I honestly can't tell you why I did it, but I bloody did it and I regret doing it.

10 McKechnie J, at [26], noted that the Magistrate had found, on the evidence of the appellant, that:

> His own evidence — that is, the defendant's evidence — was that he bit — let me correct myself. His comment during the interview was that he bit pretty hard. I think that is the section that I have referred to. Yes. 'I bit pretty hard. There was a lot of blood.' I infer from his comment that he was going to teach Owens to 'fight like a bitch' to mean that the was going to do something which he perhaps considered a man wouldn't do in the course of a fight, and that was to bite someone on the ear.

…

13 McKechnie J then remitted the matter to the learned Magistrate for him to consider two specific questions, namely:

(1) whether there is in fact evidence that the appellant used any force that he believed on reasonable grounds to be necessary:
  (a) to prevent a home invader from wrongfully entering the dwelling or an associated place;
  (b) to cause a home invader who is wrongfully in the dwelling or on or in an associated place to leave the dwelling or place; and
  (c) to make effectual defence against violence used or threatened in relation to a person by a home invader who is:
    (i) attempting to wrongfully enter the dwelling or an associated place; or
    (ii) wrongfully in the dwelling or in an associated place; or
  (d) to prevent a home invader from committing, or making a home invader stop committing, an offence in the dwelling or on or in an associated place.
(2) If there is such evidence, to consider whether the prosecution has negatived such evidence beyond reasonable doubt.

14 The two questions posed by McKechnie J are premised on an understanding of the way s 244 is intended to operate when compared with other 'defences' contained in the Code.

15 To some extent, the terms of the second paragraph of s 248 dealing with self-defence against unprovoked assault are similar to those used in s 244. Section 248 provides as follows:

> When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, provided that the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.
>
> If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that he cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for him to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

16 Whereas the first paragraph of s 248 speaks in terms of 'such force … as is reasonably necessary', the second paragraph of s 248 provides a defence, inter alia, if 'the person using force by way of defence believes, on reasonable grounds, that he cannot otherwise preserve the person defended from death or grievous bodily harm'.

17 In terms not dissimilar to the second paragraph of s 248, s 244(1) makes it lawful for the occupant of a dwelling 'to use any force or do anything else that the occupant believes, on reasonable grounds, to be necessary' for the purposes set out in pars (1)(a)–(d).

18 The provision of the Criminal Code of Queensland equivalent to the second paragraph of s 248 was considered in *Marwey v The Queen* (1977) 138 CLR 630. A number of members of the Court there approved what Gibbs J (as he then was) had said in *The Queen v Muratovic* [1967] Qd R 15 at 18–19, to the effect that all that was necessary to establish a defence

under the provision in question was that the accused had an honest and reasonable belief that the nature of the unprovoked assault upon him might cause him to be killed or suffer grievous bodily harm and he honestly and reasonably believed that he could not preserve himself otherwise than by the use of force against his attacker. In that event, such use of force was lawful, although it, in turn, caused death or grievous bodily harm to the other person.

…

20 The decision in *Marwey v The Queen* governs the law in this State: see *Minniti v The Queen* [2001] WASCA 148 per Murray J, with whom the Chief Justice agreed.

21 Similar observations concerning the equivalent provision of the second paragraph of s 248 found in the Criminal Code of Queensland, were also made in the Court of Appeal of Queensland in *The Queen v Gray* (1998) 98 A Crim R 589 …

22 In my view, the same observations should be made of s 244(1) of the Criminal Code in this State as have been made in respect of the second paragraph of s 248. That is to say, there is no requirement in order to make out the 'defence' against home invasion for the occupant to show that the force he or she used was 'reasonably necessary' to prevent a home invader from wrongly entering the dwelling or the other purposes referred to in s 244(1)(a)–(d). Unlike the first paragraph of s 248, which establishes a criterion which is objective and does not concern itself with a defender's actual state of mind, s 244(1), like the second paragraph of s 248, is, at least in part, subjective. The occupant must believe that what he or she is doing is necessary to prevent a home invader from wrongfully entering a dwelling, etcetera. The occupant must hold that belief 'on reasonable grounds', but it is the existence of an actual belief to that effect that is the critical or decisive factor. There is no additional requirement that the force used to prevent a home invader from wrongfully entering a dwelling, etcetera, must also be, objectively speaking, 'necessary' for the defence to apply.

23 Thus, it is important to emphasise, as did McKechnie J, at [31] of his reasons in the earlier appeal, that the trier of fact must analyse the question of belief critically. As McKechnie J noted, s 244 of the Code is not designed to provide a lawful occasion on which 'an angry person might assault another'. Nonetheless, an 'angry person' may still be entitled, in an appropriate situation, to the benefit of the 'defence'.

24 McKechnie J plainly accepted that the evidence already adduced before the learned Magistrate was 'capable of giving rise to the existence of a belief on reasonable grounds'. The question which remained, in effect, was whether in fact the appellant actually held such a belief. As his Honour directed, that was a matter to be determined by the learned Magistrate after an overall assessment of all the evidence at the trial, bearing in mind that the respondent remained at all times obliged to negative the 'defence' beyond reasonable doubt.

Reasons for decision of the Magistrate of 30 April 2003

25 When the learned Magistrate further considered the questions identified by McKechnie J, he accepted that Owens became a home invader who was wrongfully in the dwelling. His Worship expressly found that:

> Whilst he (Owens) was in the course of removing himself from the premises, which he was obliged to do upon being told to go, Owens formed the intention to assault the defendant with the chain. He then put that intention into effect. From the moment when he formed

> the intention to assault the defendant and began to carry out that intention he became a person who was in the dwelling for an unlawful purpose. For the purposes of sub-section 244(1), the defendant was entitled to use any force or do anything else to Owens which the defendant believed on reasonable grounds was necessary to cause Owens to leave the dwelling, it having been made abundantly clear to the defendant by the actions of Owens that Owens was not about to simply leave, as he was, by then, obliged to do, forthwith.

26 The learned Magistrate therefore found that the appellant was entitled to grab hold of Owens subject, however, to the proviso that he believed on reasonable grounds that the application of any force was necessary to achieve the objective of causing him to leave the dwelling.

27 The learned Magistrate also found that, after the appellant had been assaulted, and after he believed that he was about to be again assaulted by Owens, the appellant was entitled to make effectual defence against violence both used and threatened by Owens who was at that time wrongfully in the dwelling.

28 Further, the learned Magistrate found that the appellant was entitled to apply force of the type permitted by s 244(1)(d) to prevent Owens from committing a further offence or assault against him.

29 The learned Magistrate then reviewed the evidence of the appellant and his earlier findings in respect of it. He noted that he had previously found that the appellant 'did intend to bite Owens' ear'. He confirmed his earlier finding that the appellant 'intended to bite it very hard and that he did so' and that 'he intended to maintain his bite on it for as long as he did'. He noted that the appellant 'was really unable to explain why he did that'. The learned Magistrate stated that the appellant 'did not expressly say that he believed that it was necessary to bite off a piece of the ear in order to achieve the objectives which are set out in s 244(1)'. While the Magistrate accepted that belief may be inferred from proven primary facts, he concluded:

> I am satisfied that the reason that the defendant bit off a piece of Owens' ear was not because he believed that it was necessary to do so in order to bring about any of the results contemplated in paragraphs (b), (c) or (d) of the sub-section. During the recorded interview he said that he had bitten Owens 'because he was still having a go at me and I was very angry. The reason I did was that he was fighting like a bitch and I wanted to show him how to fight like a bitch'.

30 The learned Magistrate concluded that the appellant did not believe it was necessary to bite off Owens' ear in order to achieve any one of the outcomes set out in s 244(1), but had a 'different purpose in mind being a purpose which did not fall within s 244 and which was not otherwise authorised or excused or justified by the law'. The other and different purpose to which the learned Magistrate referred appears to be encapsulated in the following expression of opinion of the learned Magistrate: 'In my opinion the reason for the defendant biting off part of Owens' ear is constituted by a number of factors. He was extremely angry, not only at the assault and threatened assault with the chain but also because of the inappropriate behaviour of Owens during most of the evening. He wanted to teach him a lesson for the manner in which Owens had jumped on his back and been growling like a dog and, to the belief of the defendant, biting him during the earlier incident when the defendant was fighting with McCallum. Although McCallum was punching the defendant in the head while

the defendant was keeping Owens down and on his back on the ground, the defendant, being considerably larger and stronger than Owens and less affected by alcohol than Owens, was easily able to and had overpowered Owens. In the position in which he then was Owens posed very little physical threat to the defendant, even though he was behaving in a manner which suggested that there was a possibility that he may bite or scratch the defendant. Although, the intervention of McCallum, by punching a [*sic*] defendant in the head at that time, did make the objective of the defendant in maintaining his physical control over Owens more difficult and did to an extent increase the possibility that Owens may be able to cause him some injury.'

The grounds of appeal

31 … At the hearing of the appeal, the primary submission made by counsel for the appellant was that the learned Magistrate's inference that the appellant's actions in biting Owens' ear resulted from his anger ignored the other inferences which were equally available to him and which were consistent with innocence, namely, that the appellant's actions were based on the appellant's belief that his action was necessary for the purposes of s 244(1)(b), (c) or (d).

32 Put shortly, the submission made on behalf of the appellant is that a finding that the appellant was angry at the time and acted out of anger when he bit Owens' ear does not necessarily exclude a finding that the appellant also held the belief necessary to exonerate him under s 244 in respect of the conduct complained of.

33 More particularly, counsel for the appellant submits that a finding that the appellant was angry with Owens and wanted to 'teach him a lesson' does not necessarily mean that the appellant could not also hold the belief referred to in s 244(1) of the Code.

…

43 In my view, the learned Magistrate did not deny the proposition that a person might both act with anger and also make out on the evidence his or her entitlement to the 'defence' afforded by s 244 of the Code. However, in this case, in my view, the Magistrate, for the reasons he gave, was not satisfied that the appellant in fact held the belief it was necessary to bite off part of Owens' ear to achieve one of the relevant s 244(1) purposes. Rather, he found, as a matter of fact, the appellant used the force in question because he 'wanted to teach him [Owens] a lesson' for the manner in which Owens had previously assaulted him and had otherwise been conducting himself up to that point.

44 I consider the learned Magistrate in fact asked and answered the critical question concerning the appellant's actual belief. In posing the question and answering it in the way he did, he necessarily excluded the possibility that the appellant was both angry and possessed of the relevant actual belief at the time he bit off part of Owens' ear.

45 The learned Magistrate expressly stated that he was '… satisfied that the reason that the [appellant] bit off a piece of Owens' ear was not because he believed that it was necessary to do so in order to bring about any of the results contemplated in paragraphs (b), (c) or (d) of the section'.

…

48 There was abundant evidence to support the inference drawn by the learned Magistrate that the appellant 'wanted to teach Owens a lesson'. The evidence supporting that inference includes the following:

(1) during his video record of interview the appellant said that he had bitten Owens' ear, 'because he was fighting like a bitch and I wanted to show him how to fight like a bitch';
(2) in his evidence-in-chief the appellant admitted saying to Owens, 'You're going to fight like a bitch. I'll teach you how to fight like a bitch';
(3) the appellant described his emotional state as 'very upset', 'probably furious'. In his video interview and in cross-examination he admitted to being 'very angry';
(4) prior to the biting incident, Owens had struck the appellant with a heavy chain;
(5) earlier on in the evening, the appellant had been attacked by Owens. During that attack, Owens was apparently growling like a dog and biting and scratching the appellant's neck.

49 On this evidence, it was reasonably clear that the appellant had got the 'upper hand' in the fight when he bit Owens, as the learned Magistrate suggested. The appellant's evidence was that he had grabbed the chain and thrown it away. He had thrown Owens to the ground and was on top of him.

50 This is one of those cases where an appellate court should be careful not to substitute its own view of the evidence for the view formed by the trier of fact: *Knight v The Queen* (1992) 175 CLR 495 at 511. The Magistrate had the considerable advantage, when compared with this Court on appeal, of hearing and seeing all of the witnesses and forming his own impression as to what they did and why: *Whitehorn v The Queen* (1983) 152 CLR 657 at 687.

52 … For these reasons, the appeal should be dismissed.

[Note: An appeal against this decision was dismissed: *James v Sievwright* [2004] WASCA 12.]

Provocation

CHAPTER 15

PROVOCATION AND CRIMINAL RESPONSIBILITY

15.1 Persons accused of offences of violence sometimes claim that they were 'provoked' by the victims so that they lost their self-control. There are several ways in which evidence of provocation may be relevant in a trial:

1. Provocation may sometimes be taken into account as a mitigating factor in sentencing.
2. Provocation may sometimes support a claim that a fault element of an offence was lacking. For example, the accused on a murder charge may contend that she or he acted in a 'blind rage' in which there was no intention to kill or to cause grievous bodily harm.
3. Provocation may sometimes provide an exculpatory defence despite the presence of the fault elements of an offence.

15.2 It is the third use of evidence of provocation that is the concern of this chapter. As an exculpatory defence, provocation has a wider role to play under the Criminal Codes of Queensland (Code (Qld)) and Western Australia (Code (WA)) (the Codes) than at common law. At common law, provocation functions only as a partial defence to murder, reducing the offence to manslaughter if certain conditions are met.

- In Queensland, provocation can function as a partial defence to the offence of murder under the Code (Qld) s 304, although the partial defence has been abolished in Western Australia.
- In both Queensland and Western Australia, provocation can also operate as a complete defence to assault: Codes ss 268–269 (Qld)/ss 245–246 (WA).

15.3 The widespread recognition of provocation as a partial defence to murder may be connected with the historical lack of sentencing discretion for that offence. Only by reducing the offence to manslaughter could provocation be taken into account as a mitigating factor in sentencing. In Western Australia, the partial defence of provocation was abolished when a measure of discretionary sentencing for murder was introduced in Code s 279(4) (WA).

15.4 There are two basic conditions for a defence of provocation, both at common law and under the Codes:

1. *a subjective test* — provocation must cause actual loss of self-control;
2. *an objective test* — the provocation must at least be capable of causing an ordinary person to lose self-control to the extent the accused lost control, with some versions of the defence requiring that the provocation be likely to cause an ordinary person to lose self-control to that extent.

15.5 Provocation by itself does not provide a defence to any offence. The defence is available only for provocation causing loss of self-control.

The requirement of provocation causing loss of self-control is designed to exclude from the defence the calculating revenge-seeker or even the person who is just extremely angry. They are excluded, no matter how great the provocation. Provocation is not a defence that accepts retaliation as reasonable in some circumstances. It is a defence which views the provoked person as someone acting on an impulse while suffering from a temporary impairment of the capacity to make moral choices between courses of action.

In considering whether or not an accused actually did lose self-control, account can be taken of any relevant evidence, including evidence that the accused was intoxicated or short-tempered: *Salamon v The Queen* [1959] SCR 404 at 410–11; *Attorney General for Jersey v Holley* [2005] 2 AC 580 at [5]. However, such evidence is irrelevant in relation to the objective condition.

15.6 For a defence to be established, provocation must not only cause actual loss of self-control but also be sufficient (in some versions of the defence) or likely (in other versions) to cause an ordinary person to lose self-control to the extent of doing what the accused did.

The limits of self-control for an ordinary person are open to debate. See, for example, the disagreement between the judges of the High Court in *Green v R* (1997) 191 CLR 334; 148 ALR 659 (15.34C) over reactions to unwanted homosexual advances.

The purpose of an objective test is to deny the defence of provocation to persons who lose self-control because of unusual temperament or excitability, or because of self-induced states such as intoxication. The rationale sometimes advanced is that society needs protection against dangerous persons. However, this is unconvincing in relation to the partial defence to murder because a successful defence of provocation will still lead to a conviction for manslaughter.

15.7 Provocation is governed by the standard rule respecting the evidentiary burden for exculpatory defences. It is for the defence to put provocation in issue.

The Codes s 269(2) (Qld)/s 246 (WA) provide that the questions whether self-control was actually lost, and whether the ordinary person was likely to have lost self-control, are questions of fact. Nevertheless, a defence of provocation will not go to the jury for determination if the judge considers there is no evidence to support it; for example, when the objective test for the defence could not be satisfied on any view of the evidence: *Stingel v R* (1990) 171 CLR 312; 97 ALR 1 at 15.33C.

It has been said that provocation should be left to a jury whenever there is evidence to support it, even if the accused does not testify to a loss of self-control: *Cowan* [2005] QCA 424; 157 A Crim R 345, [21]; *Drier* [2006] QCA 237, [23]. This can be particularly important in cases where self-defence is raised as the primary defence, with provocation as an alternative.

15.8 The location of the persuasive burden depends on the type of provocation defence which is in issue.

When the defence to assault is in issue, the prosecution carries the burden to negative the defence to assault beyond reasonable doubt. This follows from general principles respecting burdens of proof.

This position used to be the same for the partial defence to murder in Queensland. However, following a legislative amendment in 2011, the accused now carries the burden to prove the defence: Code (Qld) s 304(7). Under general principles respecting reverse persuasive burdens, the standard of proof is the balance of probabilities: see **2.7**.

PROVOCATION UNDER THE CODES

15.9 The Codes establish two defences of provocation:

1. Section 269 (Qld)/s 246 (WA) make provocation a complete defence to assault and, therefore, also to the compound offences of assault; for example, assault occasioning bodily harm: s 339 (Qld)/s 317 (WA).
2. In Queensland, s 304 (Qld) makes provocation a partial defence to the offence of murder, reducing the offence to manslaughter. These defences are available in cases where the standard fault elements of the offence are present, such as an intention to apply force in relation to an assault or an intention to kill in relation to murder. Indeed, it is only when the standard fault elements are present that there is any need to turn to a special exculpatory defence of provocation.

15.10 The defence under s 269(1) (Qld)/s 246 (WA) relieves a person of criminal responsibility for 'an assault'. It has been held that this restricts the defence to offences of which an assault is a legally necessary element, such as assault occasioning bodily harm under s 339 (Qld)/s 317 (WA): *Kaporonovski v R* (1973) 133 CLR 209; 1 ALR 296 at **15.35C**. It is not sufficient that an assault happens to be a factual incident of an offence, as might be the case for unlawful wounding (s 323 (Qld)/s 301 (WA)) or manslaughter: s 303 (Qld)/s 280 (WA). Such offences do not permit the defence even though, in the circumstances of a particular case, a factual assault may have occurred. The defence is only available where an assault is a necessary element for the completion of the offence. This restrictive rule could enable the prosecution in some cases to exclude the defence simply by changing the charge.

15.11 Provocation for the purposes of the defence to assault is defined in the Codes ss 268–269 (Qld)/ss 245–246 (WA). The conditions for the defence are complex. The most important are as follows:

1. The defence is available only to a person who has been deprived of the power of self-control by provocation: s 269(1) (Qld)/s 246 (WA).
2. The person must act upon the provocation 'on the sudden' and before there is time for 'the passion to cool': s 269(1) (Qld)/s 246 (WA).
3. The provocation must be of such a nature as to be likely to deprive an ordinary person of the power of self-control: s 268(1) (Qld)/s 245 (WA).
4. The defence is excluded when the force used in responding to the provocation was disproportionate or was intended or likely to cause death or grievous bodily harm: s 269(1) (Qld)/s 246 (WA). The defence is generally confined to less serious assaults

although it is still possible for the assault to cause bodily harm or even, under exceptional circumstances, death or grievous bodily harm.

15.12 In Queensland, the Code s 304 (Qld) provides that a person who kills under circumstances which would otherwise constitute murder is guilty only of manslaughter if the act is done 'in the heat of passion caused by sudden provocation'. The provision refers to action taken 'in the heat of passion' rather than to deprivation of the power of self-control. Nevertheless, the meaning appears to be the same. In *R v Miller* [2009] QCA 11; [2009] 2 Qd R 86 at [55], it was said:

> 'Heat of passion' is of course an outdated expression but it is not difficult to explain. It means only extreme emotion of some sort: almost invariably anger in this context though, on occasions, it may also include fear … 'Heat of passion' denotes some emotion, or passion, of great intensity experienced by an accused which deprives him or her of self-control …

Section 304 further provides that the response must occur before there is time for the 'passion to cool'.

15.13 _ There is no definition of provocation in s 304 (Qld). The Queensland courts have taken the position that the Code s 268 (Qld) applies only to the defence to assault: see *R v Johnson* [1964] Qd R 1. Moreover, it was held in *Johnson* that the meaning of provocation for the defence to murder under s 304 (Qld) is to be determined by reference to the common law rather than the meaning of the term 'provocation' in ordinary language. The common law meaning (which incorporates a version of the 'ordinary person' test: see **15.14**) was preferred on the basis that 'sudden provocation' had become a term of art at common law by the time that the Code was enacted. Lucas AJ also suggested that the ordinary language meaning of provocation would give an unacceptably broad scope to the defence. The *Johnson* approach was adopted in obiter dicta by a majority of the High Court in *Kaporonovski*, above, at **15.35C**.

The differences between the meaning of provocation in ordinary language, at common law, and under s 268 (Qld)/s 245 (WA) are examined below in the context of a general discussion of the elements of the defence of provocation.

The objective test

15.14 An objective test is expressly stated in the definition of provocation in the Codes s 268(1) (Qld)/s 245(WA) for the purposes of the defence to assault in s 269 (Qld)/s 246 (WA). In this context, loss of self-control by an ordinary person must have been 'likely'. On the meaning of the term 'likely', see **4.19**.

Surprisingly, perhaps, there is no express mention of the ordinary person in relation to the partial defence to murder under s 304 (Qld). Nevertheless, an objective test from the common law has been read into this provision. The common law has taken the view that the provocation need only have been capable of depriving the ordinary person of the power of self-control: *Masciantonio v R* (1995) 183 CLR 58; 129 ALR 575. Thus, while the provocation must have been *sufficient* to cause an ordinary person to lose self-control, it need not have been *likely* to do so. It was said in *Buttigieg v R* (1993) 69 A Crim R 21 at 34 that the use of the term 'likely' might suggest too high a degree of probability for the purpose of a defence to murder.

15.15 In describing the level of self-control which is expected, the term 'reasonable person' has sometimes been used at common law instead of 'ordinary person'. In *Stingel* (**15.36C**),

however, it was held that any reference to the reasonable person would be inappropriate. The reasonable person would never respond to provocation by loss of self-control and violence. Yet the ordinary person, who is subject to the inadequacies of most people, can sometimes behave in this way.

It was also said in *Stingel* that 'ordinary' does not mean 'average'. The notion of ordinariness was taken to include a range of levels of self-control, with the critical point being the lowest rather than the average level within this normal range.

15.16 The High Court has indicated that the expected level of self-control can be adjusted by taking account of the age of an accused: *Stingel* at 15.36C. In a case involving a young person, the jury should be directed that the provocation must be sufficient to cause an ordinary person of the age of the accused to lose self-control. This development recognises that young persons are widely thought to have lesser powers of self-control than adults. The High Court in *Stingel* rejected the adjustment of the standard of the ordinary person in any other way. It was held that other variables affecting levels of self-control should be taken into account only for the purpose of determining the limits within which levels of self-control can be regarded as ordinary.

Stingel involved a case under the Criminal Code (Tas) but the general approach was confirmed as a matter of common law principle by the High Court in *Masciantonio*, above.

15.17 Cases involving persons from remote Aboriginal communities have traditionally referred to an ordinary person from such communities with the distinctive cultural characteristics of such a person. The impact of *Stingel* upon these cases is unclear. In *Mungatopi v R* (1991) 2 NTLR 1, the Northern Territory Court of Criminal Appeal proceeded on the assumption that the level of self-control of the ordinary person can still be adjusted by reference to characteristics of remote Aboriginal communities. Nevertheless, it was recognised that it could be questioned whether this approach is consistent with *Stingel*. The approach can only be defended on the ground that any range of ordinariness must be specific to a community and that it would be unfair in this context to subsume remote Aboriginal communities within a wider Australian community.

15.18 McHugh J, dissenting in *Masciantonio*, argued that the *Stingel* approach produces inequality rather than equality before the law. At issue here is the competition between formal and substantive conceptions of equality. See the discussion of this issue with respect to objective tests generally in 6.21–6.25, 14.15 and 14.38. Maintaining a single test of the ordinary person preserves formal equality but may produce substantive inequality for persons with characteristics that make it difficult for them to attain the levels of self-control of most people.

McHugh J was mainly concerned about differences in self-control stemming from ethnic or cultural background. Perhaps more problematic is the significance of mental impairment bearing on the power of self-control, since it may be possible to accommodate ethnic and cultural differences within the range of ordinary levels of self-control.

15.19 *Stingel* followed established authority in other jurisdictions, including England. See the decision of the House of Lords in *DPP v Camplin* [1978] AC 705; 2 All ER 168. The line of authority was briefly repudiated by a majority decision of the House of Lords in *R v Smith* [2001] 1 AC 146; [2000] 4 All ER 289. However, the orthodox position was reasserted by the majority of the Privy Council in *Attorney General for Jersey v Holley* [2005] 2 AC 580.

Smith was a case of mental impairment, in which it was alleged that serious clinical depression had reduced the accused's capacity to refrain from acting violently. The issue

was whether the jury could take this into account in measuring the accused's loss of self-control against an objective standard. A majority of the House of Lords said that it could be taken into account. Their reasoning was that the point of an objective test is simply to demand that the accused exercise reasonable self-control, given any characteristics of the particular accused which might affect the power of self-control to be expected of that accused. Some flexibility is necessary to avoid injustice. However, the majority in *Holley* held that an accused's alcoholism as a disease could not be taken into account. It was said that loss of self-control had to be judged by applying a uniform objective standard of the degree of self-control expected of an ordinary person of the defendant's age and sex with ordinary powers of self-control.

See also **6.21–6.25** on the challenge to the *Stingel* principle presented by the decisions of the Queensland Court of Appeal in *R v Mrzljak* [2004] QCA 420; [2005] 1 Qd R 308 (**6.30C**) and the Western Australia Court of Appeal in *Aubertin v State of Western Australia* [2006] WASCA 229; (2006) 33 WAR 87 (**6.31C**), which introduced a flexible, individualised standard for 'reasonable' mistakes under the Codes s 24. The possibility cannot be discounted of the High Court revisiting the range of characteristics attributable to the ordinary person for the provocation defence.

15.20 There is another less controversial way that particular characteristics of the accused can become relevant to the objective test. The gravity of any instance of provocation will often depend on its context, and characteristics of the accused are part of this context. For example, a racial or ethnic slur may be serious when it is directed to the person who is actually a member of the insulted group, whereas it may be absurd when directed to someone who has been mistakenly supposed to be a member of that group. Thus, personal characteristics of the accused should be considered whenever these are relevant to assessing the gravity of the provocation: *Stingel* at **15.36C**.

Of course, this may involve drawing a fine line when provocation involves a slur about a characteristic such as mental instability. Such a slur could also lower the level of self-control. One of the factors influencing the decision in *Smith* (see **15.17**, above) was the practical difficulties juries must encounter in taking account of characteristics for one purpose but not the other.

15.21 Among the factors that can magnify the gravity of provocation are previous incidents between the parties. Cumulative provocation can occur in which the final incident becomes 'the straw that broke the camel's back'. The final incident must still be sufficiently grave to be likely to cause the ordinary person to lose self-control, yet it can be something which would be relatively trivial considered in isolation. The background of a history of provocation may be what gives the final insult its distinctive gravity: see the comments on this issue in *Stingel* (**15.36C**).

Proportionality and degrees of loss of self-control

15.22 For provocation to be a defence to assault, the force used must not be disproportionate to the provocation: Codes s 269(1) (Qld)/s 246 (WA).

In contrast, there is no express reference to proportionality in the partial defence to murder under s 304 (Qld). Moreover, there is no basis for reading in such a requirement from common law principles. The common law has now rejected earlier suggestions that proportionality might be a separate requirement: *Johnson v R* (1976) 136 CLR 619 at 632; 11 ALR 23.

Making proportionality a separate requirement for the defence does not sit easily with the idea that the defence is based upon loss of self-control. If there has been a loss of self-control then it is quite likely that the force used will be disproportionate. Indeed, in cases of homicide, the force used will always be disproportionate to some extent, unless there are circumstances of justification (such as self-defence) which afford more valuable defences than the defence of provocation.

Nevertheless, although proportionality between the provocation and response is not a separate requirement for the Queensland defence to murder, some rough limitations on disproportionate responses arise from the way that courts now formulate the requirement that the provocation be sufficiently grave to cause an ordinary person to lose self-control. It has been accepted that there are degrees of loss of self-control. Provocation which would be sufficient to cause an ordinary person to lose self-control and punch the provoker may not be sufficient to cause an ordinary person to lose self-control to the extent of strangling the provoker. Therefore, it has been said that loss of self-control means loss of self-control to the extent of doing what the accused actually did: *Stingel* at 15.36C.

Conduct constituting provocation

15.23 At one time, the common law did not permit the defence to rest upon provocation by words alone. That position has long been abandoned. Nevertheless, judges have sometimes said that words alone cannot provide a foundation for provocation as a defence to murder except in circumstances of a most extreme and exceptional character. This position was expressly adopted in Queensland by a legislative amendment in 2011: Code (Qld) s 304(2).

Queensland has also now provided that only in circumstances of an extreme or exceptional character can the defence be founded on 'done or believed to have been done to end a domestic relationship, to change its character, or to indicate that it may, should or will end or change': s 304(3). For this purpose, a domestic relationship is defined in s 304(4) as:

> … an intimate personal relationship as defined under the Domestic and Family Violence Protection Act 1989, section 12A(2), even if the persons' lives are not enmeshed as mentioned in section 12A(2)(b) of the Act.

The stimulus for these amendments was a series of cases in which males successfully raised provocation defences on charges of murdering their female partners.

15.24 For the defence to assault, the Codes s 268(1) (Qld)/s 245(WA) require that provocation take the form of a 'wrongful act or insult' and s 268(3) (Qld)/s 245 (WA) exclude any 'lawful act'. There is some uncertainty about the meaning of 'wrongful' and 'lawful'.

Section 268 (Qld)/s 245 (WA) is an odd provision if ordinary meanings are to be given to both the exclusion of 'lawful' acts from conduct that can constitute provocation and the reference to 'any wrongful act or insult'. On its face, the exclusion of lawful acts might appear to indicate that nothing can constitute provocation for the purposes of the defence unless it is an offence or, at the very least, a tort. This interpretation could make the reference to 'any wrongful act or insult' superfluous as well as misleading. Many acts and insults which would be regarded as highly provocative and wrongful in terms of social standards of behaviour are lawful in the sense of not constituting offences or torts; yet there would not be provocation for the purposes of the defence if 'lawful' acts encompass everything except offences and torts.

15.25 Two ways of overcoming this difficulty have been proposed. In *Roche v R* [1988] WAR 278, Burt CJ suggested that the word 'lawful' be read restrictively to mean not merely free from prohibition but positively declared to be lawful under the Code. So, for example, the expression would then refer to acts of self-defence or arrest: see, for example, the Codes ss 271, 546 (Qld)/s 248 (WA). See also the Police Powers and Responsibilities Act 2000 (Qld) ss 198–205; Criminal Investigation Act 2006 (WA) Part 12.

By contrast, in *Stevens & Doglione v R* [1989] 2 Qd R 386, Demack J suggested that 'lawful' should be given its broader meaning but that 'wrongful' be interpreted restrictively, as a synonym for 'unlawful'. This interpretation gives less scope for the defence than that suggested in *Roche*; it becomes necessary to find that the act or insult alleged to constitute provocation amounts to a legal wrong and not just a social wrong. In *Stingel* (15.36C), the High Court made observations about the meaning of the phrase 'wrongful act or insult' in s 160 of the Criminal Code (Tas). It was held that the words of that section, including 'wrongful', are words of wide general import which should be given their ordinary meaning. This observation does not conclusively resolve the question how the term 'wrongful' should be interpreted in the Queensland and Western Australia Codes because the definition of provocation in the Criminal Code (Tas) differs in some other respects. Nevertheless, the comments of the High Court lend some support for the approach proposed by Burt CJ in *Roche*. The exclusion of any 'lawful act' should be taken to refer only to acts which are positively declared to be lawful.

15.26 Another controversial issue concerns the scope of the requirement for wrongfulness in the Codes s 268(1) (Qld)/s 245 (WA). Two interpretations are possible:

1. 'wrongful' may qualify only 'act'; or
2. 'wrongful' may qualify 'insult' as well as 'act'.

In *Stevens & Doglione* [1989] 2 Qd R 386, the court preferred the latter interpretation on the ground that this was 'the usual grammatical construction'. When this interpretation is coupled with that court's view that 'wrongful' means 'unlawful', the result would give little scope for an insult to form the basis of a defence of provocation.

In *Stingel* (15.36C), however, the High Court ruled that, with respect to the same phrase in the Criminal Code (Tas) s 160, 'wrongful' qualifies only 'act' and there are no technical limitations on the kind of insults that can constitute provocation. This ruling was stated to apply only to the Criminal Code (Tas) and the interpretation of the Queensland and Western Australia Codes was left open. However, no reasons were offered for distinguishing the position under the latter Codes. Moreover, the High Court considered, and expressly rejected, the argument that grammatical construction favoured 'wrongful' qualifying 'insult'; and it was said that requiring an insult to be 'wrongful' would introduce unjustifiable difficulty in this area of the law.

Suddenness and time for passion to cool

15.27 The Codes s 269(1) (Qld)/s 246 (WA) require that, for provocation to act as a defence to assault, the response must occur 'on the sudden'. This is in addition to the requirement that the response occur before there is time for the passion to cool.

15.28 The Code s 304 (Qld) requires 'sudden' provocation for the partial defence to murder. This is best interpreted as a requirement that the incident of provocation should have been sudden in the sense of being without forewarning. If this be correct, the phrase is merely a

gloss on the basic objective test that provocation should have been likely or sufficient to cause an ordinary person to lose self-control. When there is forewarning of provocation, there will usually be no grounds for the ordinary person to lose self-control.

15.29 There is no requirement for suddenness of response in relation to the partial defence to murder under s 304 (Qld). Moreover, although it is a requirement that the response occur 'before there is time for the person's passion to cool', the High Court of Australia has rejected the idea that any interval between the provocation and the response necessarily excludes the defence: *Pollock* [2010] HCA 35; 271 ALR 219 at [54] (15.38C). The High Court has even denied that the phrase states a discrete element of the defence which is separate from the 'ordinary person test'. In *Pollock*, it was said at [65]:

> The words of s 304 that require that the act causing death is done 'in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool' are the expression of a composite concept incorporating that the provocation is such as could cause an ordinary person to lose self-control and to act in a manner which encompasses the accused's actions. It is the last-mentioned objective requirement that keeps provocation within bounds. The concluding words beginning 'and before' are not the statement of a discrete element of the partial defence.

Conversely, the absence of a requirement for suddenness of response does not mean that any delay is immaterial. It may indicate that the killing was driven by motives of revenge or punishment rather than loss of self-control: *Pollock* at [62] (15.38C).

Self-induced provocation

15.30 The Codes s 268(4) (Qld)/s 245 (WA) bar the defence to an assault for any person who first incited the provocation in order to then have an excuse for retaliation.

15.31 There is no such express requirement for the partial defence to murder under s 304 (Qld). It is unclear whether a similar restriction would be recognised at common law. The question was left open in *R v Peisley* (1990) 54 A Crim R 42 at 48–9. However, it is difficult to imagine how a claim for loss of self-control would have any degree of credibility in the face of strong evidence that the provocation had been deliberately incited in order to provide an opportunity for retaliation.

Involvement of third parties

15.32 In most cases where a provocation defence is raised, one person has offered provocation to another who then attacks the person who offered the provocation. A person may, however, be provoked by an act or insult directed to a third party. Moreover, if someone who is provoked loses self-control, there may be an attack on persons other than the original provoker. The definition of provocation in the Codes s 268(1) (Qld)/s 245 (WA) includes detailed rules governing these situations. In Queensland, however, the common law definition applies in murder cases (see 15.11) and the common law rules respecting third parties are unclear.

15.33 For the purposes of the defence to assault, the Codes s 268(1) (Qld)/s 245 (WA) allow a person to lose self-control because of provocation offered either to himself or herself or to a person who is under his or her immediate care or to a person falling within a conjugal or close family relationship (parental, filial or fraternal). Queensland extends the range of the defence

to include a master–servant relationship. The wrongful act or insult must be made to another person in the presence of the accused. The defence will not apply if the accused is later told about the wrongful event and did not witness it: *Hume v Juras* [2006] WASC 187.

Some common law authorities (which may be relevant in relation to the defence to murder under s 304 (Qld)) have insisted that the provocation must be offered to the person provoked: *R v Duffy* [1949] 1 All ER 932 at 932. Other common law authorities have countenanced the idea that someone may be provoked by conduct or words directed at another person: *R v Quartly* (1986) 11 NSWLR 332. The question must be regarded as still open at common law although the trend of opinion favours removing any technical restrictions in this part of the defence.

Of course, the question can be avoided in cases where provocation takes the form of a generalised insult, such as a racial or ethnic slur. A slur directed at one person can be provocation to other persons of the same group who may hear it.

15.34 With respect to who may be attacked, the opening words of the Codes s 269(1) (Qld)/s 246 (WA) state that a person is not criminally responsible for an assault committed on a person who has given provocation for the attack. This impliedly excludes assaults on other persons.

The common law governs the elements of provocation as a partial defence to murder in Queensland. The common law has loosened its specifications respecting the possible victims of a provoked attack. There used to be a rule that provocation must emanate from the victim: see the discussion in *Gardner v R* (1989) 42 A Crim R 279 at 284. In *Gardner* (at 284), however, it was concluded that the defence extended to killing anyone, as long as there was a 'sufficient nexus' with the original provocation. In *R v Pangilinan* [1999] QCA 528; [2001] 1 Qd R 56, the Queensland Court of Appeal held that there are no special rules on who may be killed.

15.35C **Kaporonovski v R**
(1973) 133 CLR 209; 1 ALR 296
High Court of Australia

McTiernan ACJ and **Menzies J**: This is an application for special leave to appeal from the judgment of the Court of Criminal Appeal in Queensland …
At the trial of the applicant upon a charge of unlawfully doing grievous bodily harm — an offence created by s 320 of the Criminal Code — the learned trial judge, after the conviction of the applicant and pursuant to s 668B of the Criminal Code, stated a case for the Court of Criminal Appeal by which two questions were asked as follows:

1. Whether any defence under s 23 is available upon the evidence in this case; and
2. Whether ss 268 and 269 of the Criminal Code apply to the charge under the Criminal Code of unlawfully doing grievous bodily harm.

The facts as stated were as follows:

> Ibro Bajric suffered a laceration and subsequent severe injury to his left eye on the 5th day of March, 1971. There was no dispute on the part of the defence that the injury to Ibro Bajric's eye was occasioned by an act on the part of the accused in forcing a glass against Ibro Bajric's eye. The injury that was caused to Ibro Bajric did amount to grievous bodily harm. Ibro Bajric gave evidence before me that before the injury was occasioned to his eye he had said words to the accused which amounted to a wrongful insult. The accused gave

evidence that immediately before Ibro Bajric suffered his injury Bajric had used words to the accused which amounted to a wrongful insult and which were similar in import but not identical to the words which Bajric said he used. The accused said that he struck Bajric because the words used by Bajric had caused him, the accused, to become very upset. In my opinion there was evidence of conduct on the part of Ibro Bajric which could amount to provocation as defined by s 268 and there was evidence that the accused was provoked by this conduct. Before me the accused gave evidence that he took hold of Ibro Bajric's wrist and that he pushed against Bajric's hand. He said that Bajric also pushed back with his hand. The accused said he pushed Bajric's hand back towards Bajric's face. The accused said that Bajric had his glass of beer in his hand, and that the glass then broke and the accused became aware of beer and blood on his face and that Bajric had suffered injury. The accused also gave evidence before me that Bajric had lifted the glass with the possible intention of hitting the accused, and that in the process of defending himself he struck Bajric's hand and the glass finished near Bajric's eye.

The first question is whether the facts as stated could warrant the jury finding that the applicant was not criminally responsible by reason of the provisions of s 23 of the Criminal Code …

In our opinion the majority of the Court of Criminal Appeal were correct in deciding that the first question should be answered 'No'.

The second question we find very much more difficult …

There are strongly expressed differing judicial opinions which must be taken into account but there is no authority one way or the other binding this court.

In these circumstances, having had the advantage of reading what has been written by other judges relevant to the controversy, we must decide for ourselves whether s 269 applies to the crime created by s 320.

In considering these competing views it is necessary to give close attention to s 304 as well as to ss 268 and 269 of the Criminal Code.

Section 268 is a definition of provocation differing substantially from the provocation which at common law serves to reduce to manslaughter a killing which would otherwise amount to murder. The term 'provocation' as defined in s 268 has, however, no application except 'to an offence of which an assault is an element'. Section 269 provides that a 'person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault' if certain conditions exist. One is that 'the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm' …

Section 269 provides a defence. Section 304 serves to reduce a killing which would otherwise be murder to manslaughter. It is abundantly clear that s 269 has no application to a person unlawfully killing and that s 304 provides exclusively where there is provocation for killing. Furthermore, s 304 can apply to a killing which happens otherwise than by reason of an assault, eg to the provoked interference to an aircraft about to take off which, by reason of such interference, crashes causing the death of the pilot; cf s 319A. A number of cases which have been described are concerned with the problem whether what is described in s 304 as 'sudden provocation' is provocation as defined in s 268. In accordance with one view the answer is 'No'. In accordance with the other view the answer is 'Yes'. The difference is similar, but not quite the same as the difference which has arisen whether s 269 applies to a crime such as unlawfully doing grievous bodily harm, for, in each case, the meaning of the words 'an offence of which an assault is an element' in s 268 requires consideration.

In determining the application of s 269 the meaning of the words is decisive; in determining whether 'provocation' as defined by s 268 is the 'sudden provocation' referred to in s 304, the meaning of the words in s 268 is an important consideration, but other considerations have also to be taken into account. However, as the present problem is with the application of s 269 to the crime of doing grievous bodily harm created by s 320, it is not necessary to examine the other considerations which tend against treating the words 'sudden provocation' in s 304 as 'provocation' described in s 268.

Prima facie an offence of which an assault is an element means an offence which is not committed unless there be an assault, for it is the definition of an offence which determines its 'elements'. There are a number of instances of such offences in the Criminal Code. There are, however, other offences in which assault is not an element of the offence in the sense just mentioned but the proof of the offence may (in a particular case) involve the proof of an assault; eg murder, manslaughter, unlawfully doing grievous bodily harm, causing death or grievous bodily harm by the dangerous driving of a motor vehicle on a road. Is it then a fair meaning of the words 'an offence of which an assault is an element' in s 268 to apply them to such offences so that s 269 would, except in the case of a killing, provide a defence in the particular case? With deference to those who take, and have taken, a contrary view, we think not. We acknowledge, of course, that the construction which we have adopted does confine the operation of s 269 to narrow limits …

Our conclusion that the decision of the Court of Criminal Appeal is correct rests upon the following considerations, all of which are to be found expressed in the judgments of judges of the Supreme Court of Queensland. First and foremost there is the prima facie meaning of the words of s 268 which point to proof of an assault being necessary to establish the offence defined by some provisions in the Criminal Code. It is to the necessary elements of 'an offence' that attention is directed by the section rather than to the particular evidence tendered to prove the offence charged. Secondly, s 269, in providing that a person is not criminally responsible for an assault committed upon another person, suggests that its likely effect is simply that the act constituting the assault, charged as part of the offence, loses its character as an element in the offence if done with provocation. It is the assault which loses its criminal character so that the offence charged, or a necessary element in that offence, is deprived of its criminal character. … We would therefore … dismiss the appeal.

[**Walsh J** agreed with the orders of **McTiernan ACJ** and **Menzies J**. **Gibbs** and **Stephen JJ** dissented.]

15.36C Stingel v R

(1990) 171 CLR 312; 97 ALR 1
High Court of Australia

The court delivered the following written judgment.

This is an appeal, pursuant to special leave, from a decision of the Court of Criminal Appeal of Tasmania (Nettlefold, Underwood and Wright JJ) dismissing an appeal from the appellant's conviction of murder. The issue which the appeal raises is whether, as the Court of Criminal Appeal held, the learned trial judge was correct in ruling that the matters relied upon by the

appellant as giving rise to a defence of provocation under s 160 of the Criminal Code (Tas) (the Code) were not capable of constituting provocation under that section with the result that that defence to the charge of murder was not left to the jury. The questions of law raised by that issue are important and of some difficulty.

It is common ground that, in the early hours of the morning of 5 June 1988, the appellant, then aged 19, killed a young man named Jason Scott Taylor by stabbing him in the chest with a butcher's knife. At the time he was killed, Taylor was sitting with his 17-year-old girlfriend (A) in a car parked in the Recreation Ground at Scottsdale, a town near Launceston. The general nature of the relationship between the appellant and A was not really in dispute. That relationship provides the context in which the events of the night of 4 June must be viewed for the purpose of determining whether a defence of provocation should have been left to the jury.

From May until about November 1986, A and the appellant went out together on a regular basis. At that time A was a pupil at the Scottsdale High School. The relationship between them broke up, after a series of arguments, about the time when A left school. It resumed for a few days around Christmas and was then permanently terminated by A. Notwithstanding A's communicated desire not to associate with the appellant, he was and remained, to use the learned trial judge's words, 'obsessed by or infatuated with' her and would not leave her alone. He frequently waited for her outside her place of employment. He followed her about and tried to talk to her. On a number of occasions when A told him she did not want to see him or talk to him, he threatened her with violence. He even threatened to kill her so that no one else could 'have' her …

In October or November 1987, A obtained a court order restraining the appellant from approaching her or talking to her …

… A developed what the appellant described as 'a loose relationship' with Jason Taylor. By 4 June 1988, the appellant (according to his unsworn statement at the trial) believed that Taylor was using A: 'Pick her up, usually at the football club cabaret, have sex with her, and have nothing more to do with her'.

There was considerable dispute at the trial about events on the night of 4 June leading up to the killing of Jason Taylor and about the precise circumstances of the killing. It is common ground that the issue involved in the appeal, namely, whether a defence of provocation should have been left to the jury, falls to be resolved by reference to the version of events most favourable to the accused: see, eg, *Lee Chun-Chuen v R* [1963] AC 220 at 230; *Parker v R* (1963) 111 CLR 610 at 616; *Bedelph v R* [1980] Tas R 23 at 30, 42; *Hutton v R* [1986] Tas R 24 at 29–30. That version of events, which is, in important respects, in sharp conflict with the sworn testimony of A, was contained in the appellant's unsworn statement. It is as follows.

On the evening of the killing there was a cabaret at the premises of the Scottsdale Football Club. The appellant, A and Taylor were all there. The appellant was feeling 'unwell' by reason of the combined effect of having 'got real drunk the night before' and 'a bad stomach ulcer which was playing up'. During the course of the evening at the club, he 'consumed one Bundy and Coke … at about 9.15 pm', having already taken 'a couple of Valium tablets at 7.30 pm'. The appellant was aware that Taylor and A were also at the club. He did not approach them but 'kept an eye on what [A] was doing' and 'noticed that Jason Taylor was very drunk — real drunk'. At about 10 pm, and 'for no reason' which the appellant could see, Taylor walked up to him and punched him in the stomach. That made the appellant 'feel more crook' and he 'started trembling'. According to the appellant, the 'punch wasn't to start a fight'. The appellant 'kept right away and sat down'. Later, during the evening, he had 'a couple of dances'

with three different females. Subsequently, he saw A 'kiss Ian Sowell'. Not long after, he saw an altercation between A and Taylor who 'starting pushing her around and telling her to "piss off, piss off"'. The appellant moved over to where they were. His unsworn statement continues:

> I wanted to go up to her and comfort her, but I didn't have the courage. I was a bit frightened about what would happen about the restraining order. Some other people came in and started comforting her. I motioned my arms to the people who was with her to see if she was all right. She seemed to calm down and remained in the company of other people.

Shortly afterwards, the appellant had a further encounter with Taylor in the club. He asked Taylor why he didn't leave A alone. Taylor replied: 'yeah, yeah'. Taylor 'was crying drunk at this stage. He had tears in his eyes and was falling all over the place'. Taylor then took A, who was crying, outside. A came back inside by herself and was still crying.

The cabaret at the club finished at about 1 am on the Sunday. The appellant 'was aware that there were several parties on afterwards'. He went to one of them. He had seen Taylor leave the club with A and noticed that they were not at the party. He remained at that party for about 15 minutes and then 'went for a drive down the street'. He 'was concerned' that Taylor 'might hurt' A. He had seen Taylor 'throw a drink followed by a glass at [A] on a previous occasion and … had seen her pushed about by him' He went to another local party where he remained for five minutes. He then went to a local cafe where he got something to eat and remained for about half an hour. He returned to the second party for a further five minutes. When he left there, he walked down the street with some other friends. He then got back into his car 'and decided to go for a drive and then went to the clubrooms'. His unsworn statement continues:

> I went into the Recreation Ground. I saw Jason sitting in his car. He was sitting in the front seat and appeared to be dozing. I decided to go over and have a talk to him about getting into [A]. I parked my car facing the same way as his about two metres away. I got out of the car and yelled 'Taylor, Taylor'. Just before I opened his door I saw [A]. I could see her head across his lap. I noticed he had no trousers on. I then opened the door. I saw her giving him a head job. I saw she had her trousers off. He then said 'Piss off you cunt, piss off'. She was still in the same place. After he spoke she sort of looked up. I then spat it. I felt myself getting really wild. Seeing her like that with him and being told to 'Piss off you cunt' by Jason caused me to lose control. We had not been alone often. I just got wild. I had looked after her. When I used to go out with her we spent little time alone. He was one night standing her. I had looked after her. She had told me she had been raped when she was little. She used to cry in my arms over it. I was shocked. I felt that he was hurting me.
>
> He had no trousers on and had an erection. She was naked from the waist down. I left the door open and turned around and went back to my car. I lit up a smoke. I had a butcher's knife in the car. I got it and took a couple of draws on my cigarette. I looked back at Jason and the car door was still open. Jason still had an erection and he was playing with himself. She was naked in the car. I had smoked about a quarter of the cigarette. I don't know what happened to the cigarette, but I think that I put it out. The week before at football training he called her 'a slut' because she got onto Tim Groves (George). I have remembered this since I made my statement to the police. I pushed his right shoulder with my left hand. His hands came up towards me to push me. I had the knife in my right hand, blade downwards. I grabbed the knife in both hands and lunged downwards at him. I did not care where the knife went. I think the knife hit one of his hands and then into his chest.

It all happened so quickly. It was what I had seen that really worked me up. I was really worked up at the time. When I went out with [A] I had never had sex with her. She had told me she was frightened of sex and that she had been raped when she was little. I don't know but I feel that perhaps she may have been forced into what she was doing. I knew that Jason was only using her, that he did not love her, whereas I did.

It all happened really quickly. No-one said anything.

I was all worked up and feeling funny. It was like I was in a rage, almost to the stage where I felt dazed. It was like I really don't know what happened until the knife went into him.

…

The argument in the present case centred around four distinct questions. The first is the effect of the requirement of a defence of provocation under s 160 that there be a 'wrongful act or insult'. The second is the content of the test embodied in s 160(2)'s requirement that the wrongful act or insult be 'of such a nature as to be sufficient to deprive an ordinary person of the power of self-control'. The third is the function of a trial judge in deciding, pursuant to s 160(3), whether 'any matter alleged is, or is not, capable of constituting provocation'. The fourth, which is the ultimate issue on the appeal, falls to be answered in the light of the answers to those three earlier questions. It is whether the learned trial judge was, in the circumstances of the case, correct in declining to leave provocation to the jury.

'Any wrongful act or insult'

The composite phrase 'wrongful act or insult' appears in a number of other statutory provisions dealing with provocation, including the Queensland and Western Australian Criminal Codes. The phrase did not, however, have any settled legal meaning when the Code was enacted in 1924 and it should not be seen as a technical one. Its critical words — 'wrongful', 'act' and 'insult' — are words of wide general import which should be given their ordinary meaning. In the Report of the Criminal Code Bill Commission of 1879, the Commissioners — Lord Blackburn, Barry J (of the High Court of Justice in Ireland), Lush J and Sir James Stephen — commented (at 24–5) that they had used the words 'wrongful act or insult' in the draft s 176 to introduce 'an alteration of considerable importance into the common law': see, also, Sir James Stephen, *A History of The Criminal Law of England*, (1883), vol 3, pp 81–2, 85. In that context, the adoption of the phrase in s 160(2) of the Code should be seen as involving a deliberate departure from the long prevalent common law approach that the kinds of conduct which could, as a matter of law, constitute provocation reducing murder to manslaughter were somewhat artificially confined and, putting to one side a confession of adultery, did not include a case of 'mere words': see, eg, A Stephen, *Digest of the Criminal Law*, 3rd ed, 1883, pp 161–4; *R v Palmer* [1913] 2 KB 29 at 30–1; *R v Withers* (1925) 25 SR (NSW) 382 at 389–91; *R v Camplin* [1978] AC 705 at 714–15; *Moffa v R* (1977) 138 CLR 601 at 605, 616–17, 619–21. Accordingly, the scope of the word 'insult' in s 160(2) should not be restricted by reference to earlier common law doctrine. In particular, it can denote an insulting word or gesture which is neither accompanied by nor in the context of physical violence or the conveyance of information.

There was some discussion in the course of argument about whether the adjective 'wrongful' in s 160(2) qualifies 'insult' as well as 'act'. It would seem to have been consistently assumed in Tasmanian cases that 'wrongful' does not qualify 'insult': see, eg, *Bedelph v R*, at 40; *Hutton v R* at 40–1. Some support for the view that it does can be found in judgments dealing

with the phrase 'any wrongful act or insult' occurring in differently worded provisions of the Western Australian and Queensland Codes. In *R v Scott* (1909) 11 WALR 52 at 67, Burnside J, referring to the effect of the composite phrase in the Western Australian Code, said that he could not see: 'why an act in order to amount to provocation must be wrongful, but an insult may be of any character at all. The greater must be wrongful, the lesser need not be.' With due respect, however, his Honour's comments are scarcely persuasive. In the phrase 'wrongful act', the adjective 'wrongful' is necessary to import the element of offensiveness. The word 'insult' involves the implication of offensiveness without a need for any accompanying adjective …

In *R v Stevens* [1989] 2 Qd R 386, the Queensland Court of Criminal Appeal applied Burnside J's approach to the phrase 'any wrongful act or insult' in the Queensland Code. In the course of his judgment, in which Kelly SPJ and Kneipp J concurred, Demack J said (at 392):

> The phrase is 'any wrongful act or insult' not 'any wrongful act or any insult', and the usual grammatical construction would require 'wrongful' to qualify both 'act' and 'insult'. Further, it is hardly to be expected that parliament would wish to excuse a violent response to a trivial insult.

Again, however, those reasons are unpersuasive at least as regards the construction of the phrase in s 160 of the Code. We do not see why 'the usual grammatical construction would require' the word 'wrongful' to qualify 'insult' as well as 'act'. It is equally grammatical to read 'wrongful act' and 'insult' as the designated alternatives. It is true that the insertion of a second 'any' in the phrase would have prevented ambiguity. So also, however, would the insertion of a second 'wrongful'. Nor, in our view, does the consideration that it is hardly to be expected that parliament would wish to excuse a violent response to a trivial insult apply to govern the construction of the phrase 'wrongful act or insult' in s 160(2) of the Code. As the word 'any' makes plain, the reference to 'wrongful act or insult' was not intended to be confined by requirements of gravity or proportion. That confinement is to be found in the requirement of the following words of the subsection to the effect that the wrongful act or insult must be of such a nature as to be sufficient to deprive an ordinary person of the power of self-control.

The court is not concerned in the present case with the construction of the phrase 'any wrongful act or insult' as used in the context of the differently worded provisions of the Queensland and Western Australian Codes. That being so, it is inappropriate to express a concluded view about the relationship between 'wrongful' and 'insult' in the provocation provisions of those Codes. It suffices, for present purposes, to say that the word 'wrongful' should not be read as qualifying the word 'insult' in s 160(2) of the Code. Neither syntax nor context requires that 'wrongful' be so read …

'Of such a nature as to be sufficient to deprive an ordinary person of the power of self-control'

The requirement that the wrongful act or insult be of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is clearly intended to involve an objective threshold test. It is only if that test is satisfied that it becomes necessary to consider whether the accused was, in fact, subjectively deprived of his or her self-control. As Wilson J pointed out in *R v Hill* [1986] 1 SCR 313 at 342; (1986) 25 CCC (3d) 322 at 344, the 'rather cryptic statutory language requires interpretation in order to achieve the presumed purpose of the legislature in requiring the accused's conduct to be measured against that of the "ordinary person"'. Wilson J went on to identify 'the rationale underlying the objective test' in words (at 343; 345) which are, in our view, applicable to the corresponding test in s 160 of the Code:

> The objective standard, therefore, may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard.

As will be seen, however, that does not mean that the objective test was intended to be applied in a vacuum or without regard to such of the accused's personal characteristics, attributes or history as serve to identify the implications and to affect the gravity of the particular wrongful act or insult.

Section 160(2)'s objective test refers merely to depriving 'an ordinary person of the power of self-control' without expressly identifying the extent of the necessary loss of control. In *Parker v R*, Taylor and Owen JJ were of the view that similar words in the objective test contained in s 23(2) of the Crimes Act 1900 (NSW) should be construed as referring to such a loss of self-control by 'an ordinary person' as would encompass what the accused had done. Their Honours said (at 641):

> … surely, when the proviso requires that the provocation must be such that it was reasonably calculated to deprive an ordinary person of the power of self-control, and did in fact deprive the accused of such power, it is speaking of loss of the power of self-control in relation to the act or acts causing death. In other words, the question is not whether there was some loss of the power of self-control, but whether the loss of self-control was of such extent and degree as to provide an explanation for or, to constitute, in some measure, an excuse for the acts causing death. And, of course, the provocation must have been of such a character as was calculated to deprive an ordinary person of the power of self-control to that extent.

This extract from their Honours' judgment was approved by four of the five members of the court in *Johnson v R* (1976) 136 CLR 619 at 637–8 (per Barwick CJ) and at 658 (per Gibbs J, with whom Mason J (at 660) and Jacobs J (on the relevant question, at 666) agreed). It should be accepted as applying to s 160(2) of the Code. Accordingly, the wrongful act or insult must have been capable of provoking an ordinary person not merely to some retaliation, but to retaliation 'to the degree and method and continuance of violence which produces the death' (*Holmes v Director of Public Prosecutions* [1946] AC 588 at 597; and see, generally, *Sreckovic v R* [1973] WAR 85 at 91).

The central question posed by the objective test — ie of such a *nature* as to be *sufficient* — obviously cannot be answered without the identification of the content and relevant implications of the wrongful act or insult and an objective assessment of its gravity in the circumstances of the particular case. Conduct which may in some circumstances be quite unprovocative may be intensely so in other circumstances. Particular acts or words which may, if viewed in isolation, be insignificant may be extremely provocative when viewed cumulatively. Thus, in *Moffa*, where the deceased's insulting conduct had culminated in the throwing of a telephone at the applicant, Gibbs J commented (at 616):

> However, it is no doubt right to infer that the throwing of the telephone was only the last straw that caused the applicant's control to collapse. In any case, in deciding whether there is sufficient evidence of provocation, it is necessary to have regard to the whole of

> the deceased person's conduct at the relevant time, for acts and words which considered separately could not amount to provocation may in combination, or cumulatively, be enough to cause a reasonable person to lose his self-control and resort to the kind of violence that caused the death. Everything that the deceased said and did on 21st August must therefore be considered in deciding whether there was provocation.

In the same case, Barwick CJ (at 606) referred to the 'totality of the deceased's conduct' and pointed out that 'a jury would be entitled to view the situation in its entirety'.

Even more important, the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused. Were it otherwise, it would be quite impossible to identify the gravity of the particular provocation. In that regard, none of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct. For example, any one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult. Indeed, even mental instability or weakness of an accused could, in some circumstances, itself be a relevant consideration to be taken into account in the determination of the content and implications of particular conduct. For example, it may be of critical importance to an assessment of the gravity of the last of a series of repeated insults suggesting that the person to whom they are addressed is 'mad' to know that that person has, and understands that he has, a history of mental illness. As Wilson J commented in *Hill* (at 346–7; 347), the 'objective standard and its underlying principles of equality and individual responsibility are not … undermined when such factors are taken into account only for the purpose of putting the provocative insult into context'.

The 'ordinary person' (sometimes called the 'reasonable person' or 'normal person') was a comparatively late arrival in the law of provocation. The hypothetical 'person' designated by the phrase had, however, become firmly installed by the time of enactment of the Code. The phrase was not then, nor has it since become, 'a term of legal art' in criminal law: see *Camplin*, at 714. The function of the ordinary person of s 160 is the same as that of the ordinary person of the common law of provocation. It is to provide an objective and uniform standard of the minimum powers of self-control which must be observed before one enters the area in which provocation can reduce what would otherwise be murder to manslaughter. While personal characteristics or attributes of the particular accused may be taken into account for the purpose of understanding the implications and assessing the gravity of the wrongful act or insult, the ultimate question posed by the threshold objective test of s 160(2) relates to the possible effect of the wrongful act or insult, so understood and assessed, upon the power of self-control of a truly hypothetical 'ordinary person'. Subject to a qualification in relation to age (see below), the extent of the power of self-control of that hypothetical ordinary person is unaffected by the personal characteristics or attributes of the particular accused. It will, however, be affected by contemporary conditions and attitudes: see per Gibbs J, *Moffa*, at 616–17. Thus in *Parker* (at 654), Windeyer J pointed out that many reported rulings in provocation cases 'show how different in weight and character are the things that matter in one age from those which matter in another'.

It has been suggested that, under a provision such as s 160(2), the jury should 'be instructed to put themselves, as the embodiment of the ordinary person, in the accused's shoes' for the purpose of determining the possible effect of the wrongful act or insult upon the power of self-control of the ordinary person: see, eg, *R v Hill*, at 347; 348. While such an

instruction may not involve any misdirection or error when read in the context of a particular summing up, it seems to us that it should be avoided. True it is that the jury, viewed collectively, can be seen as representing the ordinary or average member of the public. To instruct the jury to put themselves in the shoes of the accused for the purpose of determining whether the wrongful act or insult was of such a nature as to deprive an ordinary person of the power of self-control could, however, involve the danger that it might be construed by an individual juror as an invitation to substitute himself or herself, with his or her individual strengths and weaknesses, for the hypothetical ordinary person. The result could be to displace the objective standard by the particular juror's subjective view of his or her personal power of self-control regardless of whether it be greater or less than that which should be attributed to a hypothetical ordinary person. If that occurred, it would be but a short step to the position where a defence of provocation would be sustained by a particular juror only if that juror was prepared to concede that he or she would have been guilty of the crime of manslaughter if placed in the situation of the accused. That would involve a mistaken and unduly harsh operation of s 160(2)'s objective test.

The function of the 'ordinary person' in s 160(2) should not be confused with the role of the 'reasonable man' in the law of negligence: see, eg, *Moffa*, at 613; *R v Webb* (1977) 16 SASR 309 at 313. Before 'provocation becomes an operative factor' in a murder trial, the prosecution 'must have satisfied the jury beyond reasonable doubt that murder, provocation apart, had been committed by the accused' (per Barwick CJ, *Johnson*, at 633). To make what the reasonable man of the law of negligence would have done in the circumstances the controlling standard of what might constitute a defence of provocation to a charge of murder would in effect be to abolish the defence since 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, not acting in self defence, he would kill his neighbour in circumstances which would, but for the provocation, be murder …

…

The assumption underlying the objective test in s 160(2) is not that to do an act which would otherwise be murder may be an ordinary or reasonable reaction to a wrongful act or insult. The assumption is that a wrongful act or insult may be of such a nature as to be sufficient to provoke an ordinary person to lose his or her self-control to an extent that he or she does the unreasonable and extraordinary, that is to say, an act which, were it not for the provocation, would constitute the crime of murder. In its context in s 160(2), the phrase 'to be sufficient to' should not be construed as meaning 'would'. It should be construed as meaning 'to have the capacity to', 'to be capable of' or 'could' or 'might': see *R v Fricker* (1986) 42 SASR 436 at 443.

No doubt, there are classes or groups within the community whose average powers of self-control may be higher or lower than the community average. Indeed, it may be that the average power of self-control of the members of one sex is higher or lower than the average power of self-control of members of the other sex. The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterised as ordinary. The lowest level of self-control which falls within those limits or that range is required of all members of the community. There is, however, one qualification which should be made to that general approach. It is that considerations of fairness and common sense dictate that, in at least some circumstances, the age of the accused should be attributed to the ordinary person of the objective test.

If s 160(2) were applicable only to cases where the accused was an adult, there would be no compelling reason why the reference to the power of self-control of an ordinary person should be construed otherwise than as referring to the power of self-control of an ordinary adult. The subsection is, however, applicable to cases where the accused is criminally responsible while still an infant: see the Code, s 18. It has generally been accepted that it would be unduly harsh to require of an immature accused the minimum standard of self-control possessed by the ordinary adult. True it is that there are those who would see this qualification as a departure from an entirely objective standard of self-control. It is one thing to say that age may be taken into account in assessing the gravity of the provocation, but another thing altogether to say that it should determine the degree of self-control required in the circumstances. And once it is accepted that the required standard of self-control may be qualified by immaturity, then it may be argued that the qualification should be extended to other human conditions such as sex or senility. Moreover, it cannot be said that the criminal law displays a similar solicitude for youth in other areas. The test of criminal negligence giving rise to involuntary manslaughter is, for example, entirely objective, taking no account of the age of the accused: see *Director of Public Prosecutions v Newbury* [1977] AC 500. But the approach may be justified on grounds other than compassion, since the process of development from childhood to maturity is something which, being common to us all, is an aspect of ordinariness. In *McHale v Watson* (1966) 115 CLR 199 at 213–14, Kitto J spoke of the exclusion of abnormalities in the formation of an objective standard of care for the purposes of negligence. His words are apposite in the present context:

> The principle is of course applicable to a child. The standard of care being objective, it is no answer for him, any more than it is for an adult, to say that the harm he caused was due to his being abnormally slow-witted, quick-tempered, absent-minded or inexperienced. But it does not follow that he cannot rely in his defence upon a limitation upon the capacity for foresight or prudence, not as being personal to himself, but as being characteristic of humanity at his stage of development and in that sense normal. By doing so he appeals to a standard of ordinariness, to an objective and not a subjective standard. In regard to the things which pertain to foresight and prudence — experience, understanding of causes and effects, balance of judgment, thoughtfulness — it is absurd, indeed it is a misuse of language, to speak of normality in relation to persons of all ages taken together. In those things normality is, for children, something different from what normality is for adults; the very concept of normality is a concept of rising levels until 'years of discretion' are attained. The law does not arbitrarily fix upon any particular age for this purpose, and tribunals of fact may well give effect to different views as to the age at which normal adult foresight and prudence are reasonably to be expected in relation to particular sets of circumstances.

There is, we think, adequate justification in policy, reason and authority for taking age, in the sense of immaturity, into account in setting the standard of self-control required by reference to the ordinary man: see *Camplin*, at 717–18, 721–2; *R v Romano* (1984) 36 SASR 283 at 288–9; *Hill*, at 332, 337, 350–1, and 353; 336, 340, 351 and 353.

A more difficult question is whether the age of the accused should be attributed to the ordinary person in a case such as the present where the accused is a young adult in his or her late teens: see Age of Majority Act 1973 (Tas), s 3. As a broad generalisation, it is true to say that the powers of self-control of a young adult of 18 or 19 years are likely to be less

than those of a more mature person. On balance, it seems to us that the preferable approach is to attribute the age of the accused to the ordinary person of the objective test, at least in any case where it may be open to the jury to take the view that the accused is immature by reason of youthfulness. It should be mentioned that there are statements in some cases which support the view that the 'ordinary person' under an objective test such as that contained in s 160(2) should be invested with the sex as well as the age of the particular accused: see, eg, *Camplin*, at 718; *R v Conway* (1985) 17 CCC (3d) 481 at 487. As we have indicated, however, we consider that the only characteristic or attribute of the particular accused which should be attributed to the 'ordinary person' for the purposes of the objective test of s 160(2) is that of age (cf *R v Romano*, at 288–9; *Hill*, at 351–2; 351).

In the light of what has been written above, the effect of the threshold objective test of s 160(2) can be stated in summary form. It is to pose for the jury the question whether, in all the circumstances of the case, the wrongful act or insult, with its implications and gravity identified and assessed in the manner we have indicated, was of such a nature that it could or might cause an ordinary person (or, when appropriate, an ordinary person of the age of the accused), that is to say, a hypothetical or imaginary person with powers of self-control within the limits of what is ordinary (for a person of that age), to do what the accused did. A consideration of that question will almost inevitably involve projecting the hypothetical ordinary person of s 160(2) into the position of the accused at the time of the killing. There is nothing objectionable about that so long as it is remembered that the reference to the ordinary person of s 160 is not a reference to a person of precisely identifiable powers of self-control but a reference to a person with powers of self-control within the range or limits of what is 'ordinary' for a person of the relevant age. In that regard, it must be borne in mind that s 160(2) refers to 'an *ordinary* person' and not to '*the average* person'.

A projection of the 'ordinary person' of the objective test into the position of the accused at the time of the killing will, however, involve a particular difficulty in a case where the existence of some attribute or characteristic of the accused is relevant both to the identification of the content or the gravity of the wrongful act or insult and to the level of power of self-control of any person possessed of it. As Crawford J pointed out in *Jeffrey v R* [1982] Tas R 199 at 233, self-control tends to reflect many characteristics and 'the degree of self-control possessed by a person may vary according to the specific qualities of his character'. If, for example, a person is obsessively jealous or extraordinarily excitable and pugnacious, his powers of self-control are hardly likely to be within the range which might properly be regarded as 'ordinary' (cf *R v Fricker*, at 445). In a case where it is necessary to take some such characteristic or attribute into account for the purpose of identifying the content or gravity of the wrongful act or insult (eg a case of a grave insult centred upon that characteristic or attribute), the objective test will, nonetheless, require that the provocative effect of the wrongful act or insult, with its content and gravity so identified, be assessed by reference to the powers of self-control of a hypothetical 'ordinary person' who is unaffected by that extraordinary attribute or characteristic. In other words, the fact that the particular accused lacks the power of self-control of an ordinary person by reason of some attribute or characteristic which must be taken into account in identifying the content or gravity of the particular wrongful act or insult will not affect the reference point of the objective test, namely, the power of self-control of a hypothetical 'ordinary person'.

…

If the question of provocation had been left to the jury and on the assumption that the jury may have reasonably found that the deceased's conduct involved both insult and wrongful act, the ultimate question for them in relation to the objective test would have been whether they were persuaded beyond reasonable doubt that the relevant words and conduct of the deceased were not of such a nature that they could or might, cause an ordinary 19-year-old, that is to say, a hypothetical or imaginary 19-year-old with powers of self-control within the range or limits of what is ordinary for a person of that age, to do what the accused did. The provocative words and conduct consisted of the remark 'Piss off you cunt' viewed with, and in the context of, the sexual activities in which the deceased and A were allegedly engaging in a parked car late at night. The jury would have been entitled to identify the implications and to assess the gravity of that provocative conduct in the context of relevant attributes and relationships, present and past, of the appellant. That being so, the jury might have viewed the remark made to the appellant as an insulting, profane and dismissive comment made to a person who had had a past relationship with A, who obviously (and to the knowledge of the deceased) remained infatuated with her, who had assumed, and was maintaining, a protective attitude to her and who was convinced that she had been, and was then being, 'used' by the deceased for his own sexual gratification. So to say seems to us to put the implications and the gravity of the provocative conduct at its highest from the accused's point of view.

The critical question is whether the jury might, if it accepted that view of the gravity and implications of the provocative conduct, have entertained a reasonable doubt about whether the objective test was not satisfied. In our view, no jury could have entertained such a reasonable doubt. The appellant's infatuation with — and associated jealousy in relation to — A was something which itself inevitably detracted from his actual powers of self-control. That being so, while the infatuation could be relevant to assessing the gravity of the insult involved in the profane and dismissive comment made to him, it cannot be seen, for the purposes of the objective test, as diminishing the power of self-control of the hypothetical ordinary person. There is an added element of artificiality involved in projecting the hypothetical ordinary person of the objective test into the situation of the appellant at the time of the killing since it is unlikely that a person with power of self-control within the range attributable to a hypothetical ordinary 19-year-old would, in all the circumstances including the court order restraining the appellant from approaching A, have been at the scene in the first place. Certainly, in the context of that court order and of the appellant's past harassment of A notwithstanding her discouragement of his advances, it is difficult to conceive that any ordinary 19-year-old would be even surprised to be told in strong and abusive terms to go away when he intruded, as the appellant did, upon the privacy of the deceased and A as they voluntarily engaged in sexual activity late at night in a darkened car. Be that as it may, no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the conduct of the deceased, including the insulting remark and the sexual activities in which he and A were allegedly engaging, was not of such a nature as to be sufficient to deprive any hypothetical ordinary 19-year-old of the power of self-control to the extent that he would go to his own car, obtain a butcher's knife and fatally stab the deceased with it. Put differently, no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the appellant's reaction to the conduct of the deceased fell far below the minimum limits of the range of powers of self-control which must be attributed to any hypothetical ordinary 19-year-old.

It follows that the learned trial judge was correct in declining to leave a defence of provocation under s 160 to the jury. The appeal should be dismissed.

15.37C

Green v R

(1997) 191 CLR 334; 148 ALR 659
High Court of Australia

Green was convicted of murder. He appealed his conviction on the ground that the elements of the defence of provocation had not been properly explained to the jury. The New South Wales Court of Criminal Appeal found that the trial judge had made some errors, including directing the jury that evidence of a history of sexual abuse was not relevant to the issue of provocation. The appeal was nevertheless dismissed by a 2:1 majority. The majority ruled that 'no substantial miscarriage of justice' had occurred as a result of the errors.

A further appeal was heard by the High Court of Australia. By a majority of 3:2, the High Court allowed the appeal and ordered a new trial. All five judges wrote separate judgments. One of the issues which divided the judges was whether there was any evidence of provocation that could conceivably meet the test under s 23(2)(b) of the Crimes Act (NSW):

> … that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm, upon the deceased.

Similar tests apply for the provocation defence in other states.

The majority of the High Court thought that the question needed to be put to the jury and properly explained, with appropriate reference to the history of sexual abuse. The trial judge had not done this and therefore the appeal was allowed.

The minority, on the other hand, took the view that the trial judge's error caused 'no substantial miscarriage of justice' because no ordinary person in the position of the appellant, faced with the provocation alleged in the case, could have lost self-control to the extent of forming an intent to kill or cause grievous bodily harm. The divergences of opinion over the psychology of the ordinary person were particularly apparent in the contrast between the judgments of **Brennan CJ**, who was one of the majority, and **Kirby J**, who was one of the minority. Extracts from their judgments are included here.

The evidence relating to the provocation defence was detailed in the judgment of **McHugh J** as follows.

McHugh J: In the early morning of 20 May 1993 the appellant, Mr Malcolm Thomas Green (the accused), killed Mr Donald Gillies (the deceased) at his home in Mudgee. In March 1994, a jury convicted the accused of murdering the deceased …

At the time of his death, the deceased was 36 years of age. He was unmarried and lived with his mother although she had been away from the family home for some days prior to the killing. The deceased had helped the accused to obtain work, had lent him small sums of money, and had been his confidant. The accused was 22 years of age. He had known the deceased about six years and described him as one of his 'best friends'. In evidence, the accused said that he trusted the deceased, looked up to him, and valued his advice.

On the night of the killing, the deceased had invited the accused to dinner. They dined and watched a number of television programs. According to the accused, each of them consumed a significant amount of alcohol during the evening. The deceased asked the accused if he would like to stay overnight. After initially refusing the offer, the accused decided to stay. The deceased said that he would sleep in his mother's bedroom and that the accused could sleep in the deceased's bedroom. In a record of interview made a few hours after the killing, the accused said:

> … and he showed me to the bed I was sleeping in. After a while when I was fully unclothed Don entered the room I was in, slid in beside me in the bed and started talking to me how a great person I was. Then he started touching me. I pushed him away. He asked what was wrong. I said, 'What do you think is wrong? I'm not like this.' He started grabbing me with both hands around my lower back. I pushed him away. He started grabbing me harder. I tried and forced him to the lower side of me. He still tried to grab me. I hit him again and again on top of the bed until he didn't look like Don to me. He still tried to grope and talk to me that's when I hit him again and saw the scissors on the floor on the right hand side of the bed. When I saw the scissors he touched me around the waist shoulders area and said, 'Why?' I said to him, 'Why, I didn't ask for this.' I grabbed the scissors and hit him again. He rolled off the bed as I struck him with the scissors. By the time I stopped I realised what had happened. I just stood at the foot of the bed with Don on the floor laying face down in blood. I thought to myself how other people can do something like this and enjoy what they do. I didn't get off this and like it not just because he was someone I knew even though he resembled someone I knew. I didn't know what to do, didn't know where to go.

…

In answer to the last question asked during the interview with the police, the accused said:

> In relation to what had happened this night I tried to take it as a funny joke but in relation to what my father had done to four of my sisters it forced me to open more than I could bear. It hasn't changed the fact to what had happened to my family but I couldn't stop myself or control what went through me.

At the trial the accused elaborated upon this answer. He was asked:

Q. What did you mean by that?
A. Well, it's just that when I tried to push Don away and that and I started hitting him it's just — I saw the image of my father over two of my sisters, Cherie and Michelle, and they were crying and I just lost it.
Q. What do you mean you just lost it?
A. I can't remember stuff after it.
Q. You can't remember after that?
A. Yes.
Q. What did you mean when you said, 'It forced me to open more than I could bear'?
A. I just lost control.
Q. Why did you lose control?
A. Because those thoughts of me father just going through me mind.
Q. What about your father was going through your mind?
A. About sexually assaulting me sisters and belting me mother.
Q. What feelings did you have at that time as a result of that?
A. Upset, angry.

The accused had not witnessed any sexual assaults by his father on his sisters. However, as a result of conversations with his sisters and mother, he believed that his father had sexually assaulted them. He also gave evidence that he had witnessed quite violent,

non-sexual assaults by his father upon his mother and sisters. His attitude towards his father, whom he had seen only once in many years, was that he 'wanted to kill him, hated him'.

…

Brennan CJ:

…

The trust which the appellant had placed in the deceased before the deceased got into the appellant's bed, the consumption of a considerable quantity of alcohol on the night of the killing, the appellant's response to the deceased's first homosexual advance that 'I'm not like this', the deceased's persistence in his homosexual advances, his grabbing and pulling of the appellant, his touching the appellant's groin and the appellant's knowledge or belief of and sensitivity to his father's sexual abuse of the appellant's sisters were all matters that were to be taken into account in determining the availability of the defence of provocation. The appellant's recollection of and sensitivity to his father's sexual abuse of the appellant's sisters ('the sexual abuse factor' as I shall call it) was relevant to the question whether the deceased's conduct had induced a loss of self-control on the part of the appellant (a question arising under para (a) of s 23(2)) and to the question of the significance of the provocative conduct to the appellant (a question arising under para (b) of s 23(2)). The sexual abuse factor was relevant to those questions because it tended to make it more likely that the appellant was more severely provoked by the deceased's unwanted homosexual advances than he would otherwise have been and thus more likely that he had been induced thereby to lose self-control and inflict the fatal blows and more likely that the appellant was so incensed by the deceased's conduct that, had an ordinary person been provoked to the same extent, that person could have formed an intention to kill the deceased or to inflict grievous bodily harm upon him.

The learned trial judge ruled against the reception of evidence of the sexual abuse factor when first it was sought to be tendered on the issue of provocation. That ruling was given on the second day of the trial. The trial judge understood that earlier decisions of the Court of Criminal Appeal required him to reject both evidence of sexual abuse of the appellant's sisters and evidence of the appellant's knowledge of that sexual abuse because subjective factors 'particular to the appellant' were not relevant to his capacity to control his response to the deceased's conduct, even though those factors rendered that conduct exceptionally provocative.[10] In this ruling, his Honour did not distinguish between the significance of the deceased's conduct to the appellant and the capacity of conduct having that significance to induce an ordinary person to form an intention to kill or an intention to inflict grievous bodily harm. In consequence of this ruling, not only was evidence of the sexual abuse factor ruled to be irrelevant to the issue of provocation but counsel for the appellant was denied the opportunity to address the jury on the heightened significance of the deceased's conduct towards the appellant.

Subsequently, evidence relating to the appellant's knowledge of the sexual abuse of his sisters was admitted in order to explain or neutralise the effect of a comment allegedly made by the appellant to a Mr and Mrs Sirola on the night before the killing of the deceased. The comment was, in effect, that the appellant wanted to have somebody killed. Proof of the comment was tendered by the prosecution to show premeditation of the murder of the deceased. Evidence of the sexual abuse factor was then admitted in order to suggest that the appellant's hatred was directed towards his father, not to the deceased …

…

In the Court of Criminal Appeal, the Crown rightly conceded that his Honour's rejection of evidence relating to the sexual abuse factor on the question of loss of self-control was erroneous. However, the Crown submitted that, on the facts, the appellant's reaction to the conduct of the deceased fell below the standards of self-control attributable to the hypothetical ordinary man in the position of the appellant. That submission was accepted by the Court of Criminal Appeal. That being so, the second requirement of para (b) of s 23(2) was not satisfied and there was no basis on which provocation could have warranted a verdict of manslaughter rather than murder. The proviso was applied to dismiss the appeal.

…

In my opinion, the trial judge was right to allow the issue of provocation to go to the jury. On the appellant's evidence and on the statements he made to the police, he was grievously incensed and insulted by the conduct of the deceased. The Court of Criminal Appeal appears to have placed some emphasis on the absence of evidence on the part of the deceased — 'the touching was amorous, not forceful', Priestley JA said in speaking for the majority. That led the majority to the view that:

> … the basis for the jury's decision was that they were satisfied beyond reasonable doubt that the sexual advances of Mr Gillies up to the point where the appellant lost his self-control were not such as could have induced an ordinary person in the position of the appellant to have so far lost self-control as to have formed an intent to kill or inflict grievous bodily harm upon Mr Gillies.

And that view, imputed to a jury that had been directed to ignore the sexual abuse factor in considering the 'ordinary person in the position of the accused' test, was confirmed by the majority having taken that factor into consideration. Priestley JA said:

> It is easy to see that many an ordinary person in the position in which the appellant was when Mr Gillies was making his amorous physical advances would have reacted indignantly, with a physical throwing off of the deceased, and perhaps with blows. I do not think however that the ordinary person could have been induced by the deceased's conduct so far to lose self-control as to have formed an intent to kill or inflict grievous bodily harm upon Mr Gillies.

With respect, the conclusion arrived at by the majority was a finding of fact that might not have been arrived at by a jury. A jury would be entitled to evaluate the circumstances in a different way.[14] The real sting of the provocation could have been found not in the force used by the deceased but in his attempt to violate the sexual integrity of a man who had trusted him as a friend and father figure, in the deceased's persistent homosexual advances after the appellant had said 'I'm not like this' and in the evoking of the appellant's recollection of the abuse of trust on the part of his father. These were matters for the jury to evaluate in determining the degree of provocation experienced by the appellant. Smart J in dissent described the deceased's actions, as narrated by the appellant, as revolting. He added:

> All this was bad enough but there were further factors, namely, the deceased's betrayal of the relationship of trust, dependency, friendship and his abuse of his hospitality. He was trying to coerce the appellant into providing him (the deceased) with sexual gratification.
>
> The past history of the accused, including the family history of the father's sexual assaults, must not be overlooked.

The provocation was of a very grave kind. It must have been a terrifying experience for the appellant when the deceased persisted. The grabbing and the persistence are critical.

Some ordinary men would feel great revulsion at the homosexual advances being persisted with in the circumstances and could be induced to so far lose their self-control as to form the intention to and inflict grievous bodily harm. They would regard it as a serious and gross violation of their body and their person. I am not saying that most men would so react or that such a reaction would be reasonable. However, some ordinary men could become enraged and feel that a strong physical reaction was called for. The deceased's actions had to be stopped.

In the last paragraph, Smart J speaks of the reaction of 'some ordinary men' to the deceased's conduct. With respect, the relevant question was the reaction of the appellant. The 'ordinary person' in para (b) of s 23(2), like the ordinary person considered in *Stingel*,[15] does not refer to a person having precisely the appellant's powers of self-control but refers 'to a person with powers of self-control within the range or limits of what is "ordinary" for a person of the relevant age'.

A reasonable jury might have come to the conclusion that an ordinary person, who was provoked to the degree that the appellant was provoked, could have formed an intent to kill or to inflict grievous bodily harm upon the deceased. It was essentially a jury question, a question the answer to which depended on the jury's evaluation of the degree of outrage which the appellant might have experienced. It was not for the court to determine questions of that kind, especially when reaction to sexual advances are critical to the evaluation. A juryman or woman would not be unreasonable because he or she might accept that the appellant found the deceased's conduct 'revolting' rather than 'amorous'. The case is not like *Stingel*. In that case, Stingel sought out and allegedly came upon a scene of consensual sexual activity between the deceased and Stingel's erstwhile girlfriend — a scene which inflamed his jealousy. Here, the deceased was the sexual aggressor of the appellant.

As the trial judge was in error in ruling that the sexual abuse factor was irrelevant to the issue of provocation, and as it was open to the jury not to be satisfied beyond reasonable doubt that s 23(1) did not apply, the accused lost a chance of acquittal of murder. Accordingly, the proviso did not apply …

The appeal must be allowed, the order of the Court of Criminal Appeal set aside and in lieu thereof the appeal to that court should be allowed, the conviction quashed and a new trial ordered.

Kirby J:

…

Factual context — homosexual advance defence

There is a further reason in the present factual context (if it be open in the language of the Act) to adhere to the unbroken exposition of the Australian law of provocation, outlined above. By factual context I refer to the suggestion that a non-violent sexual advance of a homosexual character might, in the eye of the law, be such as to amount to provocation so as to induce an ordinary person in the position of the accused to lose self-control to the extent that he would form an intent to kill or to inflict grievous bodily harm upon the deceased simply because of such an advance.

Without objection, the Solicitor-General for New South Wales placed before this court a Discussion Paper prepared in that state addressed to the so-called 'homosexual advance defence'.[178] From that document it appears that the 'defence' has arisen in homicide trials, conducted in the Supreme Court of New South Wales between 1993 and 1995, affecting no fewer than 16 accused.[179] Of the 13 cases (involving the 16 accused), two resulted in acquittals; two (including this case) in jury verdicts of guilty of murder; three of not guilty of murder but guilty of manslaughter; eight had been disposed of by pleas, generally to manslaughter or to lesser offences; and in one case no bill of indictment was found.[180]

The authors of the Discussion Paper argue that a non-violent homosexual advance should not, in law, be found to constitute sufficient provocation to incite an ordinary person to lose self-control.[181] They state that, for the law to condone such a result, would be wrong 'because it reinforces the notion that fear, revulsion or hostility are valid reactions to homosexual conduct'.[182] Thus a 'murderous reaction' towards a non-violent sexual advance, homosexual in character, 'should not be regarded as ordinary behaviour but as an exceptional characteristic of the accused'.[183] The 'ordinary person' is a fiction. However, that person represents someone exhibiting a measure of self-control in unwanted situations equal to that which society expects of those living within it and to which its system of criminal justice lends it aid.[184] Necessarily, as Gummow J points out, what can be expected is affected by contemporary conditions and attitudes.

It is for the New South Wales Parliament, government[185] and judiciary,[186] if they so choose, to respond to the proposals in the Discussion Paper. However, in my opinion, it is also relevant for this court to take the problem evidenced by the paper as a contextual reason, if the statutory language permits it, for resisting any temptation to reduce, or blur, the insistence of the court's long-standing and consistent authority, about the objective standard that is applied before provocation will be available. Before provocation can be held sufficient to warrant a jury's acquittal of an accused of murder (and a finding instead that the accused is guilty of manslaughter) the accused's response must meet objective standards of self-control imputed to the ordinary person by society. It was that measure of self-control which the court insisted upon in the case of provocation of a heterosexual character in *Stingel*.[187] The judge had there refused to leave provocation to the jury. This court upheld that decision holding, in the circumstances, that:[188]

> [N]o jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the appellant's reaction to the conduct of the deceased fell far below the minimum limits of the range of powers of self-control which must be attributed to any hypothetical ordinary 19-year-old.

The Discussion Paper reveals that the homosexual advance 'defence' has apparently become common in other states of Australia following reports of jury acquittals in New South Wales.[189] Academic writing shows that the 'defence' is by no means uncommon overseas, particularly in the United States of America.[190] This development should be viewed with some concern in the context of widely reported instances of violence (including of a most brutal kind) against homosexual people in Australia[191] which parallel like experiences in similar communities.[192]

For the law to accept that a non-violent sexual advance, without more, by a man to a man could induce in an ordinary person such a reduction in self-control as to occasion the formation of an intent to kill, or to inflict grievous bodily harm, would sit ill with contemporary

legal, educative, and policing efforts designed to remove such violent responses from society, grounded as they are in irrational hatred and fear.[193]

In my view, the 'ordinary person' in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill or to inflict grievous bodily harm. He or she might, depending on the circumstances, be embarrassed; treat it at first as a bad joke; be hurt; insulted. He or she might react with the strong language of protest; might use as much physical force as was necessary to effect an escape; and where absolutely necessary assault the persistent perpetrator to secure escape.[194] But the notion that the ordinary 22-year-old male (the age of the accused) in Australia today would so lose self-control as to form an intent to kill or grievously injure the deceased because of a non-violent sexual advance by a homosexual person is unconvincing. It should not be accepted by this court as an objective standard applicable in contemporary Australia …

…

Conclusion: no miscarriage of justice

… For my own part, I find entirely convincing the reasons given by Priestley JA, for the majority, in the Court of Criminal Appeal in explaining why, in this case, the conviction of murder was inevitable.

The accused was faced with, what for him in his situation, may be accepted to have been a provocation. It may be allowed that it was provocation of a sexual kind affecting deep feelings and affronting him. It intruded into his privacy in a way most unwelcome to him. It may even have suggested to him assumptions about his own sexuality which he found confronting or offensive. But he was a 22-year-old adult male living in contemporary Australia. He was at all times wearing at least his tracksuit pants and underwear. At no time were these garments removed or displaced. He was awake. He was aware of what the deceased was doing. He was also aware that the deceased was highly intoxicated. He was younger. He was physically fit. He was very soon able to achieve physical superiority over the deceased. His great physical power is indicated by the course which his violence took. He had relatives close at hand. He knew that they would answer a telephone call and come at once to collect him. His sister's home was within short walking distance. He could not explain in his evidence why he did not simply say 'I am going'. He agreed that there was nothing at all to prevent him from leaving. Following the killing of the deceased he was readily able to summon a motor vehicle and coolly to direct that he be taken to the police station there to assert that the deceased had done 'worse' to him than he had done to the deceased.

No jury acting reasonably could fail to be satisfied beyond reasonable doubt of the relevant matters. These were that the conduct of the deceased, however unwanted and offensive to the appellant, was not of such a nature as to be sufficient, objectively, to deprive a hypothetical ordinary 22-year-old Australian male in the position of the appellant of the power of self-control imputed to him by law to the extent of inducing him to form an intent to kill or to inflict grievous bodily harm on the deceased. Adapting what was said unanimously by this court in *Stingel*, no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the appellant's reaction to the conduct of the deceased fell far below the minimum limits of the range of powers of self-control which must be attributed to the hypothetical ordinary 22-year-old Australian male in the position of the appellant.[218]

That standard of self-control remains, in this country, objective. Both Mr Stingel and the appellant stated that they were provoked more than they could bear by a confronting sexual

challenge. No lesser standard of self-control is demanded by our society in the case of the appellant than of Mr Stingel, simply because sexual conduct of the deceased was homosexual in character. To condone a lesser standard is to accept an inequality before the law which this court has previously, repeatedly and rightly rejected. The ultimate foundation of adherence to the objective test was explained in *Stingel*,[219] in the terms of Wilson J's reasons, in the Supreme Court of Canada, in *R v Hill*:[220]

> The objective standard … may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard.

If every woman who was the subject of a 'gentle', 'non-aggressive' although persistent sexual advance, in a comparable situation to that described in the evidence in this case could respond with brutal violence rising to an intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation would be sorely tested and undesirably extended. A neutral and equal response to the meaning of the section requires the application of the same objective standard to the measure of self-control which the law assumes, and enforces, in an unwanted sexual approach by a man to a man. Such an approach may be 'revolting' to some.[221] Any unwanted sexual advance, heterosexual or homosexual, can be offensive. It may intrude on sexual integrity in an objectionable way. But this court should not send the message that, in Australia today, such conduct is objectively capable of being found by a jury to be sufficient to provoke the intent to kill or inflict grievous bodily harm. Such a message unacceptably condones serious violence by people who take the law into their own hands. Even allowing for the appellant's alleged memories of his father's sexual conduct many years earlier directed to his sisters, there is no way that this could have induced an ordinary person in his position to have so far lost self-control as to have formed the intention to kill or inflict grievous bodily harm on the deceased.

Assuming that it was appropriate to leave provocation to the jury in this case (a proposition which I doubt), the jury's verdict in this case was not only proper. It was inevitable. There was therefore no substantial miscarriage of justice. The proviso was therefore correctly applied.

[**Toohey** and **McHugh JJ** agreed with **Brennan CJ** that the evidence of the history of sexual abuse was relevant for assessing the gravity of the provocation and that it was impossible to conclude that no substantial miscarriage of justice had occurred. **Gummow J** agreed with **Kirby J** that a conviction would have been inevitable even if proper directions had been given.]

Footnotes

Brennan CJ:
10. *R v Baraghith* (1991) 54 A Crim R 240 at 245 per Samuels JA.
…
14. See *Stingel* (1990) 171 CLR 312 at 332–4.
15. (1990) 171 CLR 312 at 331–2.
…

Kirby J:

178. Attorney-General's Department (NSW), *Review of the 'Homosexual Advance Defence'*, Discussion Paper, 1996 noted (1996) 20 *Criminal Law Journal* 305; see Mason and Tomsen, 'Homophobic Violence', (1997) 33 at 39.
179. Discussion Paper 8 para 10.
180. Discussion Paper 10.
181. Discussion Paper 18 para 56–57.
182. Discussion Paper 18 para 57; see also Mason and Tomsen, 'Homophobic Violence' (1997) 33 at 39.
183. Discussion Paper 19, para 57.
184. Mison, 'Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation' (1992) 80 *California Law Review* 133 at 136.
185. Various suggestions are made in the Discussion Paper: see 4–5, 22–25; see also Thomsen, 'The Political Contradictions of Policing and Countering Anti-Gay Violence in New South Wales' (1993) 5 *Current Issues in Criminal Justice* 209.
186. Model Directions for inclusion in the Judge's Bench Book are proposed. See Discussion Paper 22 (para 68–70).
187. (1990) 171 CLR 312 at 318–20.
188. (1990) 171 CLR 312 at 336–7.
189. Discussion Paper 11 para 15. For a case involving alleged provocation to homicide in the case of a woman suspected of having a lesbian relationship with the accused's wife see *R v Radford* (1985) 20 A Crim R 388 noted in Goode, 'On Subjectivity and Objectivity in Denial of Criminal Responsibility: Reflections on Reading Radford' (1987) 11 *Criminal Law Journal* 131.
190. Mison, 'Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation' (1992) 80 *California Law Review* 133 at 134–5, 167–70; see also Dressler, 'When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard' (1995) 85 *Journal of Criminal Law and Criminology* 726 at 735; Mason and Tomsen, 'Homophobic Violence' (1997) 33 at 37, 133.
191. Mason, 'Violence Against Lesbians and Gay Men', Australian Institute of Criminology 1993; NSW Police Service, 'Out of the Blue: A Police Survey of Violence and Harassment Against Gay Men and Lesbians', 1995.
192. Noted Mison, 'Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation' (1992) 80 *California Law Review* 133 at 167–70.
193. See Mason and Tomsen, 'Homophobic Violence' (1997) 132 at 133.
194. Homosexual advance defences were raised in the 1950s in England. See, for example, *R v Cunningham* [1959] 1 QB 288 and *R v McCarthy* [1954] 2 WLR 1044 at 1046–7; [1954] 2 All ER 262 at 263. Lord Goddard CJ said in *McCarthy*: 'this provocation would no doubt have excused … a blow, perhaps more than one'. Viscount Simon in *Holmes v DPP* [1946] AC 588 at 601 said: '[A]s society advances, it ought to call for a higher measure of self-control in all cases. … [T]he law has to reconcile respect for the sanctity of human life with recognition of the effect of provocation on human frailty'. Compare the Australian decisions *Pritchard v R* (1990) 49 A Crim R 67; *Stiles v R* (1990) 50 A Crim R 13; *R v Grmusa* (1990) 50 A Crim R 358; *R v Preston* (1992) 58 A Crim R 328; *Whittaker v R* (1993) 68 A Crim R 476.

…

218. *Stingel v R* (1990) 171 CLR 312 at 336–7.
219. (1990) 171 CLR 312 at 324.
220. [1986] 1 SCR 313 at 343.
221. Cf Howe, 'More Folk Provoke Their Own Demise' (1997) 19 *Sydney Law Review* 336 at 355.

15.38C

Pollock v the Queen

2010] HCA 35; (2010) 271 ALR 219
High Court of Australia

Introduction

…

3 This was a retrial. The appellant had been convicted of the murder of his father following an earlier trial and his conviction had later been set aside by the Court of Appeal.[1] The judgment of the Court of Appeal set out seven propositions, any one of which, it was said, if proved beyond reasonable doubt, would exclude that the appellant had been acting under provocation. Those seven propositions were stated as follows:[2]

1. the potentially provocative conduct of the deceased did not occur; or
2. an ordinary person in the circumstances could not have lost control and acted like the appellant acted with intent to cause death or grievous bodily harm; or
3. the appellant did not lose self-control; or
4. the loss of self-control was not caused by the provocative conduct; or
5. the loss of self-control was not sudden (for example, the killing was premeditated); or
6. the appellant did not kill while his self-control was lost; or
7. when the appellant killed there had been time for his loss of self-control to abate.

4 Before the commencement of the appellant's retrial these seven propositions ('the sevenfold test') had been incorporated into the model directions on provocation contained in the Queensland Supreme and District Court Bench Book. The jury was directed in the terms of the sevenfold test at the retrial.

5 Following his conviction, the appellant appealed unsuccessfully to the Court of Appeal (Keane, Muir and Fraser JJA).[3]

6 The appellant appeals by special leave against the order of the Court of Appeal on the ground that the directions incorporating the sevenfold test were wrong in law. He contends that the fifth and seventh propositions are not discrete requirements of the partial defence. More generally, he contends that the sevenfold test unfairly invited the jury to consider each proposition in isolation and not as interrelated parts of a composite concept. As these reasons will show, the sevenfold test was apt to invite the jury to wrongly conclude the issue of provocation against the appellant and for this reason the appeal must be allowed, the appellant's conviction set aside and a new trial ordered.

…

The issues and the way the parties put their cases

25 There was no issue about the course of events leading to the departure of Ms Bray and the others from the Morayfield home. The deceased's sexual encounter with Ms Bray had been brought to a premature end by the appellant's petulant behaviour. The deceased was in an angry mood fuelled by alcohol. He had got out of bed and was putting on his clothes and threatening to kill the appellant as Ms Bray left the house. Physical evidence pointed to a fight having taken place in the appellant's bedroom. Ms Spottiswood, who had been asleep in the appellant's bed, woke to see the appellant and the deceased fighting in that room. One reasonable inference was that the deceased had come into the room and attacked the appellant. This was conduct which was capable of provoking the appellant.

26 There were no witnesses to the killing and the circumstances of it are largely unknown. One inference from the use of the rock and the number and severity of the blows was that the appellant had lost his self-control at the time of the killing. The appellant's emotional state in the aftermath of the killing and his statement to the police that he had 'snapped' were capable of providing support for that conclusion.

27 There were two versions of how the fight had progressed. The first version, which obtained some support from Ms Spottiswood's account, was that the fight had started in the bedroom and had continued from there out into the garden, and, in the course of the fight, the appellant had picked up the rock and struck the deceased. The second version was the account given to Ms Brownlie. On this version, the fight had been interrupted and the deceased had sought refuge in the bathroom before escaping through the window and being attacked in the garden.

…

The summing up

35 The trial judge directed the jury in general terms as to the meaning of provocation, the assessment of the gravity of the provocation, the attributes of the ordinary person and the objective ordinary person test consistently with the law as this Court has explained it in *Stingel v The Queen*[5] and *Masciantonio v The Queen*.[6] *Stingel* was concerned with provocation under the Tasmanian Code[7] and *Masciantonio* with the doctrine under the common law. In each case the Court observed that in this area of the criminal law the Codes and other statutory provisions and the common law have tended to reflect a degree of unity of underlying notions.[8] There is no complaint with her Honour's statement of the general principles.

36 Her Honour identified the act relied upon by the appellant causing the loss of self-control as the fight in the bedroom which was alleged to have extended into the garden. She did not explain how provocation might apply were the jury to find the appellant's admissions were true.

37 Her Honour explained that the prosecution would exclude provocation if it proved any one of the propositions in the sevenfold test. Written directions incorporating the sevenfold test were distributed to the jury in these terms:

> It is for the prosecution to satisfy you beyond reasonable doubt that the defendant did not act under provocation before a verdict of guilty of murder is open. The prosecution will have succeeded in satisfying you that provocation is excluded as a defence, if it has satisfied you beyond reasonable doubt of any one of the following matters:
>
> 1. the potentially provocative conduct of the deceased did not occur; or
> 2. an ordinary person of the same age as Andrew Pollock in the circumstances could not have lost control and acted as he acted with intent to cause death or grievous bodily harm; or
> 3. Andrew Pollock did not lose self-control; or
> 4. the loss of self-control was not caused by the provocative conduct; or
> 5. the loss of self-control was not sudden; or
> 6. Andrew Pollock did not kill Murray Pollock while his self-control was lost; or
> 7. whe n Andrew Pollock killed Murray Pollock there had been time for his loss of self-control to abate.

38 The fifth proposition does not include the example (that the killing was premeditated) that formed part of the Court of Appeal's statement of the test. The example was omitted at the

request of the Crown Prosecutor, with the consent of the appellant's counsel, because it was not the Crown case that the killing had been premeditated.

39 The summing up contained no elaboration of the various propositions in the sevenfold test or how the evidence related to the determination of the questions posed by each. The only directions touching on the issues raised by the fifth and seventh propositions were:

> What you have to consider here is whether Andrew Pollock acted in the heat of passion caused by sudden provocation and before there was time for his passion to cool. You must consider whether he was actually deprived of self-control and killed the deceased while so deprived.
>
> …
>
> The prosecution says there was time for his passion to cool. The defence submits you could not be satisfied beyond reasonable doubt that he was not acting while provoked. The answer to that question is one for you to judge.

The fifth proposition — the jury's question

40 'Sudden' in ordinary English has a number of meanings. These include 'immediate' and 'without delay' as well as 'unexpected' and 'unpremeditated'.[9] The jury were troubled by the meanings of 'sudden' and 'loss of self-control'. They asked for clarification of the definitions of each. With the agreement of both counsel, her Honour answered the question as to the definition of 'sudden' in this way:

> Well, 'sudden' in that context I've taken from the Oxford English Dictionary, and it means — it says 'of actions and feelings, unpremeditated, done without forethought, acting without forethought or deliberation, performed or taking place without delay; speedy, prompt, immediate'. But 'sudden' is an ordinary, English word. It doesn't have any special legal meaning in this context. It's an ordinary, English word that means what you understand it to mean as ordinary members of the community. But the dictionary has these meanings: 'Unpremeditated, done without forethought, acting without forethought or deliberation, performed or taking place without delay, speedy, prompt, immediate'. But what it means in the Criminal Code, what it means in this part of the law is its own meaning. It means sudden. If there was another word that was better, another word would have been used, but that gives you some idea of the ordinary, English meaning of the word sudden in this context.

The appellant's submissions — the fifth and seventh propositions

41 The appellant complains that absent a direction that 'sudden' in the fifth proposition connotes the absence of premeditation, it was left to the jury to exclude provocation in the event that there was any interval between the provocative conduct and the loss of self-control …

42 The complaint with the seventh proposition is that, read with the sixth proposition, it states an objective element of the defence that is additional to the threshold 'ordinary person' test.

…

The fifth proposition

53 The difficulty with the fifth proposition is that it was susceptible of being understood as requiring that the loss of self-control immediately follow the provocation. The directions given in answer to the jury's question referred to meanings of the word 'sudden' which included

'unpremeditated'. However, other meanings of 'sudden' including 'immediate' were given. It was left to the jury to decide what 'sudden' meant when applied to the appellant's loss of self-control.

54 The law requires that the killing occur while the accused is in a state of loss of self-control that is *caused* by the provocative conduct, but this does not necessitate that provocation is excluded in the event that there is any interval between the provocative conduct and the accused's emotional response to it.[28] The fifth proposition was misleading in the absence of further explanation.

…

The seventh proposition

56 The seventh proposition assumes the loss of self-control and directs attention, objectively, to whether there had been time for the loss to abate. The respondent submits that it is an accurate statement of the law as it is explained in the joint reasons in *Masciantonio v The Queen*:[29]

> Homicide, which would otherwise be murder, is reduced to manslaughter if the accused causes death whilst acting under provocation. The provocation must be such that it is capable of causing an ordinary person to lose self-control and to act in the way in which the accused did. The provocation must actually cause the accused to lose self-control and the accused must act whilst deprived of self-control *before he has had the opportunity to regain his composure*. (emphasis added)

57 The alternative submission, which the respondent developed in oral argument, is that, regardless of whether the common law requires as a discrete, objective, element that there not have been time for the accused to regain his composure, this is a requirement of the partial defence under the Code. The respondent submits that the seventh proposition is a statement of the concluding words of s 304 without the metaphor. It cannot be an error, so it is said, to direct a jury in the terms of the statute. It is a submission which assumes that the concluding words of s 304 commencing 'and before there is time' are the statement of a condition that is separate from the condition stated in the preceding phrase 'in the heat of passion caused by sudden provocation'.

58 The language of s 304 reflects statements of the doctrine which pre-date the emergence of the 'ordinary person' objective test …

61 The point being emphasised in the joint reasons in *Masciantonio* was that the objective test concerns the nature and extent of the reaction which might be caused in an ordinary person rather than its duration or precise physical form.[38] The question of whether an ordinary person could have formed the intention to kill or to do grievous bodily harm is of greater significance than the question of whether an ordinary person could adopt the means adopted by the accused to carry out the intention. So, too, the duration of the loss of self-control is of lesser significance than the capacity of the provocation to induce in the ordinary person the requisite intention. The determination of whether the prosecution has proved that an ordinary person, provoked to the degree that the accused was provoked, could not have formed the intention to kill or do grievous bodily harm and to have acted as the appellant acted does not require the jury to hypothesise the time that an ordinary person might have taken to regain composure.

62 The circumstance that an accused had time to reflect before reacting to provocation may show that the later killing was an intentional killing carried out from motives of revenge or punishment.[39] The interval between the deceased's provocative conduct and the killing may tend to show that the accused had regained control at the time of the killing.[40] These are matters bearing on the determination of whether the killing was in fact caused by provocation and done at a time when the accused was in a state of temporary loss of self-control.

…

65 The words of s 304 that require that the act causing death is done 'in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool' are the expression of a composite concept incorporating that the provocation is such as could cause an ordinary person to lose self-control and to act in a manner which encompasses the accused's actions. It is the last-mentioned objective requirement that keeps provocation within bounds. The concluding words beginning 'and before' are not the statement of a discrete element of the partial defence.

66 The jury were required to determine whether the prosecution had proved beyond reasonable doubt that the appellant did not kill the deceased while in a state of loss of self-control induced by the deceased's provocative conduct, being conduct that had the capacity to cause an ordinary person to lose self-control and form the intention to kill or to do grievous bodily harm and to act as the appellant acted. If they were not so satisfied it was not open to proceed to proposition seven and to exclude provocation upon a view that, objectively, there had been time for the appellant's loss of self-control to abate.

67 In every case in which provocation is raised it is necessary for the trial judge to explain the concept and the ways in which the prosecution may eliminate it. Model directions, when appropriately adapted to the case, may assist trial judges in this task, but model directions must not be used in a way that distracts attention from the central task of the judge in instructing the jury. That task is to identify the real issues in the case and to relate the directions of law to those issues.[47] The seven propositions identified by the Court of Appeal in the earlier appeal in this matter were not intended to be used as a template for jury directions. That they came to be included in the Bench Book may explain their use by the trial judge and trial counsel's acquiescence in that course. But, as these reasons explain, their use in this case misdirected the jury.

68 The difficulty with the fifth proposition, stated as a discrete element, was highlighted by the jury's question. The appellant's counsel did not ask the trial judge to explain that 'sudden' in this context signified the absence of premeditation. However, there is no reason to view his failure to do so as reflecting a decision thereby to obtain a perceived forensic advantage for the appellant.

The respondent's submissions — miscarriage of justice

69 The respondent submitted that whatever criticisms might be levelled at the sevenfold test, its use had not occasioned a miscarriage of justice in this case. There was no danger, so it was said, that the jury might have excluded provocation because they were satisfied that the appellant's loss of self-control had not been sudden or that objectively there had been time

for the loss of self-control to abate. This was because on any view of the facts the interval between Ms Bray's departure and the killing was short. Whatever had occurred between the appellant and the deceased had happened rapidly and the appellant's response had been 'immediate'. These submissions do not come to grips with the way the prosecution's case was put at trial. The jury were invited to find that the appellant's loss of self-control was not 'sudden' because there had been an interval during which the deceased was in the bathroom, because the appellant had the time to wipe his hand on the wall (leaving the blood-stained handprint) and because the appellant had time to prise the rock from the wall. The same factual matters appear to have been relied on in support of the submission that the prosecution had excluded provocation because there had been time for the appellant's loss of self-control to abate.

70 The directions wrongly invited the jury to exclude that the appellant was acting under provocation if the jury found that there had been any interval between the deceased's provocative conduct and the act causing death. In the light of the way the parties had put their cases it cannot be said that the misdirection did not deprive the appellant of a chance fairly open to him of being acquitted of murder. It follows that the appeal must be allowed.

71 The evidence was capable of eliminating that the killing was done under provocation. This includes that on either version of the events leading to the killing it was open to the jury to find that provocation had been negatived by the application of the threshold ordinary person test. For these reasons the consequential order should be that a new trial be held.

Footnotes

1. *R v* Pollock [2008] QCA 205.
2. R v Pollock [2008] QCA 205 at [7] per McMurdo P.
3. R v Pollock [2009] QCA 268.

…

5. (1990) 171 CLR 312; [1990] HCA 61.
6. (1995) 183 CLR 58; [1995] HCA 67.
7. *Criminal Code* (Tas), s 160 (since repealed).
8. *Stingel v The Queen* [1990] HCA 61; (1990) 171 CLR 312 at 320 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Masciantonio v The Queen* [1995] HCA 67; (1995) 183 CLR 58 at 66 per Brennan, Deane, Dawson and Gaudron JJ, 71 per McHugh J.
9. *Oxford English Dictionary*, 2nd ed (1989), vol 17 at 115–16, 'sudden'.

…

28. *Parker v The Queen* [1964] UKPCHCA 1; (1964) 111 CLR 665 at 679; [1964] AC 1369; *Chhay* (1994) 72 A Crim R 1 at 10 per Gleeson CJ; *R v Ahluwalia* [1992] EWCA Crim 1; [1992] 4 All ER 889 at 896 per Lord Taylor of Gosforth CJ.
29. *Masciantonio v The Queen* [1995] HCA 67; (1995) 183 CLR 58 at 66 per Brennan, Deane, Dawson and Gaudron JJ.
30. (1869) 11 Cox CC 336 at 338.
31. *R v Lesbini* [1914] 3 KB 1116 at 1120.
32. [1942] AC 1 at 9.
33. *Mancini v Director of Public Prosecutions* [1942] AC 1 at 9.
34. *Stingel v The Queen* [1990] HCA 61; (1990) 171 CLR 312 at 325, citing *Holmes v the Director of Public Prosecutions* [1946] AC 588 at 597 per Viscount Simon.
35. [1995] HCA 67; (1995) 183 CLR 58 at 69–70 per Brennan, Deane, Dawson and Gaudron JJ.

36. *Masciantonio v The Queen* [1995] HCA 67; (1995) 183 CLR 58 at 67 per Brennan, Deane, Dawson and Gaudron JJ citing *Johnson v The Queen* [1976] HCA 44; (1976) 136 CLR 619 at 639, 640 per Barwick CJ, 659 per Gibbs J; [1976] HCA 44.
37. *Masciantonio v The Queen* [1995] HCA 67; (1995) 183 CLR 58 at 69 per Brennan, Deane, Dawson and Gaudron JJ.
38. *Masciantonio v The Queen* [1995] HCA 67; (1995) 183 CLR 58 at 69–70 per Brennan, Deane, Dawson and Gaudron JJ.
39. *Moffa v The Queen* [1977] HCA 14; (1977) 138 CLR 601 at 611 per Barwick CJ; [1977] HCA 14; *R v Ahluwalia* [1992] EWCA Crim 1; (1992) 4 All ER 889 at 895–6 per Lord Taylor of Gosforth CJ.
40. *R v Ahluwalia* [1992] EWCA Crim 1; (1992) 4 All ER 889 at 895 per Lord Taylor of Gosforth CJ.

...

47. *Alford v Magee* [1952] HCA 3; (1952) 85 CLR 437 at 466 per Dixon, Williams, Webb, Fullagar and Kitto JJ; [1952] HCA 3.

Compulsion, Emergency and Medical Necessity

CHAPTER 16

THE GENERAL PROBLEM OF NECESSITY INCRIMINAL LAW

16.1 Sometimes the commission of an offence appears the only way to avoid something worse happening. The 'offence' is committed because it is 'necessary' to do so. Necessity in criminal law is handled through several exculpatory defences, including defences that authorise some use of force in defence of the person or property: see **Chapter 14**. This chapter is concerned with three other defences in the Criminal Codes of Queensland (Code (Qld)) and Western Australia (Code (WA)) (the Codes) which bear upon the general problem of necessity:

1. The defence of *compulsion* by threat under the Code s 31(1)(d) (Qld) and *duress* under s 32 (WA).
2. The defence of *emergency* under the Codes s 25. This is sometimes called the defence of '*necessity*', although it covers only part of the general issue of necessity. The label is taken from the common law, which recognises a residual defence of necessity with many affinities to that in s 25.
3. The defence of *medical necessity* under s 282 (Qld)/s 259 (WA). The common law has not recognised medical necessity as a separate defence, preferring to leave any problems in this field to the residual defence of necessity.

16.2 These three defences possess a common feature, most noticeable in the defences of compulsion/duress and emergency. The accused has usually pursued their own life or safety in such a way as to inflict some harm upon an innocent person. These defences raise the difficult question as to when the criminal law should condone the sacrifice of innocent people for reasons of self-interest. Not surprisingly, these defences use the formula for excuses '[a person] is not criminally responsible for …' rather than the formula for justification 'it is lawful for …': see **10.3–10.5** on the distinction between excuses and justifications. For those who would view the foetus as a 'victim' of abortion, the same question can also arise when medical necessity is used as a defence to an offence of performing an illegal abortion. This may explain why this defence, too, uses the formula of an excuse. Otherwise, the defence would clearly be phrased as a justification.

In contrast, the issue of 'innocent' victims does not arise in the context of those defences relating to the use of defensive force, at least where the defender did not initiate the fight or provoke the attack: see **14.4** on the phraseology of these defences.

THE DEFENCE OF COMPULSION OR DURESS

Threats and criminal responsibility

16.3 There are two main ways in which someone may be 'compelled' to inflict harm upon another person, with implications for different parts of the law of criminal responsibility:

1. A person may be physically compelled to do something by such means as natural events or the force of another person. For example, A may push B against C causing an assault against C. In such cases, any criminal liability will attach to the person using the physical force and not to the person subjected to it. There is, however, no need for a special exculpatory defence. A person who is physically compelled to do something is acting involuntarily. The conduct occurs independently of the exercise of his or her will. There is, therefore, no criminal responsibility under the Codes s 23(1)(a) (Qld/s 23A (WA) or under the doctrine of voluntariness at common law: see **Chapter 11**.
2. A person may be psychologically compelled to do something by such means as a threat. For example, A may threaten to kill or inflict serious injury upon B unless B attacks C. Here, the conduct of B in attacking C is willed. The choice has been made to attack C rather than suffer the injury threatened by A. If B is to be relieved of criminal responsibility for the attack, a special exculpatory defence must usually be sustained. The function of the defence of compulsion under the Code s 31(1)(d) (Qld) and duress under s 32 (WA) is to provide a defence in certain cases of this kind. The original Griffith Code imposed strict conditions for the defence. However, the conditions have now been relaxed in both Queensland and Western Australia.

See also s 31(1)(b) (Qld)/s 31 (WA) on compulsion by lawful authority.

16.4 Where an offence involves a subjective mental element such as intention, the need for an exculpatory defence can sometimes be avoided. It is conceivable that someone acting under a threat may be so afraid that there is no appreciation of the harm that will obviously be inflicted. In *Darrington & McGauley* [1980] VR 353 at 370, Jenkinson J said:

> But whether or not duress is in question as an exculpation from guilt otherwise proved, coercive conduct may be a circumstance to be considered by the tribunal of fact in determining whether one or more of the constituent elements of the crime has or have been proved beyond reasonable doubt to have existed.

In addition, for those offences which require a purpose to bring about some result, a person who acts under a threat may be able to argue that, despite foresight of the result, the purpose of acting was not to bring it about but simply to avoid suffering injury. A famous example is *R v Steane* [1947] 1 All ER 813, where it was held that an Englishman who broadcast for the Germans during World War II in order to ensure the safety of his family did not act with the intention of assisting the enemy, 'intention' being interpreted restrictively as if it meant 'purpose'. See **4.11–4.12** on the relationship between intention and purpose.

16.5 In *Taiapa v The Queen* [2009] HCA 53; 240 CLR 95; 261 ALR 488 (**16.40C**), the High Court of Australia examined the significance of opportunities to escape threats by seeking the help of the police. The court did not rule out the possibility of a defence succeeding because of uncertainties about the effectiveness of police protection. It was, however, ruled at [40] that

'an unparticularised concern that police protection may not be a guarantee of safety cannot without more supply grounds for a reasonable belief that there is no option other than to break the law in order to escape the execution of a threat'.

Compulsion in Queensland

16.6 The Code (Qld) s 31(1)(d) now permits a person to take action to avoid a threat of serious harm or detriment 'to himself or herself or another person, or his or her property or the property of another person'. This formulation extends the original defence in the Griffith Code, which was limited to cases of self-preservation. The common law has also developed to make the defence of duress available for a person who acts in order to preserve the life or safety of another person: *Palazoff v R* (1986) 43 SASR 99. The Code (Qld), though, is unusual in permitting the defence for the preservation of property. In addition, the reference to 'detriment' as well as harm may make the defence applicable to blackmail, where there is a threat to expose information creating a risk of stigmatisation or financial ruin.

16.7 The defence of compulsion should be available only when it was actually necessary to obey the instruction in order to avoid the threat being implemented. There must have been no reasonable alternative for escaping the execution of the threat, such as seeking the protection of the police.

The Code (Qld) s 31(1)(d) addresses the issue of necessity through two conditions:

1. The person making the threat must be in a position to carry it out: s 31(1)(d)(i).
2. The person threatened must reasonably believe that there is no way other than obedience to avoid the threat being executed: s 31(1)(d)(ii).

16.8 In *R v Smith* [2005] QCA 1; [2005] 2 Qd R 69, the court held there had been an error when the trial judge directed the jury that the test under s 31(1)(d)(ii) is an objective test as to what was reasonably necessary. The court concluded (at [34]–[35]) that this formulation would wrongly favour an accused if there were more than one objectively reasonable means for escaping the carrying out of a threat. It was said to be insufficient that objectively reasonable means were chosen; rather, there would have to be no other objectively reasonable means of averting the implementation of the threat.

In another respect, however, the trial judge's direction in *Smith*, above, may have disadvantaged the accused. Section 31(1)(d)(ii) expressly refers to the reasonableness of the person's own belief. It could be argued that, although there is an objective element in a test of whether the person reasonably believed there was no other option, it is not the same as a test of whether such a belief was 'objectively reasonable'. A distinction between a modified objective test, which focuses on what might be reasonable for the particular person, and a purely objective test has been drawn in connection with mistakes of fact and self-defence: see 6.21–6.25, 14.15 and 14.38. Its introduction for the defence of compulsion would mean that allowance could be made for any relevant limitations or impairments of the accused.

16.9 Any scheme for a defence of compulsion by threat must also make some provision respecting proportion between, on the one hand, the harm threatened and, on the other hand, the harm inflicted in order to escape the execution of the threat. The costs of preservation may be too high and in such cases sacrifices will be required. There are two dimensions to this issue

of proportion: the seriousness of the harm threatened and the seriousness of the harm to be inflicted.

The Code (Qld) s 31(1)(d) addresses the problem by imposing the following conditions:

1. The threat must be of *serious* harm or detriment: s 31(1)(d)(i).
2. What is done in subjection to the threat must be 'reasonably proportionate to the harm or detriment threatened': s 31(1)(d)(iii).
3. What is done in subjection to the threat must not involve the elements of certain offences including murder and any offence of which causing or intending to cause grievous bodily harm is an element: s 31(2). The list focuses on serious offences against the person. The excluded offences include attempted murder as well as murder. However, the defence is still available potentially for some very serious offences such as rape and robbery which do not have as an element causing or intending to cause grievous bodily harm.

16.10 The Code (Qld) s 31(2) denies the defence to 'a person who has by entering into an unlawful association or conspiracy rendered himself liable to have such threats made to him'. 'Rendered … liable' is an obscure phrase. The most likely interpretation is that the threats must have been a foreseeable consequence when entering into the unlawful association or conspiracy. A similar limitation on the defence has been recognised at common law: *Palazoff* (1986) 43 SASR 99. The limitation is directed at a person who becomes involved in a criminal organisation which is likely to use threats of violence in order to prevent its members withdrawing. The rationale for such a limitation is presumably that there was an alternative to succumbing to the threats: that is, not joining the criminal organisation in the first place. This may seem a tough but sensible approach where the threats are made against the person who has been involved in the organisation. It does represent too severe a position, however, when the threats are directed against a third party. In effect, it amounts to a demand that the third party be sacrificed because of the subject's prior criminal involvement.

16.11 The defence is not phrased in terms that, of themselves, allow success when a mistake of fact has been made about the existence or nature of a threat. Section 31(1)(d) (Qld) requires the existence of certain material conditions rather than a reasonable belief in the existence of these conditions. The phraseology can be contrasted with the references to a reasonable apprehension of death or grievous bodily harm in the law of self-defence: ss 271–272 (Qld)/ ss 248–249 (WA). However, s 24 provides that a person who makes a reasonable mistake of fact is to be judged as if the facts were as they were supposed to be. A mistaken belief in a threat can therefore ground the relevant defence, as long as the mistake is reasonable. On the interpretation of s 24, see **6.21–6.26**.

The terms of the defence do permit a mistake to be made about whether there are lawful options for escaping the threat. Section 31(1)(d)(ii) requires that a person claiming compulsion reasonably believed that committing the offence was the only way of escaping the threat. A reasonable mistake would be compatible with the defence.

Duress in Western Australia

16.12 A simple scheme for a defence of duress has been established under the Criminal Code (WA) s 32, modelling the scheme in the Commonwealth Code. Under s 32(2), there is no criminal responsibility for an act or omission if:

(a) the person believes:
  (i) a threat has been made;
  (ii) the threat will be carried out unless an offence is committed; and
  (iii) the act or omission is necessary to prevent the threat from being carried out;
(b) the act or omission is a reasonable response to the threat in the circumstances as the person believes them to be; and
(c) there are reasonable grounds for the relevant beliefs about the threat and the circumstances surrounding the response.

There are no specific restrictions respecting who may be threatened or what kind of harm or detriment may be threatened.

16.13 The only specific limitation concerns prior criminal involvement and the exclusion is narrowly drafted. It applies only if 'the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of (a) doing an act or making an omission of the kind actually performed or (b) prosecuting an unlawful purpose in which it is reasonably foreseeable that such a threat would be made': s 32(3) (WA). Despite its precision, the exclusion makes no allowance for a threat directed against a third party. In effect, the exclusion amounts to a demand that the third party be sacrificed because of the subject's prior criminal involvement.

16.14 The defence is based upon beliefs held on reasonable grounds. It can therefore succeed despite some mistake having been made, as long the mistake was reasonable in the circumstances.

Commonwealth offences

16.15 Duress as a defence to Commonwealth offences is in the Criminal Code (Cth) s 10.2. The basic conditions for the defence are set by s 10.2(2) (Cth). The person must reasonably believe that:

(a) a threat has been made that will be carried out unless an offence is committed;
(b) there is no reasonable way that the threat can be rendered ineffective;
(c) the conduct is a reasonable response to the threat._

The defence is not available if 'the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out': s 10.2(3). Despite its precision, however, the exclusion makes no allowance for a threat directed against a third party.

THE DEFENCE OF EMERGENCY

The role of the defence

16.16 The Codes s 25 create a general defence of 'sudden or extraordinary emergency', which is applicable to some cases of necessity not covered by other defences. The conditions for the defence in Queensland and Western Australia diverge in some respects.

The defence is subject to the express provisions of the Codes relating to compulsion, self-defence and provocation. The defences of compulsion and self-defence deal with specific situations of necessity, so that the general defence under s 25 plays a residual role. The defence of provocation deals with forms of loss of self-control that are quite separate from necessity, so that its mention in this context is an unnecessary precaution._

A defence of sudden or extraordinary emergency is also contained in the Criminal Code (Cth) s 10.3.which is in similar terms to the Code (WA) s 25.

16.17 There are very few cases dealing with the defence of emergency. An example where the defence succeeded is *Warner v R* [1980] Qd R 207. *Warner* involved driving in a dangerous manner in order to keep ahead of another driver who was following so closely that there was a risk of a crash. However, in *Strudwick v Russell* (1989) 9 MVR 15 a similar defence based on s 25 was unsuccessful because the court took the view that there were other options available to the driver.

16.18 Although the defence of emergency is often equated with the common law defence of necessity, the word 'necessary' is not expressly used. Instead, the defence refers to 'circumstances of sudden or extraordinary emergency'. The rationale is presumably that, unless there is some sudden or extraordinary emergency, there will be time to plan an alternative way of preventing the harm from occurring.

Nevertheless, the specification of 'extraordinary' as an alternative qualifying adjective to 'sudden' suggests that it would be inappropriate to insist on such a narrow timeframe that immediate action is needed to prevent harm occurring. There can be 'extraordinary emergencies' in which it is clear what must be done, even though it is not essential that it be done at this moment or in the very near future.

16.19 In *Johnson v State of Western Australia* [2009] 71; 40 WAR 116, [60], it was said:

> A 'sudden emergency' has been described as 'one that comes upon the accused unexpectedly, catching her or him off-guard': Yeo S, 'Necessity under the Criminal Code and the Common Law' (1991) 15 *Criminal Law Journal* 17, 23. An extraordinary emergency is one which has been said to be 'unexpected or sudden', but 'a situation of "extreme gravity and abnormal or unusual danger"': Yeo, at 24.

In *Nguyen v R* [2005] WASCA 22 at [17], Templeman J made these observations:

(a) The circumstances in which the defence may be raised include a sudden emergency or an extraordinary emergency. It is not necessary for the emergency to be both sudden and extraordinary.

(b) In determining whether an emergency is sudden or extraordinary it may be relevant to have regard to the time which elapsed between the offender becoming aware of the emergency and his or her acting in response to it. However, delay is not a determinative factor …

In *Nguyen*, the defence succeeded on a charge under the Migration Act 1958 (Cth) relating to organising the unlawful entry of some people into Australia. The immigrants had fled Vietnam in fear of the authorities because of their political activities.

16.20 The classic common law case of *R v Dudley and Stephens* (1884) 14 QBD 273; [1881–5] All ER Rep 61 (16.41C) may provide an example of desperate circumstances where action

did not need to be immediate. It was clear that (absent the miraculous rescue which actually occurred) one sailor would have to die if the others were to live. However, it was not clear that the killing needed to be done on one day rather than the next, or the day after that. In a case like this, the timeframe should not be conclusive (although there may be other good reasons for denying a defence). See also the facts of *Re A (Children)* [2000] 4 All ER 961 at **16.42C**.

16.21 The requirement of a 'sudden or extraordinary emergency' has been paralleled, in some interpretations of the common law defence of necessity, by a requirement for an 'imminent peril': *Perka* (1984) 13 DLR (4th) 1 at 16–22 (SCC); but see also the rejection of a requirement for an emergency in *Re A (Children)*, above, at **16.42C**. A requirement for an 'imminent peril' has sometimes been interpreted to mean that the action must have been spontaneous, without any planning or deliberation: see G P Fletcher, *Rethinking Criminal Law*, Little, Brown, Boston, 1978, pp 811–12; *Morgentaler, Smoling and Scott* (1985) 22 DLR (4th) 641. This, however, seems very restrictive. There is no reason to read such a condition into the Codes s 25.

16.22 There has been a good deal of controversy at common law about whether a general defence of necessity should be recognised at all but it now appears to be accepted that a general defence should be recognised: see, for example, *R v Loughnan* [1981] VR 443, *Perka v R* (1984) 13 DLR (4th) 1 (SCC) and *R v Conway* [1988] 3 WLR 1238. Offences in relation to which the defence has been raised include driving offences (in circumstances similar to those in *Warner*).

More controversially, in several countries the defence has provided a basis upon which abortions have been lawfully performed, despite apparent violations of the wide terms of the specific abortion offence in statute. See, for England, *R v Bourne* [1939] 1 KB 687; [1938] 3 All ER 615; for Australia, *R v Davidson* [1969] VR 667; for Canada, *Morgentaler v R* (1975) 53 DLR (3d) 161 (SCC) and *R v Morgentaler* (1976) 64 DLR (3d) 718 (Que CA).

Under the Codes the problem of abortion has traditionally been handled through the separate defence of medical necessity, supplemented in Western Australia by amendments to the elements of the offence of abortion: see **16.37–16.38**.

16.23 In the Canadian case of *Perka* (1984) 13 DLR (4th) 1 (SCC), there was extended discussion as to whether the common law defence of necessity should be characterised as providing a justification or an excuse. The court eventually decided that necessity should be recognised as providing a defence of excuse, not of justification. The concern about viewing necessity as a justification is that the authority of the law could be undermined, with courts usurping the legislative function by redefining the boundaries of criminal offences. Dickson J in *Perka* articulated this concern and then went on to say, at 130:

> Conceptualised as an 'excuse', however, the residual defence of necessity is, in my view, much less open to criticism. It rests upon a realistic assessment of human weakness, recognising that a liberal and humane criminal law cannot hold people to strict obedience of laws in emergency situations when normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable.

The phraseology of the Codes s 25 reflects a similar view of the role of the defence of necessity. In both Queensland and Western Australia, s 25 uses the formula 'a person is not criminally responsible for …' rather than the stronger formula 'it is lawful for …'. This distinguishes necessity from defensive force under the Codes ss 267, 271 and 273–278 (Qld)/ ss 244, 248 and 250–255 (WA). Necessity is treated like the more morally questionable

defences of compulsion under s 31(1)(d) (Qld) or duress under s 32 (WA) and provocation under s 269 (Qld)/s 246 (WA). The phraseology suggests that the defence was conceived as a concession to human frailty and emotion rather than as a clear acceptance that, in some circumstances, breach of the terms of a criminal offence may be justified.

16.24 The harm inflicted by committing the elements of an offence may be worse than any harm which would thereby be averted. Therefore, the law sometimes insists that a sacrifice be made. Committing the elements of an offence is permitted only when the proportion between the harm inflicted and the harm averted makes this a reasonable course of action.

The issue of proportionality is dealt with differently in Queensland and Western Australia.

Emergency in Queensland

16.25 Section s 25 (Qld) deals with the issue of proportionality through a general provision that the circumstances of sudden or extraordinary emergency must be such that 'an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise'. The defence is expressed in normative terms which require conformity to community standards of conduct.

Obviously the pressures would have to be extraordinary in order to make it permissible to inflict serious injury upon another person. Nevertheless, no specific offences are expressly excluded from the scope of the defence. In this respect, the defence of emergency under s 25 differs from the defence of compulsion under the Code s 31(1)(d) (Qld).

16.26 The interpretation of the 'ordinary person' test in Codes s 25 depends on wider developments with respect to the operation of objective tests in criminal law. The High Court in *Stingel v R* (1990) 171 CLR 312; 97 ALR 1 (**15.36C**) held that personal characteristics of the accused other than age are immaterial in determining the measure of self-control expected of an 'ordinary person' for the purposes of the defence of provocation. The rigidity of this ruling may be reviewed one day in light of subsequent decisions: see **6.17–6.19**, **14.12**, **14.24**, **15.14–15.17**.

16.27 The defence is not phrased in terms that, of themselves, allow success when a mistake of fact has been made about the existence or nature of an emergency. Section 25 (Qld) requires the existence of certain material conditions rather than a reasonable belief in the existence of these conditions. Nevertheless, s 25 has to be read together with s 24: *Warner v R* [1980] Qd R 207. Section 24 provides that a person who makes a reasonable mistake of fact is to be judged as if the facts were as they were supposed to be. A mistaken belief in an emergency can therefore ground the defence, as long as the mistake is reasonable. On the interpretation of s 24, see **6.21–6.26**.

The terms of the defence do permit a mistake to be made about whether there are lawful options for dealing with the emergency. Section 25 requires a response which meets the objective test of the ordinary person. Such a response could be based on a mistaken assessment of the options, as long as the mistake was reasonable in the circumstances.

Emergency in Western Australia

16.28 The scheme for a defence of emergency is established under the Criminal Code (WA) s 25. The conditions of s 25(2) cover issues of both necessity and proportionality in a way

which parallels the conditions for the defence of duress under s 32(2). There is no criminal responsibility for an act or omission if:

(a) the person believes:
  (i) circumstances of sudden or extraordinary emergency exist;
  (ii) doing the act or omission is a necessary response to the emergency;
(b) the act or omission is a reasonable response to the threat in the circumstances as the person believes them to be;
and (c) there are reasonable grounds for the relevant beliefs about the emergency and the circumstances surrounding the response.

16.29 The defence is based upon beliefs held on reasonable grounds. It can therefore succeed despite some mistake having been made, as long the mistake was reasonable in the circumstances.

Commonwealth offences

16.30 The conditions for the defence of emergency in Commonwealth law are set by s 10.2(2) (Cth). The person must reasonably believe that:

(a) circumstances of sudden or extraordinary emergency exist;
(b) committing the offence is the only reasonable way to deal with the emergency;
(c) the conduct is a reasonable response to the emergency.

The insertion of 'only' in (b) may make this condition stricter than that applying under the state Codes.

Emergency and homicide

16.31 There has been some discussion at common law as to whether the defence of necessity should be excluded for certain offences, particularly murder. The issues here are similar to those which have arisen in relation to the defence of duress: see the discussion in *R v Howe* [1987] AC 417; 1 All ER 771 (HL). In the context of the defence of necessity the discussion has focused on survival scenarios where one person must die in order that another or others might live. *Dudley and Stephens* (16.41C) is a famous example. There are several possible interpretations of the reasoning in that case:

- it may be an outdated authority against recognising any general defence of necessity at common law;
- it may be an authority for excluding the offence of murder from the scope of any general defence; or
- it may be merely an authority for excluding murder in cases where there would be no good reason why one person rather than another should be the one selected to die.

On the last interpretation, there could be a different result where it was clear who had to be sacrificed if anyone was to be saved. An example would be a case where two mountaineers were roped together, and one fell and would have dragged both down if the other had not cut the rope. For further discussion on the ratio from *Dudley and Stephens* and the defence of necessity in general, see *Re A (Children)* at 16.42C.

16.32 *Re A (Children)* decided that it would be lawful to separate two conjoined twins where the operation would inevitably lead to the death of one twin, when, without the operation, both twins would die.

Similar issues under the Codes should be determined as matters relating to the application of s 25. The main difference is that an 'emergency' would have to exist, whereas this was held not to be a requirement for the common law defence of necessity in *Re A (Children)*. The requirement for an emergency may well be satisfied if the death of both twins was inevitable unless they were separated. See *State of Queensland v Nolan* [2001] QSC 174; 1 Qd R 454; (2001) 122 A Crim R 517 (16.43), although separation in that case was authorised on other grounds.

THE DEFENCE OF MEDICAL NECESSITY

16.33 The Codes s 282(1) (Qld)/s 259(1) (WA) provide that a person is not criminally responsible for performing a medical procedure or treatment (a 'surgical operation' or 'medical treatment' in Queensland; a 'surgical or medical treatment' in Western Australia) upon a person if:

- it is for the person's benefit;
- it is reasonable to perform it; and
- it is performed in good faith and with reasonable care and skill.

In Western Australia, s 259(2) makes similar provision for not administering or ceasing to administer a surgical or medical treatment. In Queensland, an omission to administer surgical or medical treatment would be governed by the general rules respecting liability for omissions: see 3.7–3.13.

16.34 The defence of medical necessity requires that the operation be performed 'with reasonable care and skill'. A mistake about the medical condition of the patient will not preclude the defence so long as the mistake was reasonable under the circumstances. An unreasonable mistake, however, may amount to a lack of reasonable care and skill and create liability for criminal negligence.

16.35 The main relevance of what might be called the defence of medical necessity is in cases where a patient is unconscious or for some other reason is unable to give consent to treatment. The section provides a defence for what might otherwise be an unlawful wounding or assault. Although the common law has not developed a specific equivalent, the general defence of necessity could provide an alternative means of achieving the same result.

16.36 In Western Australia, the defence is stated to apply to 'surgical or medical treatment (including palliative care)'. The defence could potentially be important in relation to cases of 'mercy killing' where action is taken to prevent suffering becoming worse.

Queensland has made a special defence of 'palliative care' available to doctors who, seeking to relieve pain and suffering, take action which incidentally hastens death: Code (Qld) s 282A. See the discussion at 4.14. The existence of a specific defence would appear to exclude any role for the general defence of medical necessity.

16.37 More controversially, the Codes s 282(1) (Qld)/s 259(1) (WA) provide that a procedure or treatment may be performed not only for the benefit of the patient but also upon an unborn child for the preservation of the mother's life. The section therefore creates a qualification to the prohibitions on abortion under ss 224–225 (Qld)/s 199 (WA). The general defence of necessity has performed a similar role at common law: see the cases cited in **16.18**.

The qualification is more important in Queensland than in Western Australia:

- The Code (Qld) ss 224–224 contain outright prohibitions on abortion, leaving s 282 as the only qualification.
- The Code (WA) s 199 permits abortions to be performed by medical practitioners where this is justified under the Health Act 1911 (WA) s 334; and the latter statutory provision authorises abortions in a wide range of circumstances. The Code (WA) s 259 will be relevant only in exceptional cases; for example, where medical practitioners perform abortions in the late stages of pregnancy without obtaining the special approvals required under the Health Act, or where abortions are performed by persons other than medical practitioners.

16.38 In their express terms, the Codes s 282(1) (Qld)/s 259(1) (WA) permit only a very narrow range of abortions. The life itself of the mother must be at stake. Yet in *K v T* [1983] 1 Qd R 396 (**16.44C**), it was suggested than an abortion could be performed 'to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of her pregnancy would entail'.

Reliance for this interpretation was placed on two decisions from other jurisdictions: *Bourne* [1939] 1 KB 687; [1938] 3 All ER 615 and *Davidson* [1969] VR 667. In *Bourne*, it was said, at 693–4, that the phrase 'for the purpose of preserving the life of the mother' in an English statute should be taken to encompass acting in order to prevent a woman becoming 'a physical or mental wreck'. In *Davidson*, it was held that the common law defence of necessity was available in Victoria on conditions similar to those recognised in *Bourne*. Nevertheless, a distinction was drawn in *Davidson*, at 671–2, between dangers to life and dangers to health: they were each said to be capable of making an abortion lawful.

For the common law on the application of the defence of necessity to abortion to govern the interpretation of the Codes, the phrase 'for the preservation of the mother's life' must be viewed as a phrase with a technical meaning at common law: see **1.20**. If so, the common law can then be read into the Codes, in much the same way as the common law of provocation has been read into the Code (Qld) s 304: see **15.14**.

PERSUASIVE AND EVIDENTIARY BURDENS

16.39 In accordance with general principles, the burden of proof for exculpatory defences lies on the prosecution, both at common law and under the Codes: see **Chapter 2**. The defences of compulsion/duress, emergency and medical necessity are no exception to this general proposition. Nevertheless, as with other exculpatory defences, there must be some evidence placing these defences in issue before the prosecution is required to rebut them. The accused carries an evidentiary burden to put a defence in issue if it has not already been put in issue by the evidence for the prosecution. If this burden is not discharged, a defence can be withdrawn from the jury: *R v Pickard* [1959] Qd R 475.

16.40C Taiapa v the Queen

[2009] HCA 35 240 CLR 95; 261 ALR 488
High Court of Australia

1 French CJ, Heydon, Crennan, Kiefel and Bell JJ: The applicant, Dion Robert Taiapa, was convicted in the Supreme Court of Queensland of the offences of carrying on the business of unlawful trafficking in a dangerous drug, methylamphetamine, and the possession of a quantity of that drug.[1] The factual basis of the Crown case was not in issue at the trial. It was the applicant's case that he did the acts that were said to constitute the offences in order to save himself and members of his family from threatened serious harm. He contended that he was not criminally responsible for his admitted conduct in collecting and transporting a substantial quantity of methylamphetamine because he had acted under compulsion within the meaning of s 31(1)(d) of the *Criminal Code* (Q).

2 The trial judge withdrew the issue of compulsion from the jury's consideration, thereby making the applicant's conviction of each offence inevitable. The applicant appealed against his conviction on the ground that the trial judge erred in not leaving compulsion for the jury's determination.

3 The Court of Appeal of the Supreme Court of Queensland (Keane and Fraser JJA and Lyons J) dismissed the appeal. The applicant applied out of time for special leave to appeal from the order of the Court of Appeal. On 25 June 2009 French CJ, Kiefel and Bell JJ referred his application to extend time in which to bring the application and his application for special leave to the Full Court. The applicant's solicitor provided a satisfactory explanation for the delay in filing the application in an affidavit that was sworn on 18 August 2009. An order extending the time for filing the application should be made. For the reasons that follow, the application for special leave to appeal should be granted, but the appeal should be dismissed.

Justification and excuse — compulsion: s 31(1)(d)

…

5 While it is conventional to describe s 31(1)(d) as providing the *defence* of compulsion, it is well-settled that if there is some evidence capable of raising the issue, the legal or persuasive burden is on the Crown to exclude the proposition that the accused was acting under compulsion beyond reasonable doubt — that is, exclude any reasonable possibility that the proposition is true.[3] In deciding whether the evidence sufficiently raises the issue to leave compulsion to the jury, it is necessary for the trial judge to be mindful of the onus of proof. The question is whether, on the version of events most favourable to the accused that is suggested by the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the accused was not acting under compulsion.[4] It was not disputed that the onus on that question — an evidential burden — is on the accused.[5] It is the accused who must tender evidence, or point to prosecution evidence, to that effect.

The facts

6 What follows is a summary of the facts giving rise to the prosecution and of the applicant's account of the circumstances leading to his involvement in the enterprise.

7 The applicant was arrested on 22 July 2006. The police intercepted the vehicle in which he, his co-accused, Robert Ackers, and a young woman were travelling. They located 364.213 grams of methylamphetamine in the course of searching the vehicle. The estimated value of

the drug, which varied according to how it was to be sold, was between $459,000 and $1.15 million. The sum of $3,200 in cash was found on the applicant and a further sum of $25,220 in cash was found in the boot of the vehicle.

8 The applicant had a history of marijuana and cocaine use. In the period 1999 to 2002 he had dealt in drugs to support his use of them. His suppliers were two men named Tony and Salvatore. By 2002 he had accumulated a debt to Tony and Salvatore of $60,000. At around this time the applicant was convicted of trafficking in drugs and sentenced to a term of six years' imprisonment. He had not repaid the debt to Tony and Salvatore at the time he was taken into custody. He was released on parole in December 2005. Following his release the applicant and his de facto wife, Kristy Jarvis, moved to Cairns and took up residence in premises in Kidston Street. It was a condition of his parole order that he reside in the Cairns area.

9 On the evening of 29 May 2006 the applicant and Ms Jarvis were at home in the Kidston Street premises. At around 8.00pm the applicant answered a knock on the front door. As he opened the door he was seized around the neck and forced backwards into the lounge room by Tony, who was holding a gun to his face. Salvatore was also present. The two men demanded the repayment of their money. They instructed the applicant not to go to the police and threatened that, if he did, he or Kristy would be shot. The two men left, telling the applicant that he had four weeks in which to repay the money and that they would return in a fortnight.

10 Kristy was pregnant with the applicant's child at the time of this confrontation. The applicant and she agreed that she should leave Cairns and return to her home on the Gold Coast. The applicant was not able to accompany her under the terms of his parole order. Kristy left Cairns and returned to the Gold Coast on 2 June. The applicant moved out of the Kidston Street premises and into premises in Alfio Street, Cairns. Thereafter he made unsuccessful attempts to raise the money that he owed to Tony and Salvatore. Ultimately the applicant sought his mother's assistance and she agreed to lend him $29,000 in cash, which she had on hand.

11 On Saturday 15 July Tony and Salvatore confronted the applicant at the Alfio Street premises. They threatened him, again, at gunpoint and taunted him over his unsuccessful attempt to evade them. They rejected his offer to repay them $29,000 immediately and the balance by instalments. They told the applicant that in addition to giving them $29,000 he was to travel to Sydney and collect something for them. They said that they would give him further instructions in this regard the following night. They told the applicant not to try anything stupid or that he, Kristy and his mother would pay for it. They repeated their earlier instruction that the applicant was not to report the matter to the police.

12 The following evening Tony and Salvatore returned to the Alfio Street premises. On this occasion they instructed the applicant that he was to meet a man in Ettalong, which is a township to the north of Sydney, at 11.00pm on Thursday 20 July and to collect two parcels from him. The applicant understood that the parcels would contain prohibited drugs. He was instructed to remove two sections of foam upholstery from under the rear seat of his vehicle and to secrete the parcels in the cavities. They told him that they would return to the Alfio Street premises to collect the parcels and the money on the evening of Sunday 23 July.

13 The applicant did not have a driver's licence at the time of these events. He asked Robert Ackers to drive him to Ettalong. The two of them and a female friend embarked on the

trip. The applicant collected the parcels from the man at the nominated time and place. He collected the money from his mother's premises the following day. He was apprehended in the course of the return journey.

14 The applicant was asked about his reasons for failing to report the threats to the police or to his parole officer. In the course of the cross-examination the following exchange took place between the trial judge and the applicant:

> But you understand that the police — it's their job to investigate criminal behaviour and bring people who have committed it before the Court and have them dealt with?
> Yeah, I would have had to go — there's — oh, protection — there was always protection there, but there's no guarantee if I was to put in — be put in police protection, that I'd still be safe.
> Yes. At any rate, what do you mean by that, that — that you'd — did you weigh these things up, did you?
> Yes.

15 The suggestion that an alternative course of action was to report the matter to the police was raised again later in the course of the cross-examination:

> You could have driven the vehicle yourself and called in at a police station and declared yourself to be —?
> I could have done that. Yes. I could have done that. But in my —— a disqualified —? — circumstances — in my position I was in no position whatsoever to be going to the police about it.
> HIS HONOUR: I'm sorry. What do you mean by that?
> Well, the threats and that were — that were made to me I was in no position at all to do that. I wasn't going to take that risk at all to go to the police.
> But I mean why do you say that? Because the — the police are the — are the people to whom you report threats made against you, aren't they?
> Yes. They are.
> Well, I — I don't understand why you say —? Well —in your position?
> Well, if I went to — to police they could have put me in protection. There was no — is that a hundred — I don't believe that — that is 100 per cent safe. Secondly, that these blokes, they're not your every day drug dealers. They're — like there's drug dealers and then there's drug dealers. These blokes are up there.
> Yes?
> And who is to say that they wouldn't — like if I tried setting them up or — they're not going to fall into a booby trap or anything like that, I believe.

16 The Crown Prosecutor put to the applicant that he had made a choice to engage in the world of drug dealing rather than to take other options that were available to him. The applicant responded saying:

> In my position the only option for me was — for me was to do as I was told. I didn't want anyone else getting hurt. I didn't — I especially didn't want a bullet in my head.

17 The applicant's mother and Kristy Jarvis were called in his case and gave evidence that was supportive of the acceptance of his account.

The Court of Appeal's reasons

…

21 The Court of Appeal noted that the applicant had ample opportunity to alert the police to his predicament.[13] In the Court of Appeal's opinion there was no evidentiary basis for a conclusion that the applicant's lack of faith in the ability of the police to defeat the threat was based on reasonable grounds and for this reason the trial judge had been right not to leave the issue of compulsion to the jury.[14]

…

Reasonable belief

29 Reasonable belief is a familiar concept in the context of criminal responsibility in the *Criminal Code* and at common law. Section 271(2) of the *Criminal Code* speaks of a belief 'on reasonable grounds'. As Stephen J observed in *Marwey v The Queen*, to ask whether a person has a reasonable belief is not different in substance from asking whether a person has reasonable grounds for belief.[27] His Honour explained that in a case in which self-defence under s 271(2) is raised the jury are required to consider two questions. The first is an inquiry as to the state of the accused's mind. The second is an objective question that his Honour said is 'exclusively concerned with the jury's view of the grounds, whether they constitute reasonable grounds'.[28] Barwick CJ also observed that it is for the jury to judge whether such grounds exist.[29] The recognition that the determination of whether grounds are reasonable is a factual question for the jury is not to overlook the anterior question of law, which is whether there is any material upon which it would be open to a reasonable jury to determine the issue favourably to the accused.[30]

30 Professor Glanville Williams explains the respective functions of judge and jury in this way:[31]

> Burdens are in respect of facts; questions of law are decided by the judge, without any question of burden. But some questions, such as the question of reasonableness, are in an intermediate position. They are value-judgments marking the boundary between criminal and non-criminal conduct, and therefore are really decisions on law; yet they are made by the jury, except that there must be evidence that, in the view of the trial judge, would justify the jury in finding that there has been reasonableness or unreasonableness or whatever.

Discussion

31 In concluding that there was no evidence that would justify the jury in finding as a reasonable possibility that there were reasonable grounds for the applicant's belief, the Court of Appeal took as its starting point the assumption stated by King CJ in *R v Brown*:[32]

> The ordinary way in which a citizen renders ineffective criminal intimidation is to report the intimidators and to seek the protection of the police. That must be assumed, under ordinary circumstances, to be an effective means of neutralizing intimidation. If it were not so, society would be at the mercy of criminals who could force pawns to do their criminal work by means of intimidation.

32 In *Brown* King CJ considered that in the circumstances of that case the accused's failure to report a threat to the police and to seek the protection of the police for himself and his son was fatal to the common law defence of duress.[33] His Honour acknowledged that there may

be circumstances in which a failure to seek the protection of the police would not deprive an accused of the defence.[34] His Honour cited the judgment of the English Court of Appeal in *R v Hudson*[35] in this respect.[36]

33 *Hudson* was a case in which two teenage girls were convicted of perjury. At their trial Hudson gave evidence that she had been approached by a group of men, including one Farrell, who had a reputation for violence. Farrell warned her that if she gave truthful evidence they would get her and 'cut her up'. Hudson passed on the warning to her co-accused. Farrell had been present in the public gallery of the court when each of the accused gave the perjured evidence. The trial judge withdrew duress from the jury because there had not been an immediate threat capable of being carried out: the recorder and police officers were present and able to afford protection to the girls at the time each gave her evidence. The appeal raised the question whether the defence of duress may be unavailable if the accused fails to take steps to remove the threat by seeking police protection. The effect upon the defence of a failure by the person threatened to take steps to remove the threat had not previously arisen in an English case. However, the Court of Appeal appears to have accepted the statement in *Hurley*[37] that an ingredient of the defence is the absence of a safe means of preventing the execution of the threat.[38] The Court of Appeal observed:[39]

> [Counsel for the Crown] submits on grounds of public policy that an accused should not be able to plead duress if he had the opportunity to ask for protection from the police before committing the offence and failed to do so. The argument does not distinguish cases in which the police would be able to provide effective protection, from those when they would not, and it would, in effect, restrict the defence of duress to cases where the person threatened had been kept in custody by the maker of the threats, or where the time interval between the making of the threats and the commission of the offence had made recourse to the police impossible.

34 The Court continued:[40]

> In the opinion of this court it is always open to the Crown to prove that the accused failed to avail himself of some opportunity which was reasonably open to him to render the threat ineffective, and that upon this being established the threat in question can no longer be relied upon by the defence. In deciding whether such an opportunity was reasonably open to the accused the jury should have regard to his age and circumstances, and to any risks to him which may be involved in the course of action relied upon.

35 *Hudson* has been the subject of some academic criticism.[41] However, the proposition that the failure of the accused to take advantage of an opportunity to report the threat to the police does not necessarily defeat the defence has been accepted.[42] In *Hudson* the failure of teenage girls to seek police protection in circumstances in which their potential assailant was present in court at the time they gave their perjured evidence was held not to negate an arguable case that their conduct was excused by duress. In other circumstances, in the absence of an explanation, or reasons apparent from the circumstances, for the failure to seek the protection of the law enforcement authorities there will be no basis on which to leave consideration of duress to the jury.

…

Conclusion

39 The belief that s 31(1)(d)(ii) posits is that the accused or the other person who is subject to the threat is unable otherwise to escape the carrying out of the threat. 'Otherwise' in this context means other than by engaging in the unlawful conduct. It was necessary for the applicant to identify some basis in the evidence raising as a reasonable possibility the existence of reasonable grounds for his belief, that he had no alternative other than to collect and transport a quantity of prohibited drugs in order to avoid the carrying out of the threats made by Tony and Salvatore. This necessarily requires consideration of the basis for the applicant's belief that reporting the matter to the police would not have prevented the carrying out of the threats.

40 The circumstance that the demands and threats made by Tony and Salvatore were made with a gun and were accompanied by instructions not to report the matter to the police does not support the reasonableness of the applicant's belief that he had no option other than to comply with the demands in order to escape the carrying out of the threats. The applicant had, as he acknowledged, ample opportunity to seek the assistance of the police. He offered three reasons for his failure to do so. The first was that he did not have sufficient information to enable the police to identify Tony and Salvatore. The second was that he did not believe that police protection was '100 per cent safe'. The third was that Tony and Salvatore were 'not your every day drug dealers' and were unlikely to fall into a booby trap. The Court of Appeal said that the police could have placed surveillance on the applicant's premises and that a controlled delivery of the drugs to Tony and Salvatore might have led to their arrest. It is true that there was no evidence about the investigative methods or the resources available to the police. However, this does not undermine the Court of Appeal's conclusion. There is no reason to doubt it. The applicant's belief that he did not have sufficient information to enable the police to identify Tony and Salvatore does not take into account that the police may have known more about these men than he thought that they did or that the police may have been able to find out more about them than he thought they could. In any event, it does not explain his failure to report the matter to the police in order to seek their protection. The applicant's belief that police protection may not be 100 per cent safe provided no basis for a reasoned conclusion that it was not. It may explain the applicant's preference for complying with the unlawful demands. However, an unparticularised concern that police protection may not be a guarantee of safety cannot without more supply reasonable grounds for a belief that there is no option other than to break the law in order to escape the execution of a threat.

41 The Court of Appeal was correct to hold that no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that there were not reasonable grounds for the applicant's belief within s 31(1)(d)(ii).

Orders

42 For these reasons the following orders should be made. The time for filing the application for special leave to appeal is extended to 20 February 2009; the application for special leave to appeal is granted; and the appeal is dismissed.

Footnotes

1. Count 1 charged an offence contrary to s 5(1)(a) of the *Drugs Misuse Act* 1986 (Q) that, on 22 July 2006 at or near Ingham in the State of Queensland, Dion Robert Taiapa and Robert John Ackers carried on the business of unlawfully trafficking in the dangerous drug

methylamphetamine. Count 2 charged an offence contrary to s 9(a) of the *Drugs Misuse Act* 1986 that, on 22 July 2006 at or near Ingham in the State of Queensland, Dion Robert Taiapa and Robert John Ackers unlawfully had possession of the dangerous drug methylamphetamine, in a quantity exceeding 2.0 grams.

2. The protection of the provision does not extend to certain offences specified in s 31(2) nor to an accused who has by entering into an unlawful association or conspiracy rendered himself or herself liable to have such threats made to the person.
3. *R v Mullen* [1938] HCA 12; (1938) 59 CLR 124 at 136–7 per Dixon J; [1938] HCA 12; *Ugle v The Queen* (2002) 211 CLR 171; [2002] HCA 25; *Murray v The Queen* (2002) 211 CLR 193; [2002] HCA 26.
4. *Stingel v The Queen* [1990] HCA 61; (1990) 171 CLR 312 at 334 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 61; *Van Den Hoek v The Queen* [1986] HCA 76; (1986) 161 CLR 158 at 161–2 per Gibbs CJ, Wilson, Brennan and Deane JJ; [1986] HCA 76.
5. It was so at common law: *R v Bone* [1968] 1 WLR 983; [1968] 2 All ER 644. There is nothing in the *Criminal Code* altering that position.

…

14. *R v Taiapa* (2008) 186 A Crim R 252 at 260–1 [40]–[42].

…

27. [1977] HCA 68; (1977) 138 CLR 630 at 641; [1977] HCA 68.
28. *Marwey v The Queen* [1977] HCA 68; (1977) 138 CLR 630 at 640.
29. *Marwey v The Queen* [1977] HCA 68; (1977) 138 CLR 630 at 638.
30. *R v Muratovic* [1967] Qd R 15 at 20 per Gibbs J, cited with approval in *Zecevic v Director of Public Prosecutions (Vict)* [1987] HCA 26; (1987) 162 CLR 645 at 665 per Wilson, Dawson and Toohey JJ; [1987] HCA 26.
31. Glanville Williams, *Textbook of Criminal Law*, 2nd ed (1983) at 49.
32. (1986) 43 SASR 33 at 40.
33. (1986) 43 SASR 33 at 40. King CJ's opinion on this question was a minority one; Zelling J would have allowed the appeal holding that duress was sufficiently raised (at 59) and Millhouse J, while concurring in the order dismissing the appeal, did not adopt King CJ's reasons on this issue (at 61).
34. *R v Brown* (1986) 43 SASR 33 at 40.
35. [1971] EWCA Crim 2; [1971] 2 QB 202.
36. *R v Brown* (1986) 43 SASR 33 at 40.
37. [1967] VR 526 at 543: see above at fn 26.
38. *R v Hudson* [1971] EWCA Crim 2; [1971] 2 QB 202 at 207.
39. *R v Hudson* [1971] EWCA Crim 2; [1971] 2 QB 202 at 207.
40. *R v Hudson* [1971] EWCA Crim 2; [1971] 2 QB 202 at 207.
41. Glanville Williams described the decision as 'surprisingly indulgent': *Textbook of Criminal Law*, 2nd ed (1983) at 631.
42. *R v Brown* (1986) 43 SASR 33 at 40 per King CJ; *Goddard v Osborne* (1978) 18 SASR 481; and see *R v Howe* [1986] UKHL 4; [1987] AC 417 at 443 per Lord Griffiths.

…

16.41C R v Dudley and Stephens

(1884) 14 QBD 273; [1881–5] All ER Rep 61
Crown Cases Reserved

The facts of the case as found by the jury were that on 5 July 1884, the accused Dudley, Stephens and another seaman Brooks and the 17-year-old deceased were forced to abandon

their yacht and take to a lifeboat after a storm struck near the Cape of Good Hope. The lifeboat had no water and only two small tins of turnips. After four days the men caught a small turtle but this was their only food until the twentieth day. The only water they had was what they caught in their jackets when it rained.

On the eighteenth day, the accused discussed with Brooks what should be done if no food was caught and no help arrived. The accused suggested that one of the four people should be sacrificed to save the rest. Brooks understood them to refer to the boy, and dissented. The boy was not consulted.

The following day the accused suggested to Brooks that lots be drawn to see who should be sacrificed. Again Brooks refused and the boy was not consulted.

The day after this discussion (the twentieth day) the accused killed the boy. The three men then fed on the body and blood of the boy for four days until they were picked up by a passing boat. It was found that they would have died before the rescue if they had not killed the boy and that the boy who was in a much weaker state was likely to have died before them. It was further found that assuming that there was a necessity to kill someone there was no greater necessity to kill the boy than any of the other three men. The judgment of the court was delivered by **Lord Coleridge CJ**.

Lord Coleridge CJ: The two prisoners, Thomas Dudley and Edwin Stephens, were indicted for the murder of Richard Parker on the high seas on the 25th of July in the present year. They were tried before my Brother Huddleston at Exeter on the 6th of November, and, under the direction of my learned Brother, the jury returned a special verdict, the legal effect of which has been argued before us, and on which we are now to pronounce judgment …

[His Honour then read the facts as they were found by the jury, as summarised above.]

From these facts, stated with the cold precision of a special verdict, it appears sufficiently that the prisoners were subject to terrible temptation, to sufferings which might break down the bodily power of the strongest man, and try the conscience of the best. Other details yet more harrowing, facts still more loathsome and appalling, were presented to the jury, and are to be found recorded in my learned Brother's notes. But nevertheless this is clear, that the prisoners put to death a weak and unoffending boy upon the chance of preserving their own lives by feeding upon his flesh and blood after he was killed, and with the certainty of depriving *him* of any possible chance of survival. The verdict finds in terms that 'if the men had not fed upon the body of the boy they would *probably* not have survived', and that 'the boy being in a much weaker condition was *likely* to have died before them'. They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act. It is found by the verdict that the boy was incapable of resistance, and, in fact, made none; and it is not even suggested that his death was due to any violence on his part attempted against, or even so much as feared by, those who killed him. Under these circumstances the jury say that they are ignorant whether those who killed him were guilty of murder, and have referred it to this court to determine what is the legal consequence which follows from the facts which they have found.

…

There remains to be considered the real question in the case whether killing under the circumstances set forth in the verdict be or be not murder. The contention that it could be anything else was, to the minds of us all, both new and strange, and we stopped the Attorney-General in his negative argument in order that we might hear what could be said in support

of a proposition which appeared to us to be at once dangerous, immoral, and opposed to all legal principle and analogy …

…

The one real authority of former time is Lord Bacon, who, in his commentary on the maxim, 'necessitas inducit privilegium quod jura privata', lays down the law as follows: 'Necessity carrieth a privilege in itself. Necessity is of three sorts — necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger. First of conservation of life; if a man steal viands to satisfy his present hunger, this is no felony nor larceny. So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, this is neither se defendendo nor by misadventure, but justifiable.' On this it is to be observed that Lord Bacon's proposition that stealing to satisfy hunger is no larceny is hardly supported by Staundforde, whom he cites for it, and is expressly contradicted by Lord Hale in the passage already cited. And for the proposition as to the plank or boat, it is said to be derived from the canonists. At any rate he cites no authority for it, and it must stand upon his own. Lord Bacon was great even as a lawyer; but it is permissible to much smaller men, relying upon principle and on the authority of others, the equals and even the superiors of Lord Bacon as lawyers, to question the soundness of his dictum. There are many conceivable states of things in which it might possibly be true, but if Lord Bacon meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour, it certainly is not law at the present day.

…

Now, except for the purpose of testing how far the conservation of a man's own life is in all cases and under all circumstances, an absolute, unqualified, and paramount duty, we exclude from our consideration all the incidents of war. We are dealing with a case of private homicide, not one imposed upon men in the service of their Sovereign and in the defence of their country. Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called 'necessity'. But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of *Birkenhead*; these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink, as indeed, they have not shrunk. It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life. 'Necesse est ut eam, non ut vivam,' is a saying of a Roman officer quoted by Lord Bacon himself with high eulogy in the very chapter on necessity to which so much reference has been made. It would be a very easy and cheap display of commonplace learning to quote from Greek and Latin authors, from Horace, from Juvenal, from Cicero, from Euripides, passage after passage, in which the duty of dying for others has been laid down in glowing and emphatic language as

resulting from the principles of heathen ethics; it is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow. It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be 'No':

> So spake the Fiend, and with necessity,
> The tyrant's plea, excused his devilish deeds.

It is not suggested that in this particular case the deeds were 'devilish', but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime. There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment; and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has intrusted to the hands fittest to dispense it.

It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was wilful murder, that the facts as stated in the verdict are no legal justification of the homicide; and to say that in our unanimous opinion the prisoners are upon this special verdict guilty of murder. (My brother Grove has furnished me with the following suggestion, too late to be embodied in the judgment but well worth preserving: 'If the two accused men were justified in killing Parker, then if not rescued in time, two of the three survivors would be justified in killing the third, and of the two who remained the stronger would be justified in killing the weaker, so that three men might be justifiably killed to give the fourth a chance of surviving.')

[The court then proceeded to pass sentence of death upon the prisoners. This sentence was afterwards commuted by the Crown to 6 months' imprisonment.]

16.42C Re A (Children)

[2000] 4 All ER 961
Court of Appeal, England

This case involved two conjoined twins, one of whom ('Mary') had deficient lungs and heart such that she was kept alive simply by her stronger sister ('Jodie'). Separation of the twins would inevitably lead to the death of Mary, while preserving the life of Jodie. However, if the operation to separate the twins was not carried out, the medical evidence was that both twins would inevitably die within six months. The parents, devout Roman Catholics, could not bring themselves to consent to the carrying out of the operation. Accordingly, the hospital sought a declaration from the court that the operation could be lawfully carried out. The declaration

was granted by the judge at first instance, and the parents applied for and were granted leave to appeal against that order to the Court of Appeal. The Court of Appeal upheld the decision at first instance and declared that the operation could lawfully be carried out. In reaching their decision to uphold the granting of the declaration, consideration was given to the doctrine of necessity (among other legal arguments).

Brooke LJ:

…

Those who prepared that report [Law Com No 218 (1993)] would have been familiar with a modern update of the 'two men on a plank' dilemma (which dates back to Cicero De Officiis) and the 'two mountaineers on a rope' dilemma which was mentioned by Professor John Smith in his 1989 *Hamlyn Lectures* (published under the title *Justification and Excuse on the Criminal Law* (1989)). At the coroner's inquest conducted in October 1987 into the *Zeebrugge* disaster, an army corporal gave evidence that he and dozens of other people were near the foot of a rope ladder. They were all in the water and in danger of drowning. Their route to safety, however, was blocked for at least ten minutes by a young man who was petrified by cold or fear (or both) and was unable to move up or down. Eventually the corporal gave instructions that the man should be pushed off the ladder, and he was never seen again. The corporal and many others were then able to climb up the ladder to safety.

In his third lecture, 'Necessity and Duress', Professor Smith (pp 77–78) evinced the belief that if such a case ever did come to court it would not be too difficult for a judge to distinguish *R v Dudley and Stephens*. He gave two reasons for this belief. The first was that there was no question of choosing who had to die (the problem which Lord Coleridge had found unanswerable in *R v Dudley and Stephens*) because the unfortunate young man on the ladder had chosen himself by his immobility there. The second was that unlike the ship's boy on the *Mignonette*, the young man, although in no way at fault, was preventing others from going where they had a right, and a most urgent need, to go, and was thereby unwittingly imperilling their lives.

I would add that the same considerations would apply if a pilotless aircraft, out of control and running out of fuel, was heading for a densely populated town. Those inside the aircraft were in any event 'destined to die'. There would be no question of human choice in selecting the candidates for death, and if their inevitable deaths were accelerated by the plane being brought down on waste ground, the lives of countless other innocent people in the town they were approaching would be saved.

It was an argument along these lines that led the rabbinical scholars involved in the 1977 case of conjoined twins to advise the worried parents that the sacrifice of one of their children in order to save the other could be morally justified. George J Annas in *Siamese Twins: Killing One to Save the Other* (Hastings Center Report, April 1987, p 27), described how they:

> … reportedly relied primarily on two analogies. In the first, two men jump from a burning aeroplane. The parachute of the second man does not open, and as he falls past the first man, he grabs his legs. If the parachute cannot support them both, is the first man morally justified in kicking the second man away to save himself? Yes, said the rabbis, since the man whose parachute didn't open was 'designated for death'.
>
> The second analogy involves a caravan surrounded by bandits. The bandits demand a particular member of the caravan be turned over for execution; the rest will go free. Assuming that the named individual has been 'designated for death', the rabbis concluded

it was acceptable to surrender him to save everyone else. Accordingly, they concluded that if a twin A was 'designated for death' and could not survive in any event, but twin B could, surgery that would kill twin A to help improve the chance of twin B was acceptable.

There is, however, no indication in the submission we received from the Archbishop of Westminster that such a solution was acceptable as part of the philosophy he espoused …

…

Conclusion

I have considered very carefully the policy reasons for the decision in *R v Dudley and Stephens*, supported as it was by the House of Lords in *R v Howe*. These are, in short, that there were two insuperable objections to the proposition that necessity might be available as a defence for the *Mignonette* sailors. The first objection was evident in the court's questions: who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? The second objection was that to permit such a defence would mark an absolute divorce of law from morality.

In my judgment, neither of these objections are dispositive of the present case. Mary is, sadly, self-designated for a very early death. Nobody can extend her life beyond a very short span. Because her heart, brain and lungs are for all practical purposes useless, nobody would have even tried to extend her life artificially if she had not, fortuitously, been deriving oxygenated blood from her sister's bloodstream.

It is true that there are those who believe most sincerely — and the Archbishop of Westminster is among them — that it would be an immoral act to save Jodie, if by saving Jodie one must end Mary's life before its brief allotted span is complete. For those who share this philosophy, the law, recently approved by Parliament, which permits abortion at any time up to the time of birth if the conditions set out in s 1(1)(d) of the Abortion Act 1967 (as substituted) are satisfied, is equally repugnant. But there are also those who believe with equal sincerity that it would be immoral not to assist Jodie if there is a good prospect that she might live a happy and fulfilled life if this operation is performed. The court is not equipped to choose between these competing philosophies. All that a court can say is that it is not at all obvious that this is the sort of clear-cut case, marking an absolute divorce from law and morality, which was of such concern to Lord Coleridge and his fellow judges.

There are sound reasons for holding that the existence of an emergency in the normal sense of the word is not an essential prerequisite for the application of the doctrine of necessity. The principle is one of necessity, not emergency: see Lord Goff (in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 75; [1989] 2 All ER 545 at 565), the Law Commission in its recent report (Law Com No 218 (1993), paras 35.5–35.6), and Wilson J in *Perka v R* (1984) 13 DLR (4th) 1 at 33.

There are also sound reasons for holding that the threat which constitutes the harm to be avoided does not have to be equated with 'unjust aggression', as Professor Glanville Williams has made clear in s 26.3 of the 1983 edition of his book. None of the formulations of the doctrine of necessity which I have noted in this judgment make any such requirement: in this respect it is different from the doctrine of private defence.

If a sacrificial separation operation on conjoined twins were to be permitted in circumstances like these, there need be no room for the concern felt by Sir James Stephen that people would be too ready to avail themselves of exceptions to the law which they might suppose to apply to their cases (at the risk of other people's lives). Such an operation is, and is always likely to be,

an exceptionally rare event, and because the medical literature shows that it is an operation to be avoided at all costs in the neonatal stage, there will be in practically every case the opportunity for the doctors to place the relevant facts before a court for approval (or otherwise) before the operation is attempted.

According to Sir James Stephen, there are three necessary requirements for the application of the doctrine of necessity:

(i) the act is needed to avoid inevitable and irreparable evil;
(ii) no more should be done than is reasonably necessary for the purpose to be achieved;
(iii) the evil inflicted must not be disproportionate to the evil avoided.

Given that the principles of modern family law point irresistibly to the conclusion that the interests of Jodie must be preferred to the conflicting interests of Mary, I consider that all three of these requirements are satisfied in this case.

Finally, the doctrine of the sanctity of life respects the integrity of the human body. The proposed operation would give these children's bodies the integrity which nature denied them …

[The declaration that the operation could lawfully be performed was granted. **Robert Walker** and **Ward LJJ** delivered separate judgments also upholding the grant of the declaration.]

Notes

16.43 A situation comparable to that in *Re A (Children)* arose in the Queensland case of *State of Queensland v Nolan* [2001] QSC 174; 1 Qd R 454; (2001) 122 A Crim R 517. In that case, a declaration was obtained that it would be lawful to separate two twins who were joined at the head and shared blood flow through the same cranial draining veins. One of the twins lacked kidneys and a bladder. She had also developed a heart problem which made her death an immediate prospect. If she died so, too, would her sister. Instead, under the authority of the declaration, the twins were separated, the stronger one receiving an essential cerebral vein. The weaker one, lacking the vein and other essential organs, died. The *Nolan* case was like *Re A (Children)* in that it was clear what had to be done, and which twin had to die, if either were to survive. Curiously, Chesterman J justified the separation, not by reference to s 25, but rather by reference to the special defence of medical necessity under s 282. His reasoning was that performing the operation in order to save the life of the stronger twin was, in all the circumstances, reasonable for the purposes of the section. This reasoning might have justified operating on the stronger twin in the event that her parents had not consented, although, in fact, there was consent. The issue with respect to criminal liability, however, was the lawfulness of what was done to the weaker twin. Section 282 requires not only that an operation be reasonable but also that it be for the benefit of the patient. It is questionable whether killing the weaker twin benefited her. Even if the view is taken that a speedy death was to her benefit, it is doubtful that she benefited in her capacity as a 'patient'. The term 'patient' surely implies a living person. If s 282 were to justify killing the weaker twin for her own benefit, Queensland would have legalised euthanasia whenever this is 'reasonable'. In contrast, s 25 and the common law defence

of necessity, on any of their conceivable interpretations, permit killing only under very exceptional circumstances. It was both unnecessary and unwise to invoke s 282 rather than s 25 in the circumstances of the *Nolan* case.

Chesterman J also sought to justify the separation on the ground of the doctors' duty, under s 286 (Qld), to prevent harm to the stronger twin. A similar approach had been advocated in *Re A (Children)* (16.43C) by Ward LJ. However, duties of care are not unlimited: see 3.11. It may be questioned whether a duty of care to one person can ever justify what would otherwise be the murder of another, in the absence of a specific statutory provision to this effect (akin to, for example, the Codes s 273(Qld)/s 250 (WA) respecting defence of another person). Nevertheless, if a duty of care can have this effect, it can surely only be under the kind of extraordinary circumstances contemplated by s 25. It is, therefore, difficult to imagine that putting the matter in terms of a duty owed to the stronger child could provide a different outcome from that following from the straightforward application of s 25. Admittedly, there would be a rhetorical difference if it enabled the causation of the weaker twin's death to be 'justified' rather than just 'excused'.

16.44C K v T

[1983] 1 Qd R 396
Queensland Supreme Court

The applicant was the father of the child with which the respondent was pregnant. The parties were not married. The respondent informed the applicant of her decision to have an abortion, also seeking financial assistance to cover the costs of the procedure. The applicant indicated his strong opposition to an abortion and offered to maintain the respondent throughout the pregnancy on the basis that the child, when born, would be adopted out. The respondent did not accept the offer and indicated her intention to proceed with the abortion. The applicant then sought an injunction from the court restraining the respondent from causing or permitting an abortion to be performed. In refusing to grant the order sought, **Williams J** considered the law in Queensland relating to abortions as follows.

Williams J:

…

… [A] doctor performing a surgical operation on a woman who is with child is not criminally responsible for the death of that embryo child pursuant to s 224 if the operation is within the purview of s 282 of the Code …

Ultimately whether or not there has been a criminal abortion is an issue triable by a jury (cf Sir George Baker P in *Paton v British Pregnancy Advisory Service Trustees* [1979] 1 QB 276 at 281). At such a trial the jury would be instructed in accordance with *R v Bourne* [1939] 1 KB 687, as applied by Menhennitt J in *R v Davidson* [1969] VR 667; for the use of an instrument with intent to procure miscarriage to be lawful on therapeutic grounds, the accused person must honestly believe on reasonable grounds that the act done by him was (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of her pregnancy would entail; and (b) in the circumstances not out of proportion to the danger to

be averted. In Queensland there is no legal requirement that any particular number of doctors should hold the requisite opinion in good faith before the protection afforded by s 282 is established, but, following dictates of prudence, the opinion of more than one doctor is usually sought (cf the English Abortion Act 1967). Those enactments must in the first instance be considered by the medical practitioners responsible for the welfare of the pregnant woman; it is only if there is apparent want of good faith on the part of the practitioner concerned in deciding upon an operation of the type in question that a prosecution would follow. As Lord Scarman (when a Lord Justice of Appeal) said: 'The great social responsibility is firmly placed by the law upon the shoulders of the medical profession.' (*R v Smith* [1973] 1 WLR 1510 at 1512.)

Having thus stated the law, as I understand it to be, there are obvious grave difficulties confronting a court asked to adjudicate upon the issues raised here. A judge sitting alone could not give judicial approval to an operation yet to be carried out; not only would he be usurping the jury's function of determining the bona fides of the doctor and the reasonableness of his conduct but he would be encroaching on an area that courts have traditionally, and for good reason, avoided. Courts do not give advisory opinions as to whether or not contemplated conduct may be illegal or criminal. Section 282 has general application (it is not limited to abortion) and if it were accepted that the courts could give some anticipatory declarations of non-illegality to a particular surgical procedure there would be an entirely unwarranted interference by the law in matters of medical responsibility. Further, and this is a topic I will return to later, the law has largely refused to recognise a right in an ordinary citizen to obtain an injunction restraining the commission of a criminal offence; to the extent that such a remedy is available it is only available, except in special circumstances, at the suit of the Attorney-General …

[His Honour decided that there was no right to injunctive relief. An appeal to the Full Court was dismissed: see *Attorney-General (ex rel Kerr) v T* [1983] 1 Qd R 404.]

Insanity, Automatism, Diminished Responsibility

CHAPTER 17

INTRODUCTION

17.1 The main focus of this chapter is on mental deficiencies of a continuing kind, where there is an 'abnormal mind' within the terms of the special defences of insanity in the Criminal Codes of both Queensland (Code (Qld)) and Western Australia (Code (WA)) (the Codes) or diminished responsibility (in Queensland but not Western Australia, and for murder alone). On the insanity defence, see the Codes s 27; on diminished responsibility, see Code (Qld) s 304A. Separate chapters deal with temporary deficiencies caused by factors such as intoxication (see Chapter 18) or provocation (see Chapter 15), under which 'normal' minds function in abnormal ways.

17.2 There is one form of temporary deficiency examined in this chapter. Automatism is an act performed by a person without awareness or will. Sane automatism can be caused by factors such as a physical or psychological blow. It is examined here because of the difficulties that courts have sometimes experienced distinguishing between automatism due to insanity and automatism due to other causes. The legal definition of insanity has been developed through cases on the relationship between the defence of insanity and the defence of sane automatism: see 17.39–17.43.

INSANITY IN CRIMINAL LAW

The role of the insanity defence

17.3 The Codes s 27 prescribes the conditions for an insanity defence. In the case of an indictable offence, a successful insanity defence leads to a special verdict of not guilty on account of unsoundness of mind: Code (Qld) s 647; Criminal Procedure Act 2004 (WA) s 113.

A person acquitted on the ground of unsoundness of mind is liable to indeterminate detention, subject to periodic review: Code (Qld) s 647 and Mental Health Act 2000 (Qld) s 200, Criminal Procedure Act 2004 (WA) s 149 and Criminal Law (Mentally Impaired Accused) Act 1996 (WA) ss 20–40. The insane person is not subject to criminal sanction but, as a dangerous person, is still liable to be subjected to coercive measures that have affinities with criminal sanctions.

- In Queensland, the custodial order is called a '*forensic order (Criminal Code)*': Mental Health Act 2000 s 299.
- In Western Australia, pursuant to the Criminal Law (Mentally Impaired Accused) Act, the court must make a custody order in respect of certain offences listed in the Schedule to the Act and for other offences may release a person on one of the forms of community orders under the Sentencing Act 1995.

17.4 Although insanity is usually called a 'defence', the special verdict may be more attractive to the prosecution than the accused. Suppose the accused has argued for a straightforward acquittal on the ground that some mental element of the offence was absent. The prosecution may wish to respond by contending that unsoundness of mind was the reason for its absence. This use of the special verdict is not expressly acknowledged under the Codes. Nevertheless, the courts of Queensland and Western Australia have followed decisions at common law in allowing the prosecution to raise insanity, although usually where the accused has first put his or her mental state in issue by arguing that some mental element of the offence was absent. An example is *R v Falconer* (1990) 171 CLR 30; 96 ALR 545 at **17.49C**.

17.5 The defence of diminished responsibility in Queensland is concerned with less serious mental disorders than those involved in insanity: Code (Qld) s 304A(1). It is available only for murder. The effect of successfully raising the defence is that the offence is reduced from murder to manslaughter: s 304A(2). The law recognises that sentencing should take account of the killing having occurred when the accused was not in full command of his or her faculties. In this result, diminished responsibility is a similar defence to provocation: see **Chapter 15**.

Fitness to stand trial

17.6 The defences of insanity and, in Queensland, diminished responsibility are concerned with an accused's mental condition at the time of the alleged offence, not at the time of the trial. Nevertheless, an accused must be mentally fit to stand trial before there can be any inquiry into criminal responsibility. Fitness to stand trial is governed by different statutory regimes in Queensland and Western Australia.

17.7 In Queensland, the Code s 613 provides for a separate trial to determine whether, for any reason, the accused is incapable of understanding the proceedings so as to be unable to make a proper defence. If the reason for a finding of incapacity is 'unsoundness of mind', there is a special verdict to this effect. The accused can then be discharged or, where there is a question about the accused's mental health, held in custody at an appropriate institution until such time as he or she can be dealt with under the protective provisions of the Mental Health Act 2000 (Qld). The question of a person's capacity to understand the proceedings can also be referred to a Mental Health Court: see **17.13–17.15**. The Code (Qld) s 613 applies at the time of pleading, focusing on the capacity of the accused to understand the proceedings so as to make a proper defence. The section also provides for the possibility of a new trial if the accused recovers: s 613(4).

Another provision which also addresses the issue of fitness to stand trial is the Code (Qld) s 645. This presumably applies where someone becomes mentally ill after the trial has commenced. The section provides that, where an issue arises about whether a person presently on trial is 'of sound mind', the jury is to determine the issue. The section then provides for a custody order until such time as the accused can be dealt with under the Mental Health Act

2000. Section s 645(2) also provides for the possibility of a new trial if the accused recovers, in the same way as does s 613.

17.8. In Western Australia, fitness to stand trial is governed by the Criminal Procedure Act 2004 and the Criminal Law (Mentally Impaired Accused) Act 1996 (CL(MIA) Act).

Whether an accused is fit to stand trial is for the judge to determine. An accused is presumed to be mentally fit to stand trial until the contrary is proved on the balance of probabilities: CL(MIA) Act ss 10 and 12.

The CL(MIA) Act s 9 provides that an accused is not mentally fit to stand trial for an offence if the accused, because of mental impairment, is:

(a) unable to understand the nature of the charge;
(b) unable to understand the requirement to plead to the charge or the effect of a plea;
(c) unable to understand the purpose of a trial;
(d) unable to understand or exercise the right to challenge jurors;
(e) unable to follow the course of a trial;
(f) unable to understand the substantial effect of evidence presented by the prosecution in the trial; or
(g) unable to properly defend the charge.

The term 'mental impairment' is defined in s 8 as meaning 'intellectual disability, mental illness, brain damage or senility'. This definition is repeated in the Code (WA) s 1 for the purposes of the insanity defence: see 17.24. The CL(MIA) Act and the Code (WA) also both define 'mental illness' as meaning 'any underlying pathological infirmity'. Additional features of the definition of mental illness, more relevant to the insanity defence than to the issue of fitness to stand trial, are discussed at 17.24.

17.9 In Western Australia, the consequences of a finding of unfitness to stand trial are governed by CL(MIA) Act ss 15–19. These consequences differ depending whether there is a prospect of the accused becoming fit to stand trial within 6 months or not. If the accused is likely to become fit, the proceedings may be adjourned for up to 6 months. If such an event is unlikely, the presiding judicial officer may quash the indictment. If there is no indictment he or she may dismiss the charge and quash the committal. In this event, there is no bar to the accused being later indicted and tried for the offence if the accused ceases to suffer from a mental impairment. The presiding judicial officer, without deciding the guilt of the accused, may then either make an order for release or a custody order. A custody order will be appropriate having regard to a number of factors including the strength of the evidence against the accused, the nature of the alleged offence and the circumstances of its alleged commission, the accused's character, antecedents, age, health and mental condition and the public interest. The effect of a custody order is dealt with at 17.17.

17.10 In *GFS v R* [2001] WASCA 219, a custody order was reversed despite the prosecution case on rape charges being 'reasonable'. It was concluded that the person would never be brought to trial and, if the order remained in force, would have to be held in custody for an indeterminate period without having been found guilty of any offence. The person did not pose a risk to the public, his disabilities would only worsen and, setting on one side the charges brought against him, he had generally been of good character. The alleged offences had taken place some 18 years before and there was no suggestion that he had committed any offences similar to those charged during the intervening period.

Persuasive and evidentiary burdens

17.11 As a matter of ordinary experience, and in the absence of evidence to the contrary, everyone is presumed to have normal mental capacity. In *R v Falconer* (1990) 171 CLR 30; 96 ALR 545 (11.13C), the High Court discussed the presumption that a person's conduct was voluntary or willed. This is one dimension of the more general presumption that a person has full mental capacity. There is, therefore, at least an evidentiary burden on anyone raising a defence relating to deficient mental capacity to put the matter in issue.

There is also a presumption of sanity both at common law and under the Codes s 26. This presumption applies unless the contrary is proved. In order to rebut the presumption, there must be more than some evidence to show that a person is of unsound mind. Whichever party asserts insanity has an onus of proof.

17.12 The standard of proof is the lower civil standard of the balance of probabilities. This is well established when insanity is raised on behalf of the accused. There has been some debate concerning the appropriate burden of proof in cases where the insanity issue is raised by the prosecution. The alternatives are:

1. the prosecution should only have to prove insanity on the balance of probabilities, as is the case when the accused raises insanity; or
2. the prosecution should have to prove insanity beyond reasonable doubt, as it would in proving other allegations.

The question has mainly been discussed in relation to the issue of fitness to stand trial rather than the insanity defence:

- In *Walton v R* (1991) 56 A Crim R 304, a majority of the Court of Criminal Appeal (Qld) held that the prosecution need prove unfitness only on the balance of probabilities. The majority took the view that a determination of unfitness is not a punitive measure even when the prosecution has raised the issue.
- In Western Australia, the CL(MIA) Act s 12 makes proof on the balance of probabilities generally applicable.

There are no statutory provisions governing the matter for the insanity defence in either state. It is likely that the prosecution would be required only to prove insanity on a balance of probabilities, but the law is not settled: *Donovan v R* [1990] WAR 112.

The role of the Mental Health Court in Queensland

17.13 In Queensland, cases in which an accused's mental condition is questioned can be referred to the Mental Health Court as an alternative to the issues being raised in the context of the trial. The jurisdiction of the Mental Health Court covers fitness to stand trial together with the defences of insanity and diminished responsibility: Mental Health Act 2000 (Qld) s 257. The court comprises a Supreme Court judge assisted by two psychiatrists: s 381. The two psychiatrists do not participate in the formal decision: their role is to advise the judge in relation to the psychiatric evidence. A reference to the court may be made by the accused or the accused's legal representative, by the Attorney-General or the Director of Public Prosecutions (DPP) and, under some circumstances, by the Director of Mental Health: s 257.

17.14 The Mental Health Court can make a decision with respect to the defences of insanity or diminished responsibility only if satisfied that there is no reasonable doubt that the person committed the conduct elements of the offence: s 268. In deciding whether the person was suffering from unsoundness of mind or diminished responsibility, the court uses the definitions of these conditions in the Code (Qld): Sch 2. In the event of a finding of unsoundness of mind, the prosecution must discontinue criminal proceedings: s 281. The court can, however, make a '*forensic order (Mental Health Court)*' for the detention of the person: s 288. In the event of a finding of diminished responsibility, proceedings for murder must be discontinued but can continue for other offences: s 282.

17.15 Both the accused and the Attorney-General have a right of appeal to the Court of Appeal: Mental Health Act 2000 (Qld) s 334.

In addition, an accused found to be of unsound mind when the offence was committed may still elect to be brought to trial for it: ss 310–311. In this eventuality, the prosecution would be entitled to raise again the issue of the accused's mental condition. The verdict of the jury, whatever it might be, would presumably take precedence over the decision of the Mental Health Court.

In order to reach its conclusion on unsoundness of mind, the Mental Health Court must be satisfied beyond reasonable doubt as to the conduct elements of the offence in issue. While this finding would not be binding in a subsequent trial, it is unlikely that, in practice, many accused would seek a trial following proceedings in the Mental Health Court.

In the event of the Mental Health Court finding that the person was of sound mind when the offence was committed, there is nothing to stop the issue being raised again when the case comes to trial.

Defendants acquitted on grounds of unsoundness of mind in Western Australia

17.16 The prosecution must prove its case beyond reasonable doubt before a jury can consider a special verdict. Otherwise the accused is entitled to a complete acquittal. This requirement raises issues when the offence has a mental element such as intention and the accused raises a defence of unsoundness of mind. In *Ward v R* [2000] WASCA 413; 23 WAR 254, a bench of five judges considered whether the question of intent had to be determined by a jury before or after the jury had determined the question of insanity. Differing views were expressed.

17.17 Any person under a custody order is detained until released by order of the Governor. So that there is a regular check on the person's status, the Mentally Impaired Defendant's Review Board must report to the Minister at various times or when requested by the Minister to do so.

17.18 When a judge forms the opinion that a sentence or order to be imposed may depend on a specific fact, the judge may require the jury to give its verdict on that fact specifically: Criminal Procedure Act 2004 (WA) s 113(2). This power may be exercised not only for orders following conviction but also for orders following acquittals on account of unsoundness of mind: s 113(2)(b). This section has not been interpreted by a court. Presumably, a judge could

ask a jury whether it finds that an unlawful killing was carried out with a specific intention: see *Ward*, above. However, a court must impose a custody order for any serious offence listed in the Schedule to the CL(MIA) Act. All forms of homicide are listed except infanticide which carries its own element of diminished responsibility.

THE INSANITY DEFENCE

Elements of the insanity defence

17.19 The basic elements of the insanity defence are stated in the Codes s 27(1) (Qld)/s 27(1) (WA).

First, the accused must have been suffering from a particular mental condition when the relevant conduct occurred: in Queensland, a 'mental disease or natural mental infirmity'; in Western Australia, a 'mental impairment'.

In addition, the mental condition must have deprived the accused of any one of the following three capacities:

1. the capacity to understand what he or she was doing;
2. the capacity to control his or her actions;
3. the capacity to know that he or she ought not to do the act or make the omission.

17.20 The Codes s 27(2) provides that a person who suffered from delusions on some specific matter or matters, but who is not otherwise entitled to the defence, is to be judged as if the facts were as the person believed them to be. It is questionable whether this extends the range of the defence beyond that already established under the first of the alternatives; that is, incapacity to understand what he or she was doing. The origins of the supplementary provision may lie in doubt about whether the insanity defence would be available to a person who, for example, meant to kill (and, therefore, had the mental element for murder in Queensland or wilful murder in Western Australia) but was under a delusion that the victim was trying to kill him or her. For such a delusion to provide a defence, there must be an extension to the standard rules relating to self-defence: see Chapter 14. This extension falls within the scope of the second part of s 27 if not the first part.

17.21 The Codes s 27 is based on the famous *M'Naghten* Rules (*Re M'Naghten's Case* (1843) 8 ER 718), formulated by the House of Lords following the acquittal of one Daniel M'Naghten on the ground of insanity. M'Naghten, a Scottish woodturner, harboured delusions about an international conspiracy between the Pope and the British Government. He intended to assassinate the Prime Minister, Sir Robert Peel, but, in fact, shot and killed Peel's secretary. The case is remarkable in that the House of Lords did not hear an appeal. Instead, the House of Lords examined the case at the instigation of Queen Victoria and summoned the judges to give their opinion before formulating the rules.

The *M'Naghten* Rules have been the subject of much criticism, especially by medical professionals, but still provide the framework for the modern law of insanity at common law in many countries: see an often quoted statement of Dixon J in *R v Porter* (1933) 55 CLR 182 at 188–90; [1936] ALR 438 at 441–2.

17.22 The central proposition in the *M'Naghten* Rules was stated at 8 ER 722:

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.

There was also a statement (at 723) about specific delusions that parallels the Codes s 27(2).

Mental disease (Queensland) and impairment (Western Australia)

17.23 In Queensland, the accused must have suffered from a 'mental disease or natural mental infirmity': Code (Qld) s 27(1). The concept of 'mental disease' is taken from the common law on insanity. The reference to 'natural mental infirmity' does not expand the scope of the defence; it merely confirms that the mental condition can be congenital.

Mental disease has been defined broadly to include any significant abnormality of mind. The traditional formulation for the Code has been taken from *R v Foy* [1960] Qd R 225, where Philp J used these expressions: a 'temporary or permanent derangement of his mind', 'an abnormal mental state, no matter how caused or how transient', 'any form of physical or material change or deterioration of the brain or recognisable disorder or derangement of the understanding'. In *Falconer* (17.49C), Gaudron J presented an even simpler definition, ruling that mental disease covers those mental states 'which are never experienced by or encountered in normal persons'.

These broad definitions of mental disease clearly include abnormal mental states which have identifiable physical causes such as epilepsy (*R v Mursic* [1980] Qd R 482 (17.48C)) or arteriosclerosis: *R v Kemp* [1957] 1 QB 399; [1956] 3 All ER 249. However, some difficulty has been encountered in distinguishing between automatism caused by insanity and automatism caused by other factors. This problem is discussed below (see 17.39–17.43), after the separate arms of the insanity defence have been examined.

17.24 In Western Australia, the accused must have suffered from a 'mental impairment'. 'Mental impairment' is defined in the Code (WA) s 1 as 'intellectual disability, mental illness, brain damage or senility'. This definition covers the same ground as the common law concept of 'mental disease'.

There is also a definition of 'mental illness':

> 'mental illness' means an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli.

The object of this definition is to distinguish instances of so-called 'sane automatism': see 17.34–17.36.

17.25 It is a question of law whether or not a particular mental state amounts to a mental disease or impairment: *Falconer* (17.49C). This means that although it is for the jury to decide what the mental state of the accused was, the judge must first direct the jury as to whether an alleged state of mind would amount to a mental disease. Medical opinion can be taken into account, but ultimately the decision is a matter of law.

Incapacity

17.26 The Codes s 27(1) requires that the accused be deprived of one of three listed capacities. Impairment of capacity is not sufficient to discharge the burden of proof; there must be deprivation.

17.27 Evidence pointing to impaired capacity rather than incapacity may still be relevant and admissible to negative a state of mind such as intention: *Hawkins v R* (1994) 179 CLR 500; 122 ALR 27. *Hawkins* was a Tasmanian case involving a charge of murder but it embodies a principle of wider application. A successful defence of lack of intent will usually result in conviction of a lesser offence. On a charge of murder, for example, a successful defence of lack of intent to kill or cause grievous bodily harm could still lead to a conviction of manslaughter.

The High Court took the view in *Hawkins* that evidence of mental abnormality can be used to support a claim of lack of voluntariness or will only in the context of an insanity defence: see 179 CLR at 509–510; 122 ALR at 32–33. The primary consideration appears to have been that a successful claim of unwilled conduct will produce a complete acquittal unless the insanity rules apply.

17.28 In Queensland, an accused who has committed what would otherwise be murder, but who suffers from an impaired mental capacity rather than a complete incapacity, may sometimes have a defence of diminished responsibility: Code (Qld) s 304A. The result is a conviction of manslaughter. The limited role of the defence of diminished responsibility is discussed below: see **17.44–17.47**.

The arms of the insanity defence

17.29 The Codes s 27(1) cover three forms of mental incapacity: 17.19. The various forms of the insanity defence are sometimes known as its 'arms' or 'limbs'.

In contrast to the Codes, the *M'Naghten* Rules recognise only two alternatives: incapacity to understand what one is doing and incapacity to know that it is wrong. The common law does not recognise incapacity to control conduct as a separate basis for the insanity defence, although this may not make any difference to the scope of the defence: see the discussion in **17.27**.

17.30 The first arm of the insanity defence, both under the Codes and at common law, involves incapacity to understand what one is doing. This means incapacity to understand the material character of one's conduct. For example, a mentally disordered person may not appreciate that the ferocity of some assault will kill or seriously injure the victim. In some instances, this form of insanity defence will deny a mental element of an offence such as intention. The insanity defence will also be available for offences such as manslaughter which have negligence as their fault element. In effect, the objective standard of the reasonable person is discarded for persons whose cognitive capacity has been damaged by mental disorder, if the damage makes them incapable of understanding what harm they are inflicting. They will be acquitted by special verdict, even though the consequences would have been foreseeable to and avoided by a reasonable person.

The first arm of the insanity defence may also cover cases where deficient understanding relates, not to some basic element of the offence, but to an exculpatory circumstance such as self-defence. If there is any doubt in this respect, then s 27(2) makes the defence available in such cases: see the discussion in **17.19**.

17.31 The second arm of the insanity defence under the Codes involves incapacity to control one's actions. This arm has no specific parallel at common law. There is some doubt about its significance. Two different interpretations have been advanced.

The interpretation currently predominant gives the second arm of the Codes s 27 a very narrow sphere of operation. Under this interpretation, incapacity to control conduct merely refers to those cases where the conduct is involuntary, occurring independently of the exercise of the will: see Chapter 11. This interpretation was adopted in *Falconer* (17.49C) by Mason CJ, Brennan and McHugh JJ and assumed by Deane and Dawson JJ. It makes the second arm substantively redundant because the only conceivable cases of involuntary conduct due to mental disease would involve states of automatism in which the person was not aware what was being done. The first arm of s 27, therefore, already covers any ground on which the second arm can work; indeed, this is how cases of insane automatism are handled at common law. The automaton is simply held to have lacked the capacity to know the nature and quality of the conduct.

A more radical interpretation of the second arm of s 27 is that it permits the insanity defence in cases of 'irresistible impulse', where a person has experienced an overwhelming desire to do something and has been unable to exercise restraint: *Moore* (1908) 10 WALR 64, 65–6; *Wray* (1930) 33 WALR 67, 68–9. With this interpretation, the second arm would introduce a true exculpatory defence not available at common law. At common law, irresistible impulse may be evidence of insanity but does not itself constitute insanity: *Attorney-General (South Australia) v Brown* [1960] 1 All ER 734; [1960] ALR 395.

The difference between the two interpretations is that, on the 'irresistible impulse' interpretation, there can be an actual (even though irresistible) decision to engage in the conduct whereas, on the 'involuntariness' interpretation, there is no room for any decision to engage in the conduct. *Falconer* appears to settle the question in favour of the 'involuntariness' interpretation.

17.32 The third arm of the insanity defence under the Codes involves incapacity to know that one ought not do the act or make the omission. This arm operates as a true exculpatory defence. The equivalent at common law is usually expressed in terms of incapacity to know that the conduct was wrong.

Some jurisdictions outside Australia have taken the view that the only relevant standard of conduct in this context is the law itself, so that there can be no insanity defence for someone who knew that the conduct was an offence. However, the Australian view, at common law as well as under the Codes, is that the defence is available to someone who, although knowing the legal status of the conduct, was nevertheless incapable of appreciating that it would be morally condemned: *Stapleton v R* (1952) 86 CLR 358. An example is someone who believed that he or she was acting under divine command. *Stapleton* also affirmed that the accused's capacity to develop a personal sense of right and wrong is irrelevant. The issue is merely the accused's capacity to understand the normative judgments of the community.

Commonwealth offences

17.33 The Criminal Code (Cth) s 7 creates a defence of 'mental impairment'. The defence covers the same kinds of mental conditions as does the insanity defence under the Queensland and Western Australian Codes. It is also subject to the same rules respecting the persuasive burden and the special verdict.

The Commonwealth defence dispenses with the traditional requirement for mental impairment to the degree of mental incapacity. Under s 7.3(1), it is sufficient that the impairment had any one of three effects:

1. that the person did not know the nature and quality of the conduct;
2. that the person did not know that the conduct was wrong;
3. that the person was unable to control the conduct.

The third arm of the defence is presumably to be interpreted in the same way as the similarly phrased second aim of the defence under the state Codes: see **17.31**. In this arm of the defence, the reference to being 'unable' maintains the traditional requirement for mental incapacity. This traditional requirement is eliminated with respect to knowledge of the nature and quality of the conduct and of its wrongfulness. As a consequence of extending the defence in this way, there is less scope for using evidence of mental impairment in other ways. While evidence of mental impairment not involving incapacity can sometimes be used to deny mental elements of state offences (see **17.23**), the Criminal Code (Cth) s 7.3(6) expressly excludes this option.

AUTOMATISM AND INSANITY

Automatism and criminal responsibility

17.34 Automatism is the term used to describe involuntary behaviour caused by the mental processes of the person rather than by external force: see **11.4**. It is a condition in which bodily movements occur without direction from the conscious mind. The person may be unconscious or, according to some psychiatrists, have impaired consciousness: *R v Stone* [1999] 2 SCR 290, [155]–[156]. Another term used to describe the phenomenon is 'dissociation', which signifies that the body is acting separately from the conscious mind.

17.35 Indications of automatism include glassy-eyedness or flickering eyes: see *R v Leonboyer* [2001] VSCA 149 at [55].

Some expert psychiatrists take the view that automatistic behaviour is characteristically disorganised and purposeless so that apparently organised and goal-directed behaviour is unlikely to be truly automatistic. Other experts disagree: see the views expressed by different expert witnesses in *Leonboyer* [2001] VSCA 149 at [40], [50], [59], [68]. The narrower view of automatism found favour with the majority of the Supreme Court of Canada in *Stone* [1999] 2 SCR 290,; (1999) 173 DLR (4th) 66 where Bastarache J said at [191]:

> I agree that the plausibility of a claim of automatism will be reduced if the accused had a motive to commit the crime in question or if the 'trigger' of the alleged automatism is also the victim.

17.36 Depending on the cause of the automatism, any one of three different defences may be available:

1. Automatism caused by mental disease or mental impairment is governed by the rules on insanity: Codes s 27.
2. Automatism caused by the ingestion of alcohol or any other intoxicating substance is governed by the rules on intoxication: Codes s 28. (The intoxication rules are discussed in **Chapter 18**.)

3. Automatism caused by a physical blow or by any factor other than insanity or intoxication is governed by ordinary principles of criminal responsibility: Codes (Qld) s 23(1)(a)/s 23A (WA), which provide that there is no criminal responsibility for conduct occurring independently of the exercise of the will.

17.37 The most difficult problems for the courts have concerned the distinction between insane automatism and sane automatism: see **17.34–17.36**. The distinction has received most scrutiny in cases where the accused has sought a complete acquittal but the prosecution has responded by arguing that the alleged state of mind would in law amount to insanity. The issue in these cases is usually not the medical cause of the automatism. Rather, the issue is the legal characterisation of the medical cause.

17.38 There are two reasons why a defence of sane automatism may be met with an argument that the evidence raises the issue of insanity:

1. The prosecution may seek to argue that a successful claim for automatism must lead to the special verdict rather than a complete acquittal; or
2. The prosecution may seek to use the special rules governing the burden of proof for insanity to deny that there was any automatism at all and thereby to obtain a conviction. Insane automatism, like any form of insanity, must be proved by the side asserting it: see the discussion in **17.11–17.12**. In contrast, sane automatism is not governed by any special rules affecting the burden of proof. There must be some evidence putting the mental state of the accused in issue but, once this evidentiary burden is discharged by the accused, the absence of automatism must be proved beyond reasonable doubt by the prosecution. Thus, if an alleged state of mind is characterised as 'sane automatism', the prosecution must disprove it beyond reasonable doubt, whereas, if it is characterised as 'insane automatism', the accused must prove it on a balance of probabilities. In *Falconer*, Mason CJ, Brennan and McHugh JJ unsuccessfully argued for the removal of this anomaly. The portions of their judgment dealing with this problem have not been included in the extracts at **17.49C**. Their view was that the presumption of soundness of mind should apply to any mental disorder whatever its cause, so that the rules respecting the burden of proof for sane automatism would be the same as for insanity. This suggestion was, however, rejected by a 4:3 majority.

Distinguishing sane and insane automatism

17.39 There has been much debate concerning the appropriate test to distinguish between sane and insane automatism. Modern authorities have tended to focus on the distinction between external and internal causes for the mental dysfunction: *R v Hennessy* [1989] 2 All ER 9; *Falconer* at **17.49C**. Applying this test, the automatism is characterised as 'sane automatism' when caused by an external factor such as a blow to the head. An example is *Cooper v McKenna* [1960] Qd R 406, where an accused who had suffered concussion was acquitted on a charge of dangerous driving. In this situation, there is a normal mind functioning abnormally in response to a specific external stimulus. In contrast, the automatism is characterised as 'insane automatism' when it is caused by some internal functioning of the mind that can be regarded as truly abnormal.

In *Falconer* (17.49C), this approach was endorsed by Mason CJ, Brennan and McHugh JJ. On the other hand, Toohey J expressed some reservations.

17.40 A version of the external/internal test has been incorporated into the definitions of 'mental illness' in the Code (WA) s 1 and the CL(MIA) Act s 8. Under the Western Australian formulation, mental illness means:

> … an underlying pathological infirmity of mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli.

See also the Criminal Code (Cth) s 7.

17.41 An objection often raised to the external/internal test is that it is insufficiently connected with medical theories about mental illness and, in particular, psychiatric diagnoses of continuing dangerousness and/or responsiveness to treatment. For example, in cases where the automatism is alleged to have been caused by emotional stress resulting from a 'psychological blow', the issue becomes whether or not a normal person could have become dissociated as a result of such a blow: *Falconer* at 17.49C. If it is decided that the idea of a normal person becoming dissociated in those circumstances is implausible, then the automatism must be characterised as insane, even though psychiatrists may be unable to diagnose any specific mental illness and even though the psychiatric evidence may be that there is no likelihood of repetition and no condition to be medically treated. Whether or not this position devalues the external/internal test may depend on how much confidence is placed in psychiatry.

17.42 There are two areas of major difficulty in addition to psychological blows. One is the problem of behaviour occurring during episodes of parasomnia in which complex motor behaviours such as sleepwalking occur. This has traditionally been viewed as sane rather than insane automatism. This view was upheld by the Supreme Court of Canada in *R v Parks* [1992] 2 SCR 871; 15 CR (4th) 289 (17.50C), but only by ignoring the external/internal test in favour of relying on psychiatric definitions of mental illness. In contrast, in *R v Burgess* [1991] 2 QB 92; [1992] 2 All ER 769 (17.51C) the English Court of Appeal held that an attack performed during an episode of sleepwalking was the product of insanity.

In *R v Luedecke* 2008 ONCA 716, the Ontario Court of Appeal was concerned with a case of alleged 'sexsomnia' involving automatistic sexual behaviour, in which the accused had a well established history of this kind of conduct. The court held that parasomnia may or may not be a disease of the mind depending on the evidence. It was held that insanity was the appropriate classification on the evidence in the particular case.

17.43 The other area of major difficulty concerns those abnormal mental conditions which can be experienced by diabetics. In *Hennessy* [1989] 2 All ER 9 it was held that:

(a) the defence of sane automatism is available for dissociation caused by *hypoglycaemia* (occurring when insulin is taken to counteract diabetes but the blood sugar level falls too low); while

(b) only the insanity defence is available for *hyperglycaemia* (occurring when high blood sugar results directly from diabetes).

This seems to involve a strained distinction, especially when hyperglycaemia is so easily preventable by injections of insulin. A mind which needs additional insulin to operate normally is usually regarded as still being a normal mind.

DIMINISHED RESPONSIBILITY IN QUEENSLAND

17.44 In Queensland, but not Western Australia, there is a special defence of diminished responsibility which, like provocation, reduces the offence of murder to manslaughter: Code (Qld) s 304A(1). Like provocation, the defence is expressly made available for those cases that would otherwise amount to murder: it applies to killings which 'but for the provisions of this section, would constitute murder'.

17.45 There are parallels between the defence of diminished responsibility and the defence of insanity:

1. The defence must be proved by the accused: s 304A(2). In this respect, diminished responsibility is like insanity but unlike provocation.
2. The defence requires 'a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury)'. The courts have focused on the specific words used: see *Whitworth v R* [1989] 1 Qd R 437. Nevertheless, the formula is equivalent to the requirement for 'a state of mental disease or natural mental infirmity' under the law of insanity: Codes s 27. In *Whitworth*, it was held that 'psycho-social' factors such as emotions and prejudices are not abnormalities of mind for the purposes of the defence of diminished responsibility unless they produce a disease or injury. This would also be the position under the rules relating to insanity.
3. The defence requires a substantial impairment of one of the three capacities which are also relevant to the law of insanity, namely:
   (i) the capacity to understand what one is doing;
   (ii) the capacity to control one's actions;
   (iii) the capacity to know that one ought not do the act or make the omission.

The difference between the defence of insanity and the defence of diminished responsibility is that the former requires total deprivation of one of the relevant capacities while the latter only requires a substantial impairment. A state of diminished responsibility is a lesser abnormality than that required for a finding of insanity.

17.46 The role of the defence of diminished responsibility is easiest to understand in relation to the capacity to know that one ought not do an act or make an omission. By requiring only a substantial impairment rather than deprivation of this capacity, the defence of diminished responsibility expands the scope of the exculpatory defence which exists under the insanity rules.

However, there are some questions about the role of the defence of diminished responsibility in relation to the other two capacities which are mentioned. The defence of diminished responsibility is only available in cases which but for the provisions of s 304A would constitute murder. Yet, if there were a substantial impairment of the capacity to know what was being done, then it would be unlikely that the element of intention or purpose required for the offence of murder could be proved: Code s 302. As an aid to the accused, this part of the defence of diminished responsibility, therefore, appears to be superfluous. A similar analysis applies to the capacity to control conduct if this is taken to refer only to the problem of voluntariness or will, as it was assumed in *Falconer*: see 17.27. This part of the defence of diminished responsibility would only have a role to play if, contrary to *Falconer*, it were to create a special exculpatory

defence based on the idea of an impulse which was irresistible or at least difficult to resist: see the discussion of this question, in relation to the insanity defence, at 17.31.

17.47 The defence of diminished responsibility was introduced into the Code (Qld) in 1961, adopting an idea which originated in Scotland and had become part of the modern law of England and New South Wales. The Homicide Act 1957 (UK) s 2, which was incorporated into the Crimes Act (NSW) as s 23A, made the defence available when the accused 'was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for the act or omission'. The Queensland legislation followed the English model in one respect but departed from it in another. The reference to 'abnormality of mind' was incorporated but not the reference to substantial impairment of 'mental responsibility'. The English formulation confers a wide discretion on juries to allow the defence where they think fit. The Queensland formulation seeks to tighten the conditions for the defence by specifying the three capacities which are also relevant for the insanity defence. For the reasons given above, however, some parts of the Queensland formulation may be superfluous.

17.48C **R v Mursic**
[1980] Qd R 482
Queensland Court of Criminal Appeal

Connolly J: On February 8, 1980 Milan Emile Mursic was convicted of the attempted murder of his wife Gerda and on February 21, 1980 he was sentenced to be imprisoned at hard labour for ten years. He now seeks to appeal against both his conviction and his sentence …

Eye witnesses swore that he grabbed her and pushed her into the car port, that they saw him bent over and hitting downwards some half dozen times with an object which was described by one witness as resembling a piece of wood. Visibility was impeded by some low cupboards so that the object of the blows was not seen and Mrs Mursic emerged from behind the cupboards with her face bleeding, with part of her clothing on fire and with burns over her back and down the left side. A large amount of blood was subsequently found in the car port, together with clumps of hair.

…

The next ground of appeal was, in substance, that the learned trial judge failed adequately to direct the jury in relation to a possible defence of involuntariness under s 23. In fact, at a number of points in his summing up the learned judge directed the jury that the Crown must establish that the acts of the accused were willed acts …

The complaint however is that the learned judge should have put to the jury explicitly a possible defence of what was described as epileptic automatism as a defence under s 23 which the Crown must exclude beyond reasonable doubt. This submission flies in the face of all authority on the subject. There is indeed evidence that the appellant has a history of epilepsy. Epilepsy was described by Dr Eadie as a brain disorder which produces brief attacks in which brain function is disturbed. The disturbance may vary from mild confusion to total unconsciousness. This short description is sufficient to identify it as a state of mental disease or natural mental infirmity within the meaning of those expressions in s 27. Now no complaint was made by the appellant that the learned trial judge failed to leave to the jury a defence under s 27 or to take the special verdict which is called for if the jury acquits where such

a defence has been raised. Nor was any such defence raised at the trial. But it is clear law that the defence that what was done was done at a time when the prisoner lacked capacity to understand what he was doing or to control his actions by reason of mental disease or natural mental infirmity must be raised if it is to be raised at all under s 27. If it is so raised the prisoner carries the burden of proof. The defence cannot be raised under s 23. See *R v Foy* [1960] Qd R 225. There is some divergence of opinion as to what constitutes mental disease, the view having been expressed on occasions that any circumstance by which the mind is placed in disorder, no matter how transient, qualifies as a state of mental disease so that if it be relied upon at all it must be under s 27. The evidence here however is that the appellant's condition of epilepsy is of long standing and the only cause set up for a possibly unconscious or involuntary act is disease of the mind. To describe absence of volition due to such a condition as automatism is simply to avoid the operation of s 27 by a change of nomenclature. …

[His Honour refused leave to appeal. **Douglas** and **Campbell JJ** agreed with the reasons of **Connolly J** and the orders proposed.]

17.49C

R v Falconer

(1990) 171 CLR 30; 96 ALR 545
High Court of Australia

The facts of the case were given earlier (see **11.13C**), in an extract from the judgment of **Mason CJ**, **Brennan** and **McHugh JJ**, dealing with the meaning of the requirement for conduct to be willed in s 23 of the Western Australia Code.

Deane and Dawson JJ: Subject to what is said below, we are in general agreement with the reasoning of Toohey J and Gaudron J. That reasoning accords with the approach adopted by the members of the Western Australian Court of Criminal Appeal (Malcolm CJ, Wallace and Kennedy JJ) and is in conformity with the basic principle of the criminal law in all parts of this country that, subject only to well-settled (common law) or clearly expressed (Code) exceptions, the onus lies upon the prosecution to prove the elements of an alleged criminal offence in accordance with the ordinary criminal standard of proof. …

Where an accused's acts are alleged to be involuntary by reason of mental disease or natural mental infirmity, no distinction can be drawn between the defence of automatism — the absence of will accompanying the relevant acts of the accused — and the defence of insanity under s 27 of the Code. This is necessarily so because s 27 relieves a person of criminal responsibility for an act done in 'such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions …'

The definition of what constitutes a mental disease or natural mental infirmity is a matter of law. Whether an accused suffered from such a disease or infirmity at the relevant time is a question of fact. Where the voluntariness of an accused's act is to be determined by reference to a condition which, if it existed at all, must on the evidence have amounted to a state of mental disease or natural mental infirmity, the question whether the accused's acts were voluntary will be subsumed in the question whether the accused did in fact suffer from a state of insanity envisaged by the section such that it deprived him of the capacity to control

his actions. Section 27 also applies where a person is by reason of mental disease or natural mental infirmity deprived of the capacity to know that he ought not to have acted as he did. That would seem to raise a question distinct from that of voluntariness.

Where s 27 applies to relieve an accused of criminal responsibility, he is entitled to an acquittal but, under s 653 of the Code, the jury is required to find that he was of unsound mind at the relevant time and to say whether he was acquitted by them for that reason. The consequence of that is that an order is made that the accused be kept in custody at the Governor's pleasure.

If the evidence raises the question whether an accused's acts were involuntary, not because of mental disease or natural mental infirmity, but because of the operation of events upon a sound mind, it is s 23 rather than s 27 which applies. Section 23 provides that 'a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will'.

Under s 26 of the Code (and for that matter at common law) there is a presumption of law that every person is of sound mind. That means that, in order to establish mental disease or natural mental infirmity under s 27, it is necessary to rebut the presumption. That can only be done by proving the existence of one or other of those conditions on the balance of probabilities. At common law the same considerations are reflected in the exceptions to the general rule that the burden of proving guilt beyond reasonable doubt remains throughout upon the prosecution. Those exceptions are the defence of insanity and any statutory exception: *Woolmington v Director of Public Prosecutions* [[1935] AC 462 at 481].

However, there is no such presumption to be overcome in the application of s 23. The onus of proving guilt remains with the prosecution and that onus is not discharged if an accused is able to raise a reasonable doubt. Of course, common experience teaches us that a person's will ordinarily accompanies his actions and evidence will be required to establish the extraordinary circumstance that an accused's acts occurred independently of the exercise of his will or to raise a doubt whether that was so. 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. Nevertheless, given these constraints, an accused in setting up a defence under s 23 does not have to prove his condition on the balance of probabilities in order to succeed: he merely has to raise a reasonable doubt that his actions were the result of an involuntary reaction of a sane mind.

In this case, the evidence did not pose any question under s 27. It was not suggested at the trial that the accused suffered from any mental disease or natural mental infirmity. Conversely, in cases where the question of mental disease or of natural mental infirmity under s 27 is raised, there will often be no question — on the evidence — of involuntariness other than as the product of mental disease or natural mental infirmity. That is to say, no question will arise under s 23. But there may be cases, perhaps rare, in which the evidence allows alternative contentions, namely, that an accused's acts were involuntary either by reason of

mental disease or natural mental infirmity or by reason of the operation of events upon a normal mind.

Where that occurs, there is the apparent incongruity identified by Dixon CJ in his paper entitled 'A Legacy of Hadfield, M'Naghten and Maclean' (1957) 31 *Australian Law Journal* 255. The incongruity appears to arise because of the different burdens of proof affecting, on the one hand, insanity (and, hence, involuntariness arising from insanity) and, on the other, involuntariness arising from the operation of events upon a normal mind: insane automatism and sane automatism.

The problem is complicated by the consideration that it is no longer entirely appropriate to speak of insanity as a defence, having regard to the fact that the consequences of successfully raising the plea go beyond negativing volition or intent. True it is that insanity operates to produce an acquittal, but it is seldom raised by an accused now that there are no capital offences, because incarceration at the Governor's pleasure may be a harsher penalty than conviction and sentence. Indeed, nowadays it is often in the interests of the prosecution (or, at all events, the community) to raise the question of insanity, rather than in the interests of the accused. It used to be said that it was for the defence to raise a plea of insanity and not for the prosecution. That is probably still the case, but we think that the position has now been reached where it is only realistic to recognise that, if there is evidence of insanity, the prosecution is entitled to rely upon it even if it is resisted by the defence. In that regard, it is relevant to note that s 653 of the Code refers to the case where 'it is alleged or *appears*' (emphasis added) that the accused was not of sound mind. It may be anomalous for the prosecution to raise the matter initially because the prosecution should not commence proceedings if it is seeking an acquittal, even on the grounds of insanity. The responsibility for the protection of the community in those circumstances lies elsewhere than in the criminal law. But we can see no reason why, if there is evidence which would support a verdict on the grounds of insanity, the prosecution should not be able to rely upon it in asking for a qualified acquittal as an alternative to conviction.

The important thing is, however, that an accused is entitled to an acquittal if the prosecution fails to prove that his acts were voluntary. When, on the evidence, an accused's acts can only have been involuntary if he was suffering from a mental disease or natural mental infirmity, the prosecution is entitled to rely upon the presumption that every person is of sound mind. That means that a defence of insane automatism can only succeed if it is established on the balance of probabilities. But if on the evidence an accused's act may have been involuntary as a result of the operation of events upon a sound mind — as a result of sane automatism — then a reasonable doubt about the voluntariness of those acts will be sufficient to entitle him to acquittal. In such a case, there will be a reasonable hypothesis consistent with both innocence and a sane mind and we do not conceive it to be the policy of the law that in that event there should be either a conviction or indefinite committal to an institution for the criminally insane. The law is possibly open to the criticism that it envisages the release of a person who may, on the balance of probabilities, be violently insane. That is, however, a matter to be dealt with by the means otherwise available for protecting the community from such persons and, if those means are thought to be inadequate, by legislative intervention.

It follows that, in a case where an issue of sane automatism is raised by positive evidence (including expert medical opinion), an accused will be entitled to an acquittal if the prosecution fails to disprove sane automatism beyond reasonable doubt. In that event, the jury will need to go no further. If, however, the prosecution disproves sane automatism and the evidence raises the question of insane automatism, the jury will have to ask themselves whether, on the

balance of probabilities, the evidence establishes insanity under s 27. That will, as we have said, embrace insane automatism. If the evidence does establish insanity, an accused will be entitled to an acquittal, but the jury will be required to say that the acquittal is on account of unsoundness of mind. If the prosecution does disprove sane automatism and if insanity is not established on the balance of probabilities, in the absence of any other defence the jury should convict.

As Toohey J and Gaudron J demonstrate, there was evidence of sane automatism to be left to the jury in the present case. Special leave should be granted and the appeal should be dismissed.

Toohey J:

…

Both psychiatrists who examined Mrs Falconer were of opinion that she was sane though, as Malcolm CJ points out in his judgment, the question whether she was suffering from 'mental disease' in terms of s 27 of the Code was not explored. There was nothing in their evidence which would bring her within the language of s 27, unless it be open to argument that to be deprived of capacity to control one's actions through a dissociative state produced by emotional tension is itself evidence of a state of mental disease.

…

In *Bratty* [[1963] AC at 412] Lord Denning said that 'what is a "disease of the mind" within the *M'Naghten* Rules … is a question for the judge'. Equally, what is a state of mental disease under the Code is a question for the judge. Whether or not the facts disclose a state of mental disease is a question for the jury. As Professor Howard observes, at 429, 'the distinction between temporary mental disease and temporary irrationality is not easily drawn'. One test is that adopted in *R v Quick*, *R v Sullivan* [[1984] AC 156], *R v Hennessy* [[1989] 1 WLR 287; [1989] 2 All ER 9] and in *Rabey*. That is the 'external factor' test, which excludes mental disease where the defect of reason derives from some cause originating outside the accused's body, be it consumption of alcohol or a blow. In *Hennessy*, Lord Lane CJ, delivering the judgment of the Court of Appeal, said [at 294; 14]:

> In our judgment, stress, anxiety and depression can no doubt be the result of the operation of external factors, but they are not, it seems to us, in themselves separately or together external factors of the kind capable in law of causing or contributing to a state of automatism. They constitute a state of mind which is prone to recur. They lack the feature of novelty or accident, which is the basis of the distinction drawn by Lord Diplock in *R v Sullivan* [[1984] AC 156 at p 172].

According to this test, where a temporary defect of reason is caused by an internal factor, such as epilepsy, the accused is taken to be suffering from a disease of the mind. In delivering the judgment of the Court of Appeal in *Quick* [[1973] QB at 922] Lawton LJ said:

> Our task has been to decide what the law means now by the words 'disease of the mind'. In our judgment the fundamental concept is of a malfunctioning of the mind caused by disease. A malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences cannot fairly be said to be due to disease. Such malfunctioning, unlike that caused by a defect of reason from disease of the mind, will not always relieve an accused from criminal responsibility. A self-induced incapacity will not excuse (see *R v Lipman* [[1970] 1 QB 152]), nor will one which could have been

> reasonably foreseen as a result of either doing, or omitting to do something, as, for example, taking alcohol against medical advice after using certain prescribed drugs, or failing to have regular meals while taking insulin. From time to time difficult border line cases are likely to arise. When they do, the test suggested by the New Zealand Court of Appeal in *R v Cottle* [[1958] NZLR 999, 1011] is likely to give the correct result, viz, can this mental condition be fairly regarded as amounting to or producing a defect of reason from disease of the mind?

But there are real difficulties with the 'external factor' test. Sleepwalking and the diabetic condition of hypoglycaemia stem from internal malfunctioning and yet have traditionally been treated as instances of automatism. How then does one apply the test in the case of dissociation or 'psychological blow' automatism? The result of the decisions in *Quick*, *Sullivan*, *Hennessy* and *Rabey* is that a successful defence based on automatism arising from a dissociative state will ordinarily lead to a verdict of unsoundness of mind. But, as Glanville Williams points out, at 674–5, Lawton LJ, in *Quick*, was concerned to place a limitation upon Lord Denning's test in *Bratty*, by drawing attention to those who were not held to be suffering from a mental disease. To borrow Professor Williams' comment, at p 675: 'To say that the presence of an external cause of mental trouble saves a man from the imputation of madness, as was held in *Quick*, does not imply that the absence of an external cause necessarily means that he is mad.'

The application of the 'external factor' test is artificial and pays insufficient regard to the subtleties surrounding the notion of mental disease. As well, there is confusion in the idea of an external factor. A physical blow will readily answer that description. Indeed, in *Sullivan* [at 172] Lord Diplock spoke of 'external physical factor' when he said, in regard to what was said by Devlin J in *Kemp*:

> I do not regard that learned judge as excluding the possibility of non-insane automatism … in cases where temporary impairment … results from some external physical factor such as a blow on the head causing concussion or the administration of an anaesthetic for therapeutic purposes.

But, it may be asked, why should not a psychological blow resulting from external events result in non-insane automatism? The point was well made by King CJ in *Radford* when he said [at 276]:

> There is no reason in principle for making a distinction between disturbance of the mental faculties by reason of stress caused by external factors and disturbance of the mental faculties caused by the effects of physical trauma or somnambulism. 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 reaction of a sound mind to external stimuli, including stress producing factors, on the other hand. I appreciate that if it is true that a state of depersonalisation or dissociation is not itself a disease of the mind, although it may result from mental illness, the result may be that certain cases of unwilled acts which would formerly have been treated as the result of temporary insanity and would have founded verdicts of not guilty on the ground of insanity, will now result in outright acquittals. I do not see any reason to shrink from that consequence. The consequence of a verdict of not guilty by reason of insanity is detention during the Governor's pleasure. If a person was not morally responsible for the action which is the subject of the charge because that

> action was an unwilled automatic act, he should not suffer conviction or punishment. If he is not mentally ill and there is therefore no reason to suppose that the act will be repealed, detention for the protection of others is pointless and an embarrassment to the mental health authorities.

In my view, the approach taken by King CJ is the approach dictated by the relevant provisions of the Code. At the risk of repetition, a person is not criminally responsible for an act or omission which occurs independently of the will. Dissociation may warrant a conclusion that the act or omission in respect of which an accused is charged occurred independently of his or her will.

The question raised by this appeal is whether the act of shooting occurred independently of Mrs Falconer's will. If the act of shooting occurred independently of Mrs Falconer's will by reason of involuntary conduct not arising from insanity, she is entitled to an unqualified acquittal. There is nothing more for the jury to determine. If the evidence requires a jury to consider both non-insane automatism and insanity, the question of involuntary conduct should be put in two stages. That is because each of those states of mind is governed by a different section of the Code and the onus of proving each state of mind falls differently. The jury should first ask itself whether the Crown has disproved, beyond reasonable doubt, non-insane automatism (the onus of proof in relation to that defence being on the Crown). If the Crown has failed to do so, then the accused will be entitled to an unqualified acquittal.

But if the Crown has disproved non-insane automatism, it may have done so, not because the acts said to constitute the offence were voluntary, but because they were the involuntary product of an unsound mind. Thus, if the answer to the first question is in the affirmative, the jury should go on to ask a second question, namely, whether the accused has proved, on the balance of probabilities, insanity within the meaning of s 27 (the onus of proof in relation to that defence being on the accused since s 26 presumes every person to be of sound mind). If the answer to that second question is in the affirmative, the jury should acquit but with the rider that the accused was of unsound mind at the relevant time. More precisely, the jury must consider whether the acts constituting the offence were done at a time when the accused was in such a state of mental disease as to produce one of the consequences referred to in s 27. There is of course a logical difficulty, in those circumstances, in inviting the jury to consider whether the accused was unable, by reason of mental disease, to control his or her actions. However, if 'it is alleged or appears that he was not of sound mind at the time when the act or omission alleged to constitute the offence occurred' (the language of s 653), the appropriate verdict is acquittal on account of unsoundness of mind …

If the jury is satisfied that the acts constituting the offence were done in the exercise of the accused's will and is not satisfied that they were done at a time when he or she was in a state of mental disease (again, this assumes that there is evidence to warrant their consideration of this aspect), it must then consider whether the other elements of the offence have been proved beyond reasonable doubt. If they have been so proved, the proper verdict is guilty.

The question of mental disease was not explored at Mrs Falconer's trial. As already noted, both psychiatrists considered Mrs Falconer to be 'sane'. The state of mental disease referred to in s 27 implies 'an underlying pathological infirmity of the mind, be it of long or short duration and be it permanent or temporary, which can be properly termed mental illness, as distinct from the reaction of a healthy mind to extraordinary external stimuli': King CJ in *Radford* [at 274], referring to the relevant authorities, though his Honour was speaking of the *M'Naghten* Rules. The condition produced by the reactions of a sound mind to external stimuli, including stress producing factors, does not fall within s 27; it may, however, fall within s 23, as I have

suggested in these reasons. It is in accordance with those principles that the evidence to be adduced on behalf of Mrs Falconer must be assessed.

In delivering his ruling on the voir dire, the Commissioner said:

> In my opinion, the statements in *Sullivan* [[1984] AC 156 and in *Hennessy* [1989] 1 WLR 287; [1989] 2 All ER 9] make it clear that in the present case the accused's dissociative state, if it existed, was a consequence of entirely internal factors and not external factors … I consider myself, then, bound by authority to rule that automatism is not open as a defence in this case.

That statement is understandable in the light of *Sullivan* and *Hennessy* but it is open to the criticism made in these reasons that the requirement of an external factor is apt to mislead. In placing emphasis on physical trauma, those decisions fail to meet the point made by King CJ in *Radford* that an unwilled act may be 'the reaction of a sound mind to external stimuli, including stress producing factors' …

In so far as the evidence of the psychiatrists supported a thesis that, at the time she discharged the shotgun that killed her husband, Mrs Falconer was in a dissociative state, that evidence was relevant to a defence that the act of killing was independent of the exercise of Mrs Falconer's will. It went further than to raise a mere possibility that, at the time of the shooting of her husband, Mrs Falconer was acting in a dissociative state. The evidence should therefore have been admitted. Whether Mrs Falconer's actions were in truth independent of the exercise of her will was a question which should have been left to the jury in accordance with the principles discussed in this judgment.

There is a useful warning in the judgment of Dickson J in *Rabey* [at 552]:

> In principle, the defence of automatism should be available whenever there is evidence of unconsciousness throughout the commission of the crime, that cannot be attributed to fault or negligence on his part. Such evidence should be supported by expert medical opinion that the accused did not feign memory loss and that there is no underlying pathological condition which points to a disease requiring detention and treatment.

I would grant special leave to appeal in this case but would dismiss the appeal.

Gaudron J:

…

The medical evidence in the present case was that Mrs Falconer's behaviour (both as observed and as described by her) was consistent with her having experienced a state of dissociation. Such a state, according to that evidence, can occur when a person is confronted with psychological crisis or conflict such as Mrs Falconer claimed to have experienced on the day in question and results in the segmentation of personality so that a person in that state acts independently of his or her will.

The evidence as to dissociation described a single and particular mental state. It is convenient to observe that a particular mental state either is or is not one that involves a disease of the mind or natural mental infirmity or a mind that is disordered in one of the ways specified in s 28 of the Code: see *Williams v R*. And, of course, the same is true if the consideration is that directed by the common law, namely, whether a particular mental state involves a defect of reason due to disease of the mind.

It is a question of fact whether Mrs Falconer experienced the mental state of dissociation described in the evidence. It is a question of law whether that evidence raised a mental state

involving a disease of the mind or natural mental infirmity. It certainly raised no issue of a mind disordered in a way specified in s 28 of the Code. The question of law is to be answered by reference to those considerations that distinguish between the concept of a sound mind (s 26) and the concept of a mind that is diseased or infirm (s 27). Despite the differences directed by the language of the Code, that distinction is based on the same considerations as those that distinguish between the common law concept of a sane mind and the concept of a mind that has a defect of reason due to a disease of the mind: see *Hitchens v R* [[1959] Tas SR 209 at 249–50]; *Hitchens v R [No 2]* [[1962] Tas SR at 49]; *Williams v R* [[1978] Tas SR at 106]. The distinction has sometimes been expressed in terms of mental states having an external cause and those that proceed from internal causes: *R v Quick* [[1973] QB 910 at 922]. Sometimes the distinction has been expressed by reference to the transient or recurring nature of the particular mental state: *Bratty* [at 412]; *R v Carter* [[1959] VR 105 at 110]; *R v Meddings* [[1966] VR 306 at 309–10]. In general terms, a recurring state which involves some abnormality will indicate a mind that is diseased or infirm, but the fundamental distinction is necessarily between those mental states which, although resulting in abnormal behaviour, are or may be experienced by normal persons (as, for example and relevant to the issue of involuntariness, a state of mind resulting from a blow to the head) and those which are never experienced by or encountered in normal persons. That point was made, although in a quite different context, by Dixon J in *Porter* [(1933) 55 CLR at 188] where his Honour observed that the diseased mind is to be distinguished from the '[m]ere excitability of a normal man, passion, even stupidity, obtuseness, lack of self-control, and impulsiveness': see also the reference by Sir Owen Dixon in his paper 'A Legacy of Hadfield, M'Naghten and Maclean' (1957) 31 *Australian Law Journal* 255 at 260, to 'transient states attributable either to the fault or to the nature of man'. And in *Radford*, King CJ [at 274] distinguished between 'an underlying pathological infirmity of the mind, … which can be properly termed mental illness' and 'the reaction of a healthy mind to extraordinary external stimuli'.

The evidence as to dissociation was not extensive, presumably because it was only led for the purpose of obtaining a ruling as to whether it raised involuntariness as an issue separate and distinct from insanity. Even so, the thrust of the evidence was that such a state is or may be experienced by normal persons, albeit only in situations involving intense psychological crisis or conflict. That feature gives that evidence the same quality as evidence that a person may have been concussed by a blow to the head or, to take the examples given in a different context by Dixon J in *Porter*, evidence that the person was overcome by passion, lack of self-control, or impulsiveness. Such evidence, because it deals with or is premised on the experiences of normal persons, raises no question of mental disease or natural mental infirmity as provided in s 27 of the Code and, consequently, raises no question of insanity or unsoundness of mind under that section.

The evidence led in the present case raised no issue of insanity, but it did raise the question whether Mrs Falconer's act of discharging the loaded shotgun was done independently of her will. It should have been admitted as relevant to that issue and the jury should have been directed to consider whether, in the light of that evidence, the prosecution had proved beyond reasonable doubt that Mrs Falconer's will accompanied the act of discharging the gun. It should have been explained to the jury that the prosecution would not have proved that issue beyond reasonable doubt if it was a reasonable hypothesis that Mrs Falconer discharged the gun while experiencing that particular mental state described in the evidence as one that may be experienced by a normal or healthy mind and in which the personality is segmented so that acts are performed independently of the will. And it might conveniently have been explained

that that hypothesis would be excluded by satisfaction beyond reasonable doubt either that there is no such phenomenon as the particular mental state described in the evidence or that Mrs Falconer did not experience it.

There must be a new trial. Although the evidence by reference to which the present application was argued does not raise any issue of insanity it does not follow that insanity will not be raised in the new trial. It may be that the prosecution will assert that, if, at the time of discharging the loaded shotgun, Mrs Falconer experienced any mental state other than one in which she had acted consciously and deliberately, it was a state (perhaps similar in effect to that as to which evidence was led at the first trial) involving a mental disease or natural mental infirmity. Or, perhaps, the defence will postulate, as an alternative to the mental state of dissociation, some other state which involves a mental disease or natural mental infirmity.

As already indicated, it is very difficult for an accused person to raise a reasonable hypothesis that an act was done involuntarily as a result of some mental state that is or may be experienced by a healthy mind. The practical difficulties of raising that hypothesis are no less (perhaps they are greater) if it must compete with evidence that the accused had some different mental state involving a disease of the mind or natural mental infirmity. Accordingly, in my view, even if involuntariness and insanity are raised as separate and distinct issues, there is no need to modify the ordinary rules as to the onus and standard of proof applicable to each of those issues. As between those issues, the jury should be directed to consider first whether the prosecution has proved its case beyond reasonable doubt by negativing the possibility that the accused was acting involuntarily as a result of some mental state which is or may be experienced by a healthy mind. It should then be directed that, if the first question is answered against the accused (and assuming that the other elements of the offence are established beyond reasonable doubt), it should consider whether there should be a verdict of not guilty by reason of unsoundness of mind. And, of course, it will be necessary to explain that the defence of insanity or unsoundness of mind need only be proved on the balance of probabilities but that the accused bears the onus of proving it.

Special leave to appeal should be granted. The appeal should be dismissed.

Mason CJ, Brennan and McHugh JJ:

[Their Honours took a different view from the majority on the burden of proof regarding sane automatism, arguing that it should lie on the accused. With respect to whether sane automatism was an issue in the case, they agreed with the other judges.]

…

There are two aspects of apparent difference between the *M'Naghten* Rules and the Code. The first relates to the cause of the insanity or unsoundness of mind. The *M'Naghten* Rules speak only of a 'disease of the mind' while the Code's umbrella term of 'unsound mind' comprehends mental disease, natural mental infirmity (s 27) and a mind disordered by intoxication or stupefaction (s 28). The second, and more significant difference relates to the effects of these respective causes. The incapacities to which s 27 refers include the incapacity to control actions whereas the *M'Naghten* Rules speak only of such a defect of reason 'as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong'. The explanation for the inclusion of the incapacity to control actions in s 27 is that it mirrors the provisions of s 23, as Sir Samuel Griffith explained in his notes to the Draft Code, (1897), p 14:

> An act to involve criminal responsibility must be voluntary, as distinguished from involuntary (s 23) — that is to say, it must be accompanied by volition. In order that an action may be accompanied by volition there must be in the first place perception, more or less accurate, of the facts, then a determination or choice of the action to be taken upon those facts, and finally the action. If the person in question is incapable from mental disorder of rightly perceiving the facts, he should be treated on the same footing as a man who in good faith misapprehends the facts (s 24). If he is for the same cause incapable of exercising the power of determination or choice, he should be treated on the same footing as a man who does an act independently of the exercise of his will (s 23).

(The section numbers are altered to reflect the numbering of the draft sections as enacted.) Under the Code, the practical difference in the operation of s 23 on the one hand and ss 26, 27 and 28 on the other depends on the aetiology of the condition which deprives the accused of the capacity to control his actions: if mental disease or natural mental infirmity (under s 27) or a disorder of the mind (under s 28) are proved to have deprived the accused of the capacity to control his actions, the verdict of acquittal must be qualified under s 653; if it be a reasonable hypothesis on the evidence that some other cause, by itself, deprived the accused of that capacity, the verdict is an absolute acquittal. The dichotomy between automatism caused by unsoundness of mind and automatism otherwise caused is reflected in the verdict to be returned.

At common law, although the defence of insanity was not expressed to cover an incapacity to control actions caused by a disease of the mind, yet the cases have held that, once disease of the mind appears to be a cause of an incapacity to control actions, an accused who relies on automatism must be acquitted, if at all, on the grounds of insanity … A person in either category is not criminally responsible for his actions, but the law divides mental irresponsibility into two categories distinguished by the aetiology of that condition: is the mind diseased or is it not? Similarly, under ss 23 and 27 of the Code: an act may be unwilled, but the question is whether the aetiology of that condition is or is not mental disease or natural mental infirmity.

…

Under the Code, as well as under the common law, it is necessary for the trial judge to determine what is meant by the terms used to describe the mental condition of a person who is of unsound mind or insane. The meaning of those terms is a question of law, not a question to be answered by medical witnesses. Although there is some divergence in the leading judgments, generally speaking a distinction has been drawn between an underlying mental infirmity which is productive of one of the prescribed effects and a transient non-recurrent mental malfunction caused by external forces which produces an incapacity to control actions. The former is treated as unsoundness of mind or insanity; the latter is no more than a variation within the norm. Cases under the Code, as we shall see, have been decided by reference to concepts drawn from the common law despite some variations in terminology and there is no reason to hold that the term 'disease of the mind' in the *M'Naghten* Rules and the terms 'mental disease or natural mental infirmity' in s 27 of the Code connote different mental conditions.

In *R v Foy* [[1960] Qd R 225], Philp J held that unsoundness of mind comprehended every condition which Hale (*Pleas of the Crown*) had called 'dementia', whether the dementia were complete or partial, permanent or temporary or intermittent and whether it was 'natural' or caused by physical disease, concussion, labour or any other cause. It comprehended any disorder or derangement of the understanding and any destruction of the will [[1960] Qd R, at 241–3] …

…

In Canada a broad view was taken of the meaning of insanity in s 16(2) of the Criminal Code which provided that a person is insane 'when he is in a state of natural imbecility or had disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong'. In *Rabey v R* [[1980] 2 SCR 513 at 519; (1980) 54 CCC (2d) 1 at 6–7], Ritchie J pointed out that the question whether a particular mental state amounts to 'a disease of the mind' is a question of law for the judge, adopting the statement of principle by Martin JA in the Ontario Court of Appeal who said [(1977) 79 DLR (3d) 414 at 430; 37 CCC (2d) 461 at 477–8)]:

> In general, the distinction to be drawn is between a malfunctioning of the mind arising from some cause that is primarily internal to the accused, having its source in his psychological or emotional make-up, or in some organic pathology, as opposed to a malfunctioning of the mind which is the transient effect produced by some specific external factor such as, for example, concussion. Any malfunctioning of the mind, or mental disorder having its source primarily in some subjective condition or weakness internal to the accused (whether fully understood or not), may be a 'disease of the mind' if it prevents the accused from knowing what he is doing, but transient disturbances of consciousness due to certain specific external factors do not fall within the concept of disease of the mind.

In that case a young man had battered a young woman, with whom he was infatuated, after he had been slighted. Martin JA concluded [(at 435; 482–3)], and his conclusion was upheld by a majority of the Supreme Court [(at 520; 7)]:

> … that, in the circumstances of this case, the dissociative state in which the respondent was said to be, constituted a 'disease of the mind'. I leave aside until it becomes necessary to decide them, cases where a dissociative state has resulted from emotional shock without physical injury, resulting from such causes, for example, as being involved in a serious accident although no physical injury has resulted; being the victim of a murderous attack with an uplifted knife, notwithstanding the victim has managed to escape physical injury; seeing a loved one murdered or seriously assaulted, and the like situations. Such extraordinary external events might reasonably be presumed to affect the average normal person without reference to the subjective make-up of the person exposed to such experience.

…

In his judgment in *Radford* [(1985) 42 SASR 266 (CCA)], King CJ [(at 274–5)] stated in summary form the effect of the authorities. In our respectful opinion, his Honour's judgment substantially states the common law and we quote the passage at length:

> … if a jury is called upon to decide whether a state of automatism is due to disease of the mind, upon conflicting evidence or conflicting interpretations of the evidence, it must be told what the law understands by that phrase and it should be told that in language which a jury of laymen is likely to grasp. The expression 'disease of the mind' is synonymous, in my opinion, with 'mental illness'. In his charge to the jury in *R v Porter* [(1933) 55 CLR at 188] Dixon J used the expression 'disease disorder or disturbance'. But the words 'disorder' and 'disturbance' must take their colour from the word 'disease' and refer to disorder and disturbance of the mental faculties which can be characterised as mental illness. In one sense automatism must always involve some disorder or disturbance

> of the mental faculties, but I do not think that a temporary disorder or disturbance of an otherwise healthy mind caused by external factors can properly be regarded as disease of the mind as that expression is used in the *M'Naghten* Rules. As Lord Denning pointed out in *Bratty v Attorney-General for Northern Ireland* [[1963] AC at 412], the major mental diseases or psychoses such as schizophrenia are clearly diseases of the mind. Moreover, physical diseases, such as psychomotor epilepsy (*Bratty v Attorney-General for Northern Ireland*) and arteriosclerosis (*R v Kemp*), when they affect the soundness of the mental faculties should be regarded as diseases of the mind. Lord Denning considered that any 'mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind': *Bratty's* case [at 412]. Disease of the mind is to be distinguished from 'mere excitability of a normal man, passion, even stupidity, obtuseness, lack of self control, and impulsiveness': *R v Porter* [at 188]. The essential notion appears to be that in order to constitute insanity in the eyes of the law, the malfunction of the mental faculties called 'defect of reason' in the *M'Naghten* Rules must result from an underlying pathological infirmity of the mind, be it of long or short duration and be it permanent or temporary, which can be properly termed mental illness, as distinct from the reaction of a healthy mind to extraordinary external stimuli. In my opinion the notion of 'disease of the mind' should be explained to the jury in some such terms.

One may cavil at the description of a mere physical condition such as arteriosclerosis, albeit one which produces a 'mental illness', as itself a disease of the mind. But the dichotomy between mental illness and a healthy mind is correctly drawn. However, we would think it necessary that a temporary mental disorder or disturbance must not be prone to recur if it is to avoid classification as a disease of the mind. That is because a malfunction of the mind which is prone to recur reveals an underlying pathological infirmity. Subject to that qualification, the law is as stated by King CJ in the passage cited …

… [T]here seems to be no reason in principle why psychological trauma which produces a transient non-recurrent malfunction of an otherwise sound mind should be distinguished from a physical trauma which produces a like effect. That was the view of the minority in *Rabey*.

In *Rabey* [[1980] 2 SCR at 549; (1980) 54 CCC (2d) at 29], Dickson J for the minority emphasised the externality of the precipitating 'psychological blow' which caused 'a loss of consciousness'. His Lordship agreed that there should be a shock precipitating the state of automatism and that: 'Dissociation caused by a low stress threshold and surrender to anxiety cannot fairly be said to result from a psychological blow'. To determine whether in a particular case automatism is to be judged sane or insane, his Lordship treated the likelihood of repetition of the action as a material indication. He added [at 552; 31]:

> In principle, the defence of automatism should be available whenever there is evidence of unconsciousness throughout the commission of the crime, that cannot be attributed to fault or negligence on his part. Such evidence should be supported by expert medical opinion that the accused did not feign memory loss and that there is no underlying pathological condition which points to a disease requiring detention and treatment.

The problem of classification in a case of a transient malfunction of the mind precipitated by psychological trauma lies in the difficulty in choosing between the reciprocal factors — the trauma and the natural susceptibility of the mind to affection by psychological trauma — as the cause of the malfunction. Is one factor or the other the cause or are both to be treated as causes? To answer this problem, the law must postulate a standard of mental strength, which,

in the face of a given level of psychological trauma, is capable of protecting the mind from malfunction to the extent prescribed in the respective definitions of insanity. That standard must be the standard of the ordinary person: if the mind's strength is below that standard, the mind is infirm; if it is of or above that standard, the mind is sound or sane. This is an objective standard which corresponds with the objective standard imported for the purpose of determining provocation: as to which, see *Radford* [(1985) 42 SASR at 269]; *R v Hill* [[1986] 1 SCR 313 at 343–4; (1986) 25 CCC (3d) 322 at p 345]; *Johnson v R* [(1976) 136 CLR 619 at 636].

In a given case, if the psychological trauma causes a sound mind, possessed of the requisite standard of strength, to malfunction only transiently so as to produce the effects mentioned in the *M'Naghten* Rules or in s 27 of the Code, the malfunction cannot be attributed to mental infirmity but to 'the nature of man': that is to say, a malfunction which is transient and not prone to recur and to which the mind of an ordinary person would be subject if exposed to the same psychological trauma is neither a mental disease nor a natural mental infirmity. It is neither an instance of unsoundness of mind under the Code nor an instance of insanity at common law. Having regard to the reason for distinguishing between sane and insane mental irresponsibility in *Hill v Baxter* [[1958] 1 QB 277], there is no reason to require such a malfunction of the mind to attract a qualified verdict of acquittal.

…

In determining whether the mind of an ordinary person would have malfunctioned in the face of the physical or psychological trauma to which the accused was subjected, the psychotic, neurotic or emotional state of the accused at that time is immaterial. The ordinary person is assumed to be a person of normal temperament and self-control. Consequently, evidence that, in the week preceding the shooting, Mrs Falconer had demonstrated fear, depression, emotional disturbance and an apparently changed personality would not have been relevant in determining the reaction of an ordinary person. Likewise, evidence of the stress that she suffered on discovering that her husband had sexually assaulted their two daughters would not have been relevant in determining the reaction of the ordinary person to the incidents which took place on the day of the shooting. But evidence of the objective circumstances of the relationship between the parties would have been relevant to that issue, for only by considering the pertinent circumstances of that relationship could the jury determine whether an ordinary person would have succumbed to a state of dissociation similar to that which Mrs Falconer claims overtook her on that day. Speaking generally, the issue for the jury on this aspect of the case would be whether an ordinary woman of Mrs Falconer's age and circumstances, who had been subjected to the history of violence which she alleged, who had recently discovered that her husband had sexually assaulted their daughters, who knew that criminal charges had been laid against her husband in respect of these matters and who was separated from her husband as the result of his relationship with another woman, would have entered a state of dissociation as the result of the incidents which occurred on the day of the shooting.

If the trial judge had considered the evidence given on the voir dire by the two doctors in the light of the relationship between Mrs Falconer and her husband, he might have held that that evidence was insufficient to establish that the mind of an ordinary person would have reacted in the way that Mrs Falconer alleges that her mind reacted. But that issue was not addressed and it is not a question that should be answered in this application. Much depends upon the impact of the evidence in the context of the trial. Evidence which was prima facie relevant and essential to the defence of non-insane automatism was improperly

rejected. Indeed, Mrs Falconer was not allowed to tender any evidence in support of that defence. In that respect the trial miscarried. In the circumstances, it is neither appropriate nor proper to examine the evidence of the doctors, given on the voir dire, for the purpose of determining whether, if admitted, it would have established a case of non-insane automatism for consideration by the jury …

[Their Honours granted special leave to appeal, but dismissed the appeal.]

17.50C R v Parks

[1992] 2 SCR 871; 15 CR (4th) 289
Supreme Court of Canada

This case involved a sleepwalker who allegedly got up from his sleep, dressed, took his car keys and drove some 23 km along a major highway to the home of his in-laws. While still allegedly in a state of automatism, the accused parked his car, broke into the house, took a knife from the kitchen and proceeded to the bedroom where he stabbed and beat his in-laws, killing one and severely injuring the other. At the conclusion of the attack, the accused then drove to a nearby police station where he cut his hands with the knife and told the police that he had just killed two people with his hands. Evidence at the trial indicated that the accused was sleepwalking at the time of the offences and that he was not suffering from disease of the mind. As a result, the trial judge instructed the jury on the defence of non-insane automatism, and a verdict of not guilty was returned. The Crown appealed against the acquittal, first, unsuccessfully, to the Ontario Court of Appeal and then to the Supreme Court of Canada.

La Forest J (L'Heureux-Dubé and Gonthier JJ concurring): I have had the advantage of reading the reasons of the Chief Justice. I agree with him that the trial judge was correct in leaving only the defence of non-insane automatism with the jury. I am also in agreement with what the Chief Justice has to say on that issue, but I wish to add the following comments concerning the distinction in law between insane and non-insane automatism, particularly as it relates to somnambulism.

In his reasons, the Chief Justice finds that the evidence and expert testimony from the trial of the accused support the trial judge's decision to instruct the jury on non-insane automatism. I agree with this finding, but in my view that is not the end of the matter. In distinguishing between automatism and insanity the trial judge must consider more than the evidence; there are overarching policy considerations as well. Of course, the evidence in each case will be highly relevant to this policy inquiry …

A review of the cases on automatism reveals two distinct approaches to the policy component of the disease of the mind inquiry. These may be labelled the 'continuing danger' and 'internal cause' theories; see E Colvin, *Principles of Criminal Law*, 2nd ed (Toronto, Carswell, 1991), p 293. At first glance these approaches may appear to be divergent, but in fact they stem from a common concern for public safety. This was recognized by Martin JA who referred to 'protection of the public' as a focus of the policy inquiry …

The continuing danger theory holds that any condition likely to present a recurring danger to the public should be treated as insanity. The internal cause theory suggests that a condition stemming from the psychological or emotional makeup of the accused, rather than some external factor, should lead to a finding of insanity. The two theories share a common concern

for recurrence, the latter holding that an internal weakness is more likely to lead to recurrent violence than automatism brought on by some intervening external cause.

It would appear that the internal cause approach has gained a certain ascendancy in both Canadian and English jurisprudence. The theory was the basis for deciding *Rabey*, where the distinction was described by Martin JA, at 477–8 [CCC, 62–3 CRNS] as follows:

> In general, the distinction to be drawn is between a malfunctioning of the mind arising from some cause that is primarily internal to the accused, having its source in his psychological or emotional make-up, or in some organic pathology, as opposed to a malfunctioning of the mind which is the transient effect produced by some specific external factor such as, for example, concussion. Any malfunctioning of the mind, or mental disorder having its source primarily in some subjective condition or weakness internal to the accused (whether fully understood or not), may be a 'disease of the mind' if it prevents the accused from knowing what he is doing, but transient disturbances of consciousness due to certain specific external factors do not fall within the concept of disease of the mind … Particular transient mental disturbances may not, however, be capable of being properly categorized in relation to whether they constitute 'disease of the mind', on the basis of a generalized statement, and must be decided on a case by case basis.

The theory has also been adopted in England …

The judgments in both *Rabey* and *Hennessy* are careful to state that the internal cause theory is not a universal approach to the disease of the mind inquiry. Indeed Martin JA, at 477 [CCC, 62 CRNS], appears to suggest that sleepwalking is one of those conditions that is not usefully assessed on this basis.

The internal cause approach has been criticized as an unfounded development of the law, and for the odd results the external/internal dichotomy can produce; see G Williams, *Textbook of Criminal Law* (2nd ed, London, Sweet & Maxwell, 1983), pp 671–6; D Stuart, *Canadian Criminal Law* (2nd ed, Toronto, Carswell, 1987), pp 92–4; Colvin, supra, p 291. These criticisms have particular validity if the internal cause theory is held out as the definitive answer to the disease of the mind inquiry. However, it is apparent from the cases that the theory is really meant to be used only as an analytical tool, and not as an all-encompassing methodology. As Watt J commented in his reasons in support of his charge to the jury in this case, the dichotomy 'constitutes a general, but not an unremitting or universal, classificatory scheme for "disease of the mind"'.

As Martin JA suggested in *Rabey*, somnambulism is an example of a condition that is not well-suited to analysis under the internal cause theory. The poor fit arises because certain factors can legitimately be characterized as either internal or external sources of automatistic behaviour. For example, the Crown in this case argues that the causes of the respondent's violent sleepwalking were entirely internal, a combination of genetic susceptibility and the ordinary stresses of everyday life (lack of sleep, excessive afternoon exercise, and a high stress level due to personal problems). These 'ordinary stresses' were ruled out as external factors by this court in *Rabey* (although by a narrow majority). However, the factors that for a waking individual are mere ordinary stresses can be differently characterized for a person who is asleep, unable to counter with his conscious mind the onslaught of the admittedly ordinary strains of life. One could argue that the particular amalgam of stress, excessive exercise, sleep deprivation and sudden noises in the night that causes an incident of somnambulism is, for the sleeping person, analogous to the effect of a concussion upon a waking person, which is generally accepted as an external cause of non-insane automatism; see Williams, supra, at

p 666. In the end, the dichotomy between internal and external causes becomes blurred in this context, and is not helpful in resolving the inquiry.

The continuing danger approach stems from an *obiter* comment of Lord Denning in *Bratty*, supra, where he proposes the following test for distinguishing between insane and non-insane automatism, at 412 [AC]:

> It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal.

Lord Denning's causal proposition has not been universally accepted, although some elements of the theory remain today. It was questioned in *R v Quick*, supra, at 351–2 [All ER], and legal academics have questioned the utility of the test; see *Stuart*, supra, at 94–5, Colvin, supra, p 294. As well, medical authorities have doubted the ability of their profession to predict recurrent dangerousness; see M Roth, 'Modern Psychiatry and Neurology and the Problem of Responsibility', in S J Hucker, C Webster and M Ben-Aron (eds), *Mental Disorder and Criminal Responsibility* (Toronto, Butterworths, 1981), pp 104–9. In *Rabey*, Martin JA doubted the merit of Lord Denning's test, noting at 476 [CCC, 60 CRNS], that the converse of Denning's proposition was surely not good law. He stated:

> It would be quite unreasonable to hold that a serious mental disorder did not constitute a disease of the mind because it was unlikely to recur. To so hold would be to exclude from the exemption from responsibility afforded by insanity, persons, who by reason of a severe mental disorder were incapable of appreciating the nature and quality of the act or of knowing that it was wrong, if such mental disorder was unlikely to recur.

The majority of this court approved these comments, and Dickson J in dissent conceded the point, at 533 [SCR]:

> A test of proneness to recur does not entail the converse conclusion, that if the mental malady is not prone to recur it cannot be a disease of the mind. A condition, organic in nature, which causes an isolated act of unconscious violence could well be regarded as a case of temporary insanity.

Nonetheless, Dickson J sought to revive Lord Denning's basic formulation in the following passage, at 551–2 [SCR]:

> Under the heading 'Insanity versus Automatism' [Glanville] Williams states that before the decision in *Quick*, Lord Denning's view in *Bratty* was generally accepted. The test of insanity was the likelihood of recurrence of danger. In *Quick*, the Court of Appeal adopted what might seem at first sight to be a different test for insane versus non-insane automatism. But the real question is whether the violence is likely to be repeated. Williams concludes that 'On the whole, it would be much better if the courts kept to Lord Denning's plain rule; the rule in *Quick* adds nothing to it' (at 615).
>
> This view, which the Ontario Court of Appeal appears to have rejected, finds ample support in the legal literature. See Beck, 'Voluntary Conduct: Automatism, Insanity and Drunkenness', (1966–67) 9 *Crim LQ* 315, at p 321, 'The cause of the automatic conduct, and the threat of recurrence, are plainly factors that determine the line between sane and insane automatism'; Whitlock, *Criminal Responsibility and Mental Illness* at p 120,

> 'The test of whether or not an episode of automatism is to be judged as sane or insane action seems to rest on the likelihood of its repetition'; J LI J Edwards, 'Automatism and Criminal Responsibility', 21 *Mod L Rev* 375, [at] p 385, 'Where evidence is available of recurrent attacks of automatism during which the accused resorts to violence … inevitably leads to consideration of the imposition of some restraint'; Prevezer, 'Automatism and Involuntary Conduct' [1958] *Crim LR* 440 at p 441, 'If … it can safely be predicted that his conduct is not likely to recur, having regard to the cause of the automatism, there can be no point in finding him insane and detaining him in Broadmoor'; Martin, 'Insanity as a Defence', (1965–6) 8 *Crim LQ* 240, at p 253, 'Perhaps the distinction lies in the likelihood of recurrence and whether the person suffering from it is prone to acts of violence when in that state'.
>
> In principle, the defence of automatism should be available whenever there is evidence of unconsciousness throughout the commission of the crime, that cannot be attributed to fault or negligence on his part. Such evidence should be supported by expert medical opinion that the accused did not feign memory loss and that there is no underlying pathological condition which points to a disease requiring detention and treatment.

While Dickson J's views did not carry the day in *Rabey*, nothing in the majority judgment precludes the consideration of a continuing danger as a factor at the policy stage of the inquiry.

Since *Rabey*, the House of Lords has revisited the question of disease of the mind; in *R v Sullivan*, [1984] AC 156, 77 Cr App R 176, [1983] 2 All ER 673, Lord Diplock states that the *duration* of the condition in question is not a relevant consideration: a disease of the mind can be temporary or permanent. He also suggests that the relative impermanence of a condition is particularly inconsequential *if the condition is prone to recur*. A necessary corollary of these statements is the more general proposition that recurrence suggests insanity, but the absence of recurrence does not preclude it. This view of the law was stated explicitly in *R v Burgess*, [1991] 2 QB 92, 93 Cr App R 41, [1991] 2 All ER 769 (CA), at 774 [All ER]:

> It seems to us that if there is a danger of recurrence that may be an added reason for categorising the condition as a disease of the mind. On the other hand, the absence of the danger of recurrence is not a reason for saying that it cannot be a disease of the mind. Subject to that possible qualification, we respectfully adopt Lord Denning's suggested definition.

In my view, the Court of Appeal has properly stated the law on this point. Recurrence is but one of a number of factors to be considered in the policy phase of the disease of the mind inquiry. Moreover, the absence of a danger of recurrence will not automatically exclude the possibility of a finding of insanity.

In this case, then, neither of the two leading policy approaches determines an obvious result. It is clear from the evidence that there is almost no likelihood of recurrent violent somnambulism. A finding of insanity is therefore less likely, but the absence of a continuing danger does not mean that the respondent must be granted an absolute acquittal. At the same time, the internal cause theory is not readily applicable in this case. It is therefore necessary to look further afield.

In his dissenting reasons in *Rabey*, at 546 [SCR], Dickson J enumerates certain additional policy considerations that are relevant to the distinction between insanity and automatism:

> … Automatism as a defence is easily feigned. It is said the credibility of our criminal justice system will be severely strained if a person who has committed a violent act is allowed an absolute acquittal on a plea of automatism arising from a psychological blow. The argument is made that the success of the defence depends upon the semantic ability of psychiatrists, tracing a narrow path between the twin shoals of criminal responsibility and an insanity verdict. Added to these concerns is the *in terrorem* argument that the floodgates will be raised if psychological blow automatism is recognized in law.

These factors are raised by Dickson J as arguments against a finding of non-insane automatism. In the present case, however, none of these arguments is persuasive. It seems unlikely that the recognition of somnambulism as non-insane automatism will open the floodgates to a cascade of sleepwalking defence claims. First of all, the defence of somnambulism has been recognized, albeit in *obiter* discussion, in an unbroken line of cases stretching back at least a century, yet I am unaware of any current problem with specious defence claims of somnambulistic automatism. Indeed, this case and *Burgess* are among the few appellate decisions in which the status of somnambulism was a question to be decided. Moreover, it is very difficult to feign sleepwalking — precise symptoms and medical histories beyond the control of the accused must be presented to the trier of fact, and as in this case the accused will be subjected to a battery of medical tests. Finally, a comprehensive listing of the indicia of sleepwalking can be consulted by both the court and the medical experts; see P Fenwick, 'Somnambulism and the Law: A Review' (1987) 5 *Behavioural Sciences and the Law* 343, at p 354.

It may be that some will regard the exoneration of an accused through a defence of somnambulism as an impairment of the credibility of our justice system. Those who hold this view would also reject insane automatism as an excuse from criminal responsibility. However, these views are contrary to certain fundamental precepts of our criminal law: only those who act voluntarily with the requisite intent to commit an offence should be punished by criminal sanction. The concerns of those who reject these underlying values of our system of criminal justice must accordingly be discounted.

In the end, there are no compelling policy factors that preclude a finding that the accused's condition was one of non-insane automatism. I noted earlier that it is for the Crown to prove that somnambulism stems from a disease of the mind; neither the evidence nor the policy considerations in this case overcome the Crown's burden in that regard. Committal under s 614(2) of the Criminal Code is therefore precluded, and the accused should be acquitted.

As I noted at the outset, it is apparent that the medical evidence in this case is not only significant in its own right, but also has an impact at several stages of the policy inquiry. As such, I agree with the Chief Justice that in another case, on different evidence, sleepwalking might be found to be a disease of the mind. As Dickson J commented in *Rabey*, at 552 [SCR]:

> What is disease of the mind in the medical science of today may not be so tomorrow. The court will establish the meaning of disease of the mind on the basis of scientific evidence as it unfolds from day to day. The court will find as a matter of fact in each case whether a disease of the mind, so defined, is present …

[**Lamer CJ** (**Cory J** concurring), **Sopinka** and **McLachlin JJ** each delivered judgments agreeing that the defence of automatism rather than insanity was correctly left to the jury.]

17.51C

R v Burgess

[1991] 2 QB 92; [1992] 2 All ER 769
Court of Appeal, England

In this case, the Court of Appeal had to consider an appeal against a trial judge's ruling that the appellant, allegedly sleepwalking when he attacked his victim, was nevertheless suffering from a transitory abnormality or disorder caused by an internal factor, and this amounted to insanity within the *M'Naghten* Rules. In upholding the trial judge's ruling, **Lord Lane CJ** delivering the judgment of the court made the following comments about the meaning of the term 'disease of the mind' and its application to a case of sleepwalking.

Lord Lane CJ: … The appellant plainly suffered from a defect of reason from some sort of failure (for lack of a better term) of the mind causing him to act as he did without conscious motivation. His mind was to some extent controlling his actions, which were purposive rather than the result simply of muscular spasm, but without his being consciously aware of what he was doing. Can it be said that that 'failure' was a *disease* of the mind rather than a defect or failure of the mind not due to disease? That is the distinction, by no means always easy to draw, upon which this case depends, as others have depended in the past.

One can perhaps narrow the field of inquiry still further by eliminating what are sometimes called the 'external factors' such as concussion caused by a blow on the head. There were no such factors here. Whatever the cause may have been, it was an 'internal' cause. The possible disappointment or frustration caused by unrequited love is not to be equated with something such as concussion …

What help does one derive from the authorities as to the meaning of 'disease' in this context? Lord Denning in *Bratty v Attorney-General for Northern Ireland* [1961] 3 All ER 523 at 534, [1963] AC 386 at 412 said:

> On the other point discussed by Devlin J, namely, what is a 'disease of the mind' within the *M'Naghten* Rules, I would agree with him that this is a question for the judge. The major mental diseases, which the doctors call psychoses, such as schizophrenia, are clearly diseases of the mind. But in *R v Charlson* ([1955] 1 All ER 859, [1955] 1 WLR 317), Barry J seems to have assumed that the other diseases such as epilepsy or cerebral tumour are not diseases of the mind, even when they are such as to manifest themselves in violence. I do not agree with this. It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal.

It seems to us that if there is a danger of recurrence that may be an added reason for categorising the condition as a disease of the mind. On the other hand, the absence of the danger of recurrence is not a reason for saying that it cannot be a disease of the mind. Subject to that possible qualification, we respectfully adopt Lord Denning's suggested definition.

…

We accept of course that sleep is a normal condition, but the evidence in the instant case indicates that sleepwalking, and particularly violence in sleep, is not normal. We were told that *R v Parks* is to be taken to the Supreme Court of Canada. That case apart, in none of the other cases where sleepwalking has been mentioned, so far as we can discover, has the court had the advantage of the sort of expert medical evidence which was available to the judge here.

One turns then to examine the evidence upon which the judge had to base his decision and for this purpose the two medical experts called by the defence are the obvious principal sources.

He [Dr d'Orban] was asked, 'Assuming this is a sleep associated automatism, is it an internal or external factor?' He answered: 'In this particular case, I think that one would have to see it as an internal factor'.

Then in cross-examination:

> Q. Would you go so far as to say that it was liable to recur?
> A. It is possible for it to recur, yes.
> *Judge Lewis*. Is this a case of automatism associated with a pathological condition or not?
> A. I think the answer would have to be Yes, because it is an abnormality of the brain function, so it would be regarded as a pathological condition.

Dr Eames in cross-examination agreed with Dr d'Orban as to the internal rather than the external factor. He accepted that there is a liability to recurrence of sleepwalking. He could not go so far as to say that there is no liability of recurrence of serious violence but he agreed with the other medical witnesses that there is no recorded case of violence of this sort recurring.

The prosecution, as already indicated, called Dr Fenwick, whose opinion was that this was not a sleepwalking episode at all. If it was a case where the appellant was unconscious of what he was doing, the most likely explanation was that he was in what is described as a hysterical dissociative state …

He then went on to describe features of sleepwalking. This is what he said:

> Firstly, violent acts in sleepwalking are very common. In just an exposure of one day to a sleepwalking clinic, you will hear of how people are kicked in bed, hit in bed, partially strangled — it is usually just arms round the neck, in bed, which is very common. Serious violence fortunately is rare. Serious violence does recur, or certainly the propensity for it to recur is there, although there are very few cases in the literature — in fact I know of none — in which somebody has come to court twice for a sleepwalking offence. This does not mean that sleepwalking violence does not recur; what it does mean is that those who are associated with the sleeper take the necessary precautions. Finally, should a person be detained in hospital? The answer to that is: Yes, because sleepwalking is treatable. Violent night terrors are treatable. There is a lot which can be done for the sleepwalker, so sending them to hospital after a violent act to have their sleepwalking sorted out, makes good sense.

Dr Fenwick was also of the view that in certain circumstances hysterical dissociative states are also subject to treatment.

It seems to us that on this evidence the judge was right to conclude that this was an abnormality or disorder, albeit transitory, due to an internal factor, whether functional or organic, which had manifested itself in violence. It was a disorder or abnormality which might recur, though the possibility of it recurring in the form of serious violence was unlikely. Therefore, since this was a legal problem to be decided on legal principles, it seems to us that on those principles the answer was as the judge found it to be. It does however go further than that. Dr d'Orban, as already described, stated it as his view that the condition would be

regarded as pathological. Pathology is the science of diseases. It seems therefore that in this respect at least there is some similarity between the law and medicine.

The judge was alive to the apparent incongruity of labelling this sort of disability as insanity. He drew attention, as we would also wish to do, to the passage of the speech of Lord Diplock in *R v Sullivan* [1983] 2 All ER 673 at 678, [1984] AC 156 at 173 where he said:

> … it is natural to feel reluctant to attach the label of insanity to a sufferer from psychomotor epilepsy of the kind to which the appellant was subject, even though the expression in the context of a special verdict of not guilty by reason of insanity is a technical one which includes a purely temporary and intermittent suspension of the mental faculties of reason, memory and understanding resulting from the occurrence of an epileptic fit. But the label is contained in the current statute, it has appeared in this statute's predecessors ever since 1800. It does not lie within the power of the courts to alter it. Only Parliament can do that. It has done so twice; it could do so once again.

This appeal must accordingly be dismissed.

Intoxication

CHAPTER 18

INTOXICATION AND CRIMINAL RESPONSIBILITY

18.1 Many offences are committed under the influence of intoxication by alcohol and other psychotropic substances that alter mood or awareness. The significance of evidence of intoxication depends primarily on the kind of mental change which is alleged.

1. In most cases, evidence of intoxication will suggest that there has been no more than a change of mood such that the accused did something which would not have been done if he or she had been sober. Such evidence will usually be relevant only to sentencing if at all. It will not be relevant to any detwermination of criminal responsibility except in the following special circumstances:
   (a) where chronic consumption leads to brain damage, the accused may fall within the rules relating to the insanity defence: see Chapter 17 and 18.6;
   (b) where the consumption of the intoxicating substance was unintentional, the accused may be entitled to a special defence under the Criminal Codes of Queensland (Code (Qld)) and Western Australia (Code (WA)) (the Codes) s 28(1) on grounds similar to those for the insanity defence (the interaction between the intoxication rules and the insanity rules is examined in 18.7–18.10);
   (c) where there were circumstances of provocation, evidence of intoxication may help to substantiate a claim that the accused actually lost self-control (although such evidence is immaterial in relation to the objective test which requires that the ordinary person could or would have been likely to lose self-control): see 15.5, 15.14–15.19.
2. In some cases, evidence of intoxication may suggest that a required mental element of the offence was not present. The evidence may suggest that the accused's cognitive capacity was impaired such that the inferences that might be ordinarily drawn about her or his state of mind should not be drawn. This argument will usually be made in relation to offences which require some subjective fault element like intention. The argument in a murder case, for example, may be that even though the victim was attacked with obviously lethal force, it would be wrong, in light of the evidence of intoxication, to draw the obvious inference that there was an intention to kill or cause grievous bodily harm. The scope for this argument is much less for offences that do

not contain subjective fault elements such as intention or wilfulness. All offences, however, require that the conduct of the accused be voluntary in the sense of being a product of the will of the accused: Codes s 23(1)(a) (Qld)/s 23A (WA) and see Chapter 11. In extreme cases, intoxication may lead to a condition of automatism in which the person is acting unconsciously and therefore involuntarily.

Evidence of intoxication is often described as a two-edged sword. On the one hand, it may suggest a state of mind so disordered that the prosecution is unable to prove the accused had an intention to achieve a particular result. On the other hand, a person in a state of inebriation may have lowered inhibitions and form an intention to do an act when they would never have formed such an intention if they were sober.

18.2 The Codes and the common law take different positions on the range of offences for which evidence of intentional intoxication can be used to support a claim that a mental element of an offence was absent. Under the Codes s 28(3) such evidence can only be used for a restricted range of offences, offences of which 'an intention to cause a specific result' is an element. In contrast, the High Court has held by a 4:3 majority that, at common law, evidence of intoxication can be used in relation to any offence: *R v O'Connor* (1980) 146 CLR 64; 29 ALR 449. The traditional position at common law, prior to *O'Connor*, was more restrictive, allowing evidence of intoxication to be used only for a category of offences known as offences of 'specific intent'. This traditional position is reflected in the Codes s 28(3). The ambit of this provision is examined at 18.13–18.20.

18.3 Intoxication is usually labelled a 'defence' in expositions of the law of criminal responsibility. Some judges have observed that intoxication is not a true defence because it does not provide a separate ground of exculpation; it bears upon criminal responsibility only where it provides evidence to support a claim that some mental element of an offence was absent. This proposition can be misleading in relation to one feature of the Codes, because s 28(1) creates a true exculpatory defence in some special circumstances: see 18.6–18.8. Nevertheless, in their overall effect, the intoxication rules have traditionally restricted rather than expanded the grounds of exculpation.

EVIDENTIARY AND PERSUASIVE BURDENS

18.4 The accused carries an evidentiary burden to put intoxication in issue. This burden will usually be discharged by evidence relating to the consumption of intoxicating substances.

Medical evidence may also be given about the general effects of quantities of particular intoxicating substances upon mental processes. Nevertheless, in *Cameron v R* (1990) 2 WAR 1, a majority of the Western Australia Court of Criminal Appeal held that a psychiatrist could not give opinion evidence of the actual mental state of the accused at the time of the alleged offence. It was said that decisions about actual mental states are for juries to make without any direct assistance from expert witnesses.

18.5 When the evidentiary burden of a defence is discharged, the prosecution ordinarily carries the persuasive burden to negative the effect of intoxication on intention beyond reasonable doubt: see Chapter 2. However, with respect to the special defence of unintentional intoxication under the Codes s 28(1) (Qld)/s 28(1) (WA), it may be that the burden of proof lies on the accused because of the relationship between this defence and the insanity defence: see 18.7–18.10.

INTOXICATION AND INSANITY

18.6 Chronic consumption of alcohol or other intoxicating substances such as amphetamines may lead to brain damage and thus to 'mental disease' or 'mental impairment' within the meaning of the insanity rules: Codes s 27. In this situation, it is well established that the relevant rules are those pertaining to the insanity defence and not any defence of intoxication. This has always been the position at common law: *R v Davis* (1881) 14 Cox CC 563. The same position has been accepted in relation to the Codes: *Dearnley v R* [1947] St R Qd 51.

18.7 The Codes s 28 make a connection between states of insanity and temporary states of extreme but unintentional intoxication.

Extreme intoxication could temporarily deprive a person of one of the capacities identified in the insanity rules under s 27:

- the capacity to understand what one is doing;
- the capacity to control one's actions;
- the capacity to know that one ought not to do the act or make the omission.

The Codes s 28(1) (Qld)/s 28(1) (WA) state that the provisions of s 27 apply to 'a person whose mind is disordered by intoxication or stupefaction caused without intention on his or her part by drugs or intoxicating liquor or by any other means'. Thus, such a person is not criminally responsible for conduct committed while deprived of those capacities. However, s 28(2) (Qld)/s 28(2) (WA) affirms that s 28(1) does not apply to a person who has intentionally become intoxicated. This form of the intoxication defence is relevant only to a very small proportion of intoxicated persons. Nevertheless, it can help someone who, for example, has been taking drugs for medical reasons without appreciating their potential effect, or someone who has been the victim of a prank such as drink spiking, where a drug is added to an alcoholic drink, unbeknown to the drinker.

The significance of invoking the defence varies with the type of incapacity in issue, just as it does for insanity: see the discussion in **17.25–17.28**. There is a dramatic significance for someone who has been deprived of the capacity to know that he or she ought not to do the act or make the omission, because in such a case the Codes s 28 creates a true exculpatory defence.

18.8 There are cases where intentional intoxication is only one of a number of cooperating factors resulting in the accused's mind becoming disordered: for example, where the accused's mind has become disordered as a result of the unintentional ingestion of pesticides together with the intentional ingestion of alcohol.

- In Queensland, the Code s 28(2) has been amended to expressly exclude such cases from the scope of the s 28(1) defence.
- The Western Australian Code is likely to be interpreted to the same effect, despite the absence of a specific provision.

18.9 The use of the phrases 'without intention' and 'intentionally' causes some problems. The origin of this form of intoxication defence lies in a distinction traditionally drawn at common law between 'involuntary' and 'voluntary' intoxication: evidence of 'involuntary' intoxication could be used to negative the mental elements of any offence, while evidence

of 'voluntary' intoxication could only be used to negative the elements of offences of specific intent. In this context, the terms 'involuntary' and 'voluntary' are not used in the technical senses associated with the doctrine of voluntariness: see 11.3–11.10. With reference to intoxication, the term 'voluntary' is often equated with 'self-induced'. The concept was taken to encompass not only intentional intoxication but also reckless intoxication and perhaps even negligent intoxication: *R v Hardie* [1984] 3 All ER 848; *R v McDowell* (1980) 52 CCC (2d) 298. The Codes s 28(1) (Qld)/s 28(1) (WA) are often understood to express this common law position: *R v Corbett* [1903] St R Qd 246 at 249; *R v Kusu* [1981] Qd R 136 at 18.25C. Nevertheless, the actual wording of s 28 indicates a broader ambit for this form of the intoxication defence. On a literal reading of the provision, a person who recklessly or negligently became intoxicated could still fall within its ambit.

18.10 A person who seeks a defence under the Codes s 28(1) (Qld)/s 28(1) (WA) is, presumably, subject to the special conditions attaching to the insanity defence. The defence will have to be proved: s 26. Moreover, success will bring a special verdict and the risk of a custody order, although there will be usually no reason to make an order in cases where unsoundness of mind is a temporary condition.

INTOXICATION AND SPECIFIC INTENT

The terms of the Codes s 28(3) (Qld)/s 28(3) (WA)

18.11 The Codes s 28(3)(Qld)/s 28(3) (WA) allow evidence of intoxication, whether intentional or unintentional, to be considered in deciding whether or not a required mental element is present in a restricted category of offences, offences of which 'an intention to cause a specific result' is an element. The intoxication may be either 'complete or partial'.

In many instances, a successful intoxication defence of this type leads to a conviction of a lesser offence rather than to a complete acquittal. For example, if the defence succeeds for murder, where an intention to cause a specific result is an element, there will still be a conviction of manslaughter (an offence of which an intention to cause a specific result is not an element). Similarly, intoxication may reduce a charge of causing grievous bodily harm with intent (Codes s 317(Qld)/s 294 (WA)) to a lesser offence of unlawfully causing grievous bodily harm under s 320 (Qld)/s 297 (WA).

18.12 The defence under the Codes s 28(3) (Qld)/s 28(3) (WA) is expressly made available whether the intoxication is 'intentional or unintentional'. In most cases, it will be intentional.

Nevertheless, there are several reasons why a person alleging unintentional intoxication as the reason for the absence of the requisite intention may seek to rely on this part of s 28, rather than face a special verdict under the rules relating specifically to unintentional intoxication in s 28(1) (Qld)/s 28(1) (WA).

1. Section 28(3) (Qld)/s 28(3) (WA) requires only an absence of intention, while s 28(1) (Qld)/s 28(1) (WA) requires a deprivation of one of the specified capacities.
2. A successful defence under s 28(3) (Qld)/s 28(3) (WA) may provide a complete acquittal, while s 28(1) (Qld)/s 28(1) (WA) offers only a special verdict.

3. The accused has no more than an evidentiary burden under s 28(3) (Qld)/s 28(1) (WA), but may carry the persuasive burden under s 28(1) (Qld)/s 28(1) (WA).

Intention to cause a specific result

18.13 The application of the Codes s 28(3) (Qld)/s 28(3) (WA) is restricted to those offences of which 'an intention to cause a specific result is an element'. 'An intention to cause a specific result' is usually an express element of an offence and has been held to be an element of the following offences:

- murder — for example, in *R v O'Regan* [1961] Qd R 78 (18.24C) and *Dodd v R* [1978] WAR 209;
- stealing — in *O'Regan* and *Kaminski v R* [1975] WAR 143 at 146; and
- robbery — in *Kaminski*, at 146.

The opposite conclusion has been reached about:

- manslaughter — in *O'Regan*;
- rape — in *Thompson* [1961] Qd R 503, *Holman* [1970] WAR 2 and *O'Regan*;
- unlawfully using a motor vehicle — in *Kaeser* [1961] QWN 11; and
- the now abolished compound offence of committing an assault and then breaking out of a dwelling house — in *Kusu* at 18.25C.

The reasoning in *Kusu* would also cover the included offence of simple assault, so that an intention to cause a specific result is not an element of assault.

18.14 There is some uncertainty respecting the classification of the offences relating to destruction or damage of property under Codes ss 461–462, 469 (Qld)/s 444 (WA). It is an element of these offences that the person has acted 'wilfully', in sense of intentionally or recklessly: see 7.45–7.48. These are not therefore offences of which intention in its ordinary sense is a required element.

In *R v Eustance* [2009] QCA 28, it was held that the trial judge had been wrong to rule that evidence of self-induced intoxication was irrelevant in determining whether wilfulness had been proved. It was suggested at [18] that the evidence was relevant because the prosecution had argued that the accused had acted intentionally. In effect, this would mean that entitlement to rely of evidence of intoxication under s 28(3) may turn on the way the prosecution argues its case rather than on the elements of the offence in issue. This is an unorthodox approach to s 28(3). However, the issue was not argued: counsel for the DPP had conceded the relevance of the evidence both at trial and on appeal.

18.15 An attempt to commit any offence is an offence of specific intent. In *O'Regan*, Mack J suggested that the defence is available for all attempted offences, including attempts to commit offences which would not admit the defence if they were completed. This seems correct because any attempt involves an intention to commit an offence and the commission of the offence amounts to a specific result of carrying out the intention. In *Attorney-General's Reference No 1 of 1977* [1979] WAR 45 (6.29C), an issue was whether the offence of rape had a mental element. The court held that it did not. However, Burt CJ also considered the crime of attempted rape, holding: 'Intention is an element of the crime of attempted rape. It is made so by s 4 of the Code …'

18.16 The classification of offences can be uncertain because of a lack of an authoritative ruling on the interpretation of the phrase 'an intention to cause a specific result'. Two approaches to the interpretation of this phrase are possible:

1. The phrase can be interpreted literally so that the defence is only available where some consequence is a material or an ulterior element of an offence, and where intention is the fault element for this consequence.
2. The phrase can be viewed as a technical expression to be interpreted in light of the common law relating to the concept of specific intent: see **1.19–1.21** on principles of Code interpretation.

18.17 In *Kusu* (**18.25C**), it was suggested that the scope of 'an intention to cause a specific result' is the same as that of the concept of specific intent at common law. However, it was also implied that the words should be interpreted literally. The assumption was perhaps made that the two interpretations will always yield the same result. This is not necessarily correct. Unfortunately, the tests for identifying 'specific intent' at common law are complicated and controversial.

In view of the controversy existing at common law as to how the distinction between offences of specific and general intent should be drawn, the option of reading 'an intention to cause a specific result' literally is attractive. However, the correct interpretation cannot yet be regarded as settled.

18.18 The concept of specific intent is no longer relevant to the intoxication defence under the common law of Australia: *R v O'Connor* (1980) 146 CLR 64; 29 ALR 449. In some jurisdictions outside Australia, however, the intoxication defence is still restricted to offences of 'specific intent' and excluded for offences of 'general intent'. In England, the leading decision on the classification of offences is *R v Caldwell* [1982] AC 341; [1981] 1 All ER 961. In that case, the House of Lords split 3:2 on the test for distinguishing offences of specific intent from offences of general intent. The majority view was that offences of specific intent are those for which actual intention is the requisite fault element, so that recklessness or other lower levels of culpability are insufficient. In contrast, offences of general intent are those for which no higher level of culpability than recklessness is required. The minority view was that 'specific intent' offences are those for which there is an ulterior mental element relating to a state of affairs which lies beyond the conduct elements of the offence, whereas 'general intent' offences are those for which the mental elements relate only to the conduct elements.

Neither test fits well with the words used in the Codes s 28. The approach of the majority in *Caldwell* focuses on the concept of intention, as do the words of s 28, but unlike s 28 makes no reference to the requirement for the intention to relate to a result or consequence. The approach of the minority in *Caldwell* focuses on offences oriented towards results or consequences (because ulterior components are always consequential to the conduct elements of the offence) but, unlike s 28, makes no reference to the requirement for intention to be the relevant state of mind.

18.19 Two examples can illustrate the distinctions between the various tests that exist to determine whether the intoxication defence is available for a given offence.

1. The offence of murder under the Codes s 302(1)(a) (Qld)/s 279(1)(a)–(b) (WA), permits the defence if 'an intention to cause a specific result' is read literally. An intention to cause the specific result of death or grievous bodily harm is required. This

form of murder would also permit the defence on the approach taken by the majority in *Caldwell* because recklessness will not suffice for the fault element. On the other hand, the approach taken by the minority in *Caldwell* would require murder to be treated as an exception if a defence under s 28(3) (Qld)/s 28(3) (WA) is permitted, because death is a material element of the offence and not an ulterior element as required by the minority approach.

2. The defence under s 28(3) (Qld)/s 28(3) (WA) would not be applicable to the offence of receiving stolen property under the Codes s 433 (Qld)/s 414 (WA) on a literal reading, because there is no consequential element to the offence of receiving. Nor would the minority judgment in *Caldwell* allow a defence, because there is no ulterior element.
   - In Queensland, the offence is committed if the offender had 'reason to believe' that the property was obtained by means of an indictable offence: Code (Qld) s 433. Intention is not an element of the offence.
   - In Western Australia, the offence requires knowledge on the part of the receiver that the property had been obtained by means of an indictable offence: Code (WA) s 414. This requirement for knowledge amounts to a requirement for an intention to receive property obtained by the commission of an indictable offence: see 4.11–4.12 on the concept of intention. Recklessness with respect to the origins of the property will not suffice. The intoxication defence would be available on the approach taken by the majority in *Caldwell*, yet it would not be available on a literal reading of 'an intention to cause a specific result'.

18.20 The problem presented by the offence of receiving stolen property in Western Australia also arises in relation to the offence of incest under the Codes s 222 (Qld)/s 329 (WA). This offence requires knowledge of the familial relationship to the sexual partner. In *O'Regan* (18.24C), the court held that incest is not an offence involving an intention to cause a specific result. That there was no reference to the common law relating to the intoxication rules in the remarks of the court suggests that a literal interpretation was given to 'an intention to cause a specific result'. Yet, in the later case of *Kusu* (18.25C) there were some references to the common law distinction between specific and general intent.

Social policy: *O'Connor* and *Kusu*

18.21 Various rationales have been advanced for allowing evidence of intoxication to negative the mental elements of some offences but not others. None of the suggested rationales are convincing. It is difficult to escape the conclusion that making the intoxication defence available for some but not other offences is no more than a crude and somewhat arbitrary device for ensuring that a person whose intoxication leads to the accidental commission of harm will be relieved of responsibility for a particularly serious offence but will still suffer sanction following conviction for a lesser offence. If this is the rationale for the distinction, the objective would be accomplished better through the creation of some scheme of offences that specifically relate to dangerous intoxication.

Such considerations led the majority of the High Court in *O'Connor* to reject the distinction between offences of specific and general intent for the purposes of the common law and to allow relevant evidence of intoxication to be used to negative the subjective mental elements of any offence. However, in *Kusu* (18.25C), a majority of the Queensland Court of Appeal held

that the result in *O'Connor* is precluded in relation to the Codes by the express words of s 28. The view of the majority was that evidence of intoxication not amounting to unsoundness of mind can only be relevant to offences of which an intention to cause a specific result is an element.

18.22 A minority view was expressed in *Kusu* by Macrossan J: see [1981] Qd R 136 at 144–5. He drew a distinction between voluntariness and other subjective mental elements of offences. His view was that someone whose intoxication leads to conduct occurring independently of the exercise of the will always has a defence under s 23, even where the elements of the offence do not expressly include an intention to cause a specific result. On this approach, the relevance of s 28(3) (Qld)/s 28(3) (WA) would be confined to mental states such as intention which are additional to mere voluntariness. Thus, Macrossan J would read s 28 as being subject to s 23 while the majority in *Kusu* would read s 28 as qualifying s 23.

In *Cameron* (1990) 2 WAR 1, Malcolm CJ indicated some attraction for the analysis presented by Macrossan J in *Kusu*, but conceded that the weight of authority favoured the approach taken by the majority in that case. The position taken by the majority in *Kusu* also fits better with the traditional understanding of the significance of the distinction between offences of specific and general intent at common law.

Commonwealth offences

18.23 The Criminal Code (Cth) ss 8.1–8.5 introduced intoxication rules for Commonwealth offences that reflect features of both the traditional position at common law and the position after *O'Connor*.

Involuntary intoxication (that is, intoxication which was not self-induced) is a general defence if the offence can be attributed to it: s 8.5. Moreover, when the standard of the reasonable person is in issue, someone who was involuntarily intoxicated is to be measured against a reasonable person intoxicated to the same extent: ss 8.3(2), 8.4(3).

More restrictive rules apply to self-induced intoxication, defined as intoxication which was neither involuntary nor the result of 'fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force':

1. A person whose intoxication was self-induced is measured against a reasonable person who was sober: ss 8.3(1), 8.4(2).
2. Evidence of self-induced intoxication cannot be considered in determining whether an element of 'basic intent' existed: ss 8.2(1), 8.4(4). 'Basic intent' is intent with respect to physical conduct considered separately from any circumstances or consequences: ss 8.2(2), 8.4(5).
3. Evidence of self-induced intoxication can be considered in determining whether a mistake of fact was made, as long as the person had considered whether the fact existed: s 8.2(3).
4. No limitation is set on the use of evidence of self-induced intoxication in determining whether there was intention or recklessness with respect to any consequences of conduct.

Broadly, this scheme reflects the old division at common law between offences of specific intent, which permit an intoxication defence, and offences of basic intent, which do not. The principles of *O'Connor*, however, underlie the acceptance of evidence of self-induced intoxication in determining whether a mistake of fact was made.

18.24C

R v O'Regan

[1961] Qd R 78
Queensland Court of Criminal Appeal

The appellant had been convicted of the crime of incest.

Mack J:

…

It was also argued that the trial judge wrongly directed the jury that voluntary drunkenness was not a defence to a charge of incest.

There was evidence that the appellant had voluntarily consumed intoxicating liquor but there was no evidence of insanity and the appellant's counsel at the trial expressly disclaimed insanity as a defence.

The provisions of s 27 of the Criminal Code which define insanity do not apply to voluntary drunkenness (see s 28) unless, of course, the voluntary intoxication amounts to insanity, eg delirium tremens, in which case insanity could be successfully raised as a defence. With regard to involuntary intoxication the provisions of s 27 are applied, as if the person were insane.

Griffith CJ said in *Widgee Shire Council v Bonney* ([1907] 4 CLR 977 at 981) that 'under the criminal law of Queensland as defined in the Criminal Code, it is never necessary to have recourse to the old doctrine of *mens rea*', and it has never been the practice so far as I am aware to instruct juries in cases of incest or rape that those crimes involve an intent and that a person would not be guilty of those offences if it appeared from the evidence that his voluntary intoxication although falling short of insanity was such that he was incapable of forming an intent to commit the crime. The provision in the Code is contained in the third paragraph of s 28: 'When an intention to cause a specific result is an element of the offence, intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention existed.'

It is clear that this provision applies in such cases as wilful murder which is defined as a killing with an intent to kill, murder, killing with intent to do bodily harm, and stealing, the definition of which involves an intent to deprive permanently the owner of his property, but does it apply to incest? It applies to all 'attempts' including attempted incest.

I am aware of what was termed in *R v Hornbuckle* ([1945] VLR 281, 286) an anomaly if voluntary intoxication falling short of insanity was held to be irrelevant on a charge of rape but relevant on a charge of attempted rape …

'Incest' is defined in Section 222 of the Code:

> Any person who carnally knows a woman or girl who is, to his knowledge, his daughter or other lineal descendant, or his sister, or his mother, is guilty of a crime.

It was not disputed, indeed it was admitted, that at all times prior to Sunday morning the appellant knew that Frances was his daughter, and his defence on this aspect must be that he was so voluntarily drunk that he did not recollect that the child was his daughter at the material time on Sunday. In my opinion, as no question of mistake of fact arose, there could be no defence on this ground. Knowledge does not include an intent to cause a specific result, and failure to remember on a particular occasion does not negative knowledge.

…

A distinction thus appears to be drawn as to the effect of drunkenness where the intention is one of the 'constituent elements' of the crime, ie intention to kill, intention

to do grievous bodily harm and manslaughter by negligence where intention is not a constituent element.

…

If voluntary drunkenness is not a defence to manslaughter by negligence it is difficult to see how it could be a defence to a charge of bigamy or incest.

I am of opinion that s 28 was introduced to allow voluntary drunkenness to be regarded as a 'defence' where the intent to cause a specific result is stated as an element of the charge or is an element of the charge as defined by the Code, eg stealing.

It does not seem to me to have any operation where the charge is incest …

[The conviction was affirmed. **Hanger J**, in a separate judgment, held that the jury had, in fact, been satisfied on the question of knowledge, without specifically indicating whether or not the evidence of intoxication should have been considered in relation to that question. **Townley J** held the evidence of intoxication was not to be considered in relation to the question of knowledge because incest is not an offence involving an intention to cause a specific result. He dismissed the ground of appeal relating to lack of knowledge. He dissented, however, in allowing the appeal on another ground.]

18.25C R v Kusu

[1981] Qd R 136
Queensland Court of Criminal Appeal

W B Campbell J: This is a case stated pursuant to s 668B of the Criminal Code reserving certain questions of law for consideration by the Court of Criminal Appeal. The accused had pleaded not guilty to a charge under s 419 of the Code of unlawfully assaulting a person in the latter's dwelling house and then breaking out of the dwelling house in the night time. Counsel for the accused had sought a ruling from the learned trial judge that he be at liberty to cross-examine and adduce evidence to establish that his client was in a state of self-induced intoxication resulting from the consumption of alcohol such that there was at least a reasonable doubt whether the acts charged had occurred independently of the exercise of his will. The case states that two records of interview, one in respect of the offence charged and the other in respect of an alleged subsequent offence, which was with the indictment, are consistent with his having been in a state of self-induced intoxication such that he had no memory of the acts charged. His Honour upheld the Crown's objection that such evidence was irrelevant to the charge. The trial took place on September 15, 1980 and the accused was found guilty by the jury, but before verdict his counsel applied to have reserved for this court the first question in the case. The second question has been included in the discretion of the trial judge. The questions for our consideration are:

(i) Is a jury entitled to have regard to intoxication, whether self-induced or not, in considering an offence which does not involve the allegation of an intention to cause a specified result?

(ii) Is it a defence to the indictment referred to in paragraph 1 that the prisoner was, at the relevant time, in a state of self-induced intoxication resulting from the consumption of alcohol such that the acts charged occurred independently of the exercise of his will?

The application by the accused's counsel leading to the statement of this case was undoubtedly brought about by the decision of the High Court in *R v O'Connor* (1980) 54 ALJR 349, which was delivered on June 20, 1980, some three months prior to the trial. In *O'Connor* the court (by a majority, Barwick CJ, Stephen, Murphy and Aickin JJ, Gibbs, Mason and Wilson JJ dissenting) held that self-induced intoxication is relevant to the question of criminal responsibility at common law not only in relation to offences where a specific intent is an element but also to those in which a specific intent is not required to be proved. In stating that principle the majority of the court refused to follow the contrary ruling of the House of Lords in *Director of Public Prosecutions v Majewski* [1977] AC 433. The answers to the questions posed for this court depend on whether or not the ruling in *O'Connor* is applicable to the Criminal Code.

...

It has always been accepted in this state that self-induced intoxication does not relieve a person from responsibility for a criminal act. In *R v Corbett* [1903] St R Qd 246, Griffith CJ, in directing a jury on a charge of manslaughter said, at 249:

> It was suggested by counsel that if the prisoner was so intoxicated that he did not know what he was doing at the time, he is not criminally responsible for Gillespie's death. That is not the law, and never was the law. Drunkenness is never a defence unless it amounts to unsoundness of mind. No one can escape liability merely because he is intoxicated. If you come to the conclusion that the prisoner was so intoxicated that his mind was absolutely disordered, and he was thus deprived of capacity to understand what he was doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act with which he is charged, you may be able to find him not guilty on the ground of insanity. But if he intentionally caused himself to become intoxicated, that defence is not open to him. It is however, a defence if his mind was so disordered as to be unsound within the meaning of s 27 of the Criminal Code, and if this condition was caused by intoxication which arose without any intention on his part.

This construction of s 28 of the Code has always been followed in Queensland: see *Dearnley v R* [1947] St R Qd 51, at 68; *R v Smith* [1949] St R Qd 126 at 130–2; *R v O'Regan* [1961] Qd R 78, at 85–6 and 88–90. I add that it seems to me that courts in this state have always understood that s 28 made no departure from the position at common law relating to exculpation from criminal liability by reason of intoxication: see *R v Smith* (*supra* at 131). For the common law as understood at that time see the charge to the jury by Stephen J in *R v Doherty* (1887) 16 Cox CC 306, at 308.

...

However, the common law in that regard as now expressed in the decision of the majority of the court in *O'Connor* may perhaps be summed up by saying that each justice considered that in every case of common law crime there is an element of voluntariness or actual intent — a basic or general intent — for the doing of the physical act involved in the crime, as distinct from certain crimes which also involve a specific or special intent.

In *O'Connor*, Wilson J said, at 374:

> The problem before us is relevant only to those states which continue to rely, at least in part, on the common law for the principles of criminal responsibility. For Queensland, Western Australia and Tasmania the question is determined by the Criminal Codes which have been enacted in those states.

And later in his reasons, Wilson J said, at 378:

> … The Majewski doctrine is comparable to the law contained in the Criminal Codes of Queensland and Western Australia for virtually the whole of this century …

The clear words in s 28 leave me in no doubt that the legislature intended in that section to cover the whole field of liability for criminal acts committed by a person whose mind was disordered by intoxication or stupefaction caused by drugs or intoxicating liquor. The sections of the Code in Ch V must be read together. …

…

The explicit provisions in ss 23, 26, 27 and 28 of the Code as they have been interpreted over the past eight decades, with which interpretation I respectfully agree, support the following propositions as to the law in Queensland:

(1) intoxication is no defence to a charge which does not involve a specific intent unless it amounts to unsoundness of mind within s 27;
(2) a person with unsoundness — disease or disorder — of mind due to intoxication may have a defence of want of criminal responsibility because of s 28 (applying s 27) and not because of s 23;
(3) self-induced — intentional or voluntary — intoxication will not give rise to a defence to a charge which does not involve a specific intent based on either s 23 or s 28;
(4) intoxication, whether unintentional or intentional, not amounting to unsoundness of mind may be regarded as a defence by virtue of s 28 where an intent to cause a specific result is an element of the offence charged;
(5) a successful defence of intoxication amounting to unsoundness of mind at the material time to a charge which does not involve a specific intent will result in a verdict of not guilty because of unsoundness of mind.

It was submitted to us by counsel for the accused that the words in the Code, because it is a statute, should be construed in the light of changing social circumstances and that courts, in so construing it, should look at refinements in the development of criminal responsibility at common law. However, any such developments — analogous perhaps to a change in the policy of the law to effect a particular legal result — can only be taken into account when the particular statute is not explicit. *O'Connor* is not an authority on the construction of the Criminal Code, and I do not consider that it is relevant to the law in Queensland as laid down in the Code.

I turn then to answer the questions asked. I think it plain that evidence of the intoxication of an accused, whether intentional or unintentional, may often be relevant where a person is being tried for an offence which does not involve a specific intent. With respect I agree with what Gibbs J said in *O'Connor* at 360:

> It does not follow from the decision in *R v Majewski* that evidence of the intoxicated condition of the accused must be rejected as irrelevant. That would be absurd; the evidence is admissible as one of the surrounding circumstances, and in some cases it will be relevant to other questions in issue.

An accused's state of intoxication is often relevant, for example, to the state of his memory of events; it may also be relevant to explain his conduct, eg in the present case to explain his lack of memory as recorded in the record of interview, and it may have a considerable

bearing on such a matter as the sentence or treatment of offenders. Therefore, I would answer question (i) in the affirmative. I hasten to add that in so answering this question, I am not to be taken as disagreeing with his Honour's ruling in excluding the evidence of intoxication in this case. The evidence here was sought to be adduced for the purpose of establishing that the acts charged had occurred independently of his will and his Honour rightly excluded such evidence on that ground. The evidence was that the accused was in a state of intoxication which was self-induced so that he could not rely on s 28 so as to make applicable the insanity provisions of s 27. I would answer question (ii) in the negative.

The questions should be answered:

Question (i): Yes, but self-induced intoxication cannot be relied upon by an accused to absolve him from criminal responsibility for an offence which does not involve an element of intention to cause a specific result.

Question (ii): No.

I am authorised by my brother Matthews to say that he agrees that the questions should be answered as I have indicated and that he agrees with my reasons.

[**Macrossan J** delivered a separate judgment to the effect that the answer to both questions should be 'yes'.]

Participation in Offences

PART 4

Inchoate Liability

CHAPTER 19

INCHOATE LIABILITY IN CRIMINAL LAW

19.1 'Inchoate' means 'unformed; just begun; incipient'. Inchoate offences criminalise preliminary steps taken in the execution of some criminal design. There are three basic forms of inchoate liability both at common law and under the Criminal Codes of Queensland (Code (Qld)) and Western Australia (Code (WA)) (the Codes):

1. Attempting to commit an offence: Codes ss 4, 535–538 (Qld)/ss 4, 552 (WA); the Criminal Code (Cth) s 11.1.
2. Attempting to procure another person to commit an offence (in Queensland and Western Australia) or inciting an uncommitted offence (in Western Australia and under the Commonwealth): Codes s 539 (Qld)/ss 553–556 (WA); Criminal Code (Cth) s 11.4;
3. Conspiring with another person to commit an offence: Codes ss 541–543 (Qld)/ ss 558 and 560 (WA); Criminal Code (Cth) s 11.5.

This chapter focuses on attempt and conspiracy. The concepts of 'procuring' and 'counselling' (a synonym for 'inciting') are relevant to offences that have been committed as well as those in contemplation and are examined in the next chapter: **20.18–20.19**.

19.2 In addition to these inchoate offences, there are two other kinds of offences that deal with steps taken towards the commission of some harm rather than with the occurrence of the harm itself. Some offences focus on dangerous conduct where there is a risk of harm being caused, even though the actor may never have considered the danger. Examples are provided by offences relating to driving while intoxicated under the Transport Operations (Road Use Management) Act 1995 (Qld) s 79 and Road Traffic Act 1974 (WA) ss 63–64. Other offences focus on an intention to cause some harm that is ulterior to the conduct elements of the offence. Examples are offences relating to entering or being in premises with intent to commit indictable offences: Codes ss 419, 421 (Qld)/s 401 (WA). Some general principles respecting inchoate liability are equally applicable to these offences of ulterior intent. See, for example, *Cogley v R* [1989] VR 799 where general principles respecting liability for attempting the impossible (see **19.34–19.38**) were applied to an offence of assault with intent to rape.

LIABILITY FOR ATTEMPT

19.3 The scope of liability for attempts varies between jurisdictions:

- In Queensland, it is an offence to attempt to commit an indictable offence, but generally not an offence to attempt to commit a simple offence: Code (Qld) s 535. A particular example of liability for attempting a simple offence can be found under the Wagering Act 1998 (Qld) s 290.
- The scope of liability for attempts is broader in Western Australia. It is an offence to attempt to commit either an indictable offence or a simple offence: Code (WA) ss 552, 555A.
- General liability for attempts extends to all levels of Commonwealth offences: Criminal Code (Cth) s 11.1(1).

The restricted scope of liability for attempts in Queensland reflects the history of the law of attempts. It was not until the eighteenth century that the common law accepted any general doctrine of liability for attempts: *R v Scofield* (1784) Cald Mag Cas 397. The common law development was confined to indictable offences and statutory innovations have been required for extensions to summary offences.

19.4 There are substantial differences between jurisdictions regarding the penalties prescribed for attempted offences:

- The Codes s 536 (Qld)/s 552 (WA) establish a general principle for determining the penalty in the case of an attempt to commit an indictable offence, the prescribed penalty being half the maximum penalty for the completed offence (with further reductions in Western Australia for an indictable offence tried summarily). In the case of a completed offence with a penalty of life imprisonment, the maximum penalty for an attempt is generally 14 years.
- In the case of an attempt to commit a simple offence in Western Australia, the maximum penalty prescribed is the same as for a completed offence: Code (WA) s 555A(1).
- Under the Criminal Code (Cth), the maximum penalty prescribed for an attempt is generally the same as that for a completed offence: s 11.1(1).

19.5 There are specific provisions in the Codes establishing liability for some attempted offences on a different basis from the general scheme for indictable offences. Examples include:

- *Murder* — the offence of attempted murder is separately constituted under the Codes s 306 (Qld)/s 283 (WA), with a maximum penalty of life imprisonment.
- *Drugs* — under the Drugs Misuse Act 1986 (Qld) s 117(1) and the Misuse of Drugs Act 1981 (WA) s 33(1), a person attempting an offence is deemed to have committed the intended offence, with liability to the same penalty as for the intended offence.

DEFINITIONS OF ATTEMPT

19.6 The Codes provide definitions of attempt: s 4. These definitions were identical until 1987 when the Western Australian definition was amended to adopt some features of the

definition used in the English Criminal Attempts Act 1981. That definition is also reflected in the Criminal Code (Cth) s 11.1.

19.7 The definition in Code (Qld) s 4(1) contains three elements:

1. an intention to commit an offence;
2. the commencement of the execution of the intention 'by means adapted to its fulfilment'; and
3. the manifestation of the intention by some overt act.

There appears to be an overlap between the requirement in the second element that the intention be put into execution and the requirement of the third element that the intention be manifested in an overt act. There is no express requirement for the conduct to be more than merely preparatory. However, it may be that this requirement can be read into the provision through the second element: 'by means adapted to its fulfilment'. This mysterious provision is discussed further in **19.15** and **19.37**.

19.8 The definition in Code (WA) s 4, first para contains two elements:

1. an intention to commit an offence; and
2. conduct pursuant to this intention which is more than merely 'preparatory' to the commission of the offence.

The concept of conduct going beyond mere preparation is discussed in **19.15–19.18**.

19.9 There are still common features to liability for attempts established in the Codes s 4:

1. An attempt is said to occur when the actor pursues the intention 'but does not fulfil his intention to such an extent as to commit the offence': s 4(1) (Qld)/s 4, first para (WA). It has been held that this part of the definition merely identifies the commencement of an attempt. It does not identify an element the Crown must prove: *R v Barbeler* [1977] Qd R 80. Hence, there can be a conviction for an attempt even though the complete offence has been committed. See also the Criminal Code (Cth) s 11.1(4)(b).
2. Voluntary desistance from an attempt is immaterial to liability although it may affect punishment: s 4(2) (Qld)/s 4, second para (WA).

   The Code (Qld) s 538 provides that, in a case of voluntary desistance, the maximum penalty is usually only one-half what it would otherwise have been (that is, in most cases, one-quarter of the maximum penalty for the completed offence). However, there must be a choice to abandon the attempt without its fulfilment being prevented by any other factors. The burden lies on the accused to prove the fact of voluntary desistance. For completed offences with maximum penalties of life imprisonment, the maximum penalty for a desisted attempt remains at 14 years' imprisonment.
3. It is immaterial that it is impossible in fact to complete the offence: s 4(3) (Qld)/s 4, third para (WA). There is a similar rule in the Criminal Code (Cth) s 11.1(4)(a). Questions about the significance of impossibility of completion can arise in relation to any form of inchoate or ulterior liability. The general topic is discussed in **19.34–19.38**.

19.10 In *Leavitt v R* [1985] 1 Qd R 343, the court took the view that the definition of an attempt in the Code (Qld) s 4 can only apply where an attempted offence is distinguishable

from a completed offence. It does not apply where a substantive offence is cast in a mode that happens to use the term 'attempt'; thus it does not apply to the offence of attempting to strike a person with a projectile unlawfully, with any of the intents specified in the Code (Qld) s 317. For such offences, the meaning of the term 'attempt' is determined by reference to ordinary language. In *Leavitt* itself, the inapplicability of s 4 made no difference to the outcome. It was said that attempting to commit an offence involves intending to commit it, the same mental element as is required in s 4.

THE MENTAL ELEMENT IN AN ATTEMPT

19.11 The mental element of an attempted offence is determined by reference to the general law of attempts and not by reference to any mental element of the completed offence. As the conduct involved in an attempt is often innocuous, mental elements assume special significance.

The Codes s 4 require an intention to commit an offence before there can be an attempt. See also the Criminal Code (Cth) s 11.1(3). A similar intention is required at common law: *Giorgianni v R* (1985) 156 CLR 473 at 506; 58 ALR 641 at 665. Moreover, in *Leavitt* it was held that, as a matter of ordinary language, the notion of attempting to achieve a result involves intending to achieve it. The court in *Leavitt* was explicit in its view that states of mind such as contemplating the possibility or even the likelihood of the result are not sufficient.

An attempt must therefore be made either with the purpose of bringing about all elements of the completed offence or with the knowledge that these elements will occur: see **4.11** on the concept of intention.

19.12 It is generally immaterial to liability for attempts that some state of mind other than intention would suffice for the completed offence. For example, attempted murder always requires intention to kill, even though some other states of mind may suffice for the completed offence of murder: see, for example, *Whybrow* (1951) 35 Cr App R 141; *Haas* [1964] Tas SR 1; *Cutter v R* [1997] HCA 7; 143 ALR 498. Similarly, it has been held that the offence of attempted rape requires an intention to have sexual intercourse without consent, so that a mistaken belief in consent is a good defence whether or not the belief is reasonable: *Attorney-General's Reference No 1 of 1977* [1979] WAR 45 at **6.24C**. In contrast, under the Codes s 24 a mistaken belief in consent has to be reasonable before it can provide a defence to the completed offence of rape: see **6.17–6.19**.

19.13 In Queensland, there is an exception with respect to attempted offences relating to dangerous drugs. The Drugs Misuse Act 1986 (Qld) s 117(1) deems a person who attempts to commit a drugs offence to be guilty of 'the *intended* crime' (emphasis added). However, intention is not required for completed drugs offences and, although the defence of honest and reasonable mistake of fact under Code s 24 may be available, the Drugs Misuse Act 1986 (Qld) 129(1)(d) provides that the defence is excluded unless the accused proves that such a mistake was made. In *Tabe v R* [2005] HCA 59; 225 CLR 418; 221 ALR 503 (20.37C), the issue was whether, in a case of an alleged attempt to aid the possession of drugs in a parcel, the prosecution had to prove that the accused believed that the parcel contained drugs. A majority of the High Court held that s 129(1)(d) impliedly extends to secondary and inchoate liability and that it deals comprehensively with claims of mistake of fact. The result was that the prosecution did not have to prove that the accused intended to aid the possession

of drugs. Instead, it was for the accused to prove a belief that the parcel contained something else and to prove that such a belief was reasonable. This result might be viewed as a triumph of policy over principle.

19.14 Some concern has been expressed about the consequences of requiring intention with respect to all elements of the offence of attempted rape. Suppose that a person seeking to have sexual intercourse is aware of a risk that there is no consent but does not care and is determined to proceed in any event. Intuitively it seems wrong that such a person should escape liability for attempted rape merely because the state of mind respecting lack of consent amounts to recklessness rather than intention. Two ways of dealing with this problem have been proposed:

1. In some cases at common law it has been held that, although intention is required for consequential elements of offences, recklessness (or reckless indifference) will suffice for circumstantial elements: *Evans v R* (1987) 30 A Crim R 262. But this approach does not fit easily with the express reference to intention in the Codes. Applying it to the Codes would involve giving the concept of intention a broad scope rejected in other contexts: see, for example, *R v Willmot (No 2)* [1985] 2 Qd R 413 at **4.41C**.
2. It might be argued that a person who does not care whether there is consent has a conditional intention to proceed in the event that consent is withheld. In the event that there is no consent, the intention is to proceed anyway. The concept of conditional intention has been recognised in other contexts: see, for example, *R v Zhan Yu Zhong* [2003] VSCA 56; 139 A Crim R 220, on offences of incitement. Recognising it in the law of attempts would enable the intuitively correct result to be achieved in a way consistent with the language of the Codes.

ATTEMPTS AND PREPARATORY ACTS

19.15 The common law has traditionally drawn a distinction between attempts, which attract criminal liability, and mere preparatory acts, which do not. The distinction is expressly recognised in the Code (WA) s 4, and in the Criminal Code (Cth) s 11.1(2). There is no express mention in the Code (Qld) s 4 but it is generally assumed that the distinction is implicit in this provision: see the comments of the majority in *R v De Silva* [2007] QCA 301; (2007) 176 A Crim R 238(**19.32C**); but see also the reservations of Holmes JA. The words 'by means adapted to its fulfilment' have sometimes been identified as authority for applying this distinction in Queensland.

It is ultimately a question for the jury to decide whether the line between a preparatory act and an attempt has been crossed: *Director of Public Prosecutions v Stonehouse* [1978] AC 55; [1977] 2 All ER 909; see also the Criminal Code (Cth) s 11.1(2). The trial judge can, however, withdraw the case from the jury if there is no evidence capable of amounting to an attempt in law: the judge rules that there is no case to answer.

19.16 Various tests have been proposed for distinguishing attempts from preparatory acts. None has gathered widespread support. They are either too restrictive or too vague. Following are some of the most often discussed tests:

1. The '*last step*' test — this requires the accused to have taken his or her last step towards the commission of the offence. This test is precise but has been generally rejected on

the ground that it is too restrictive: *De Silva* at 19.39C. The Codes s 4(2) (Qld)/s 4, second para (WA) expressly exclude the test by providing that it is immaterial, except as respects punishment, whether the accused has done everything necessary on his or her own part.

2. The '*on the job*' test — this requires the accused to be at the scene of the completed offence and executing the final stages of the criminal design. This test is vague and arguably too restrictive.
3. The '*proximity*' test — this requires an act which is close to the completed offence. This test is also vague.
4. The '*substantial step*' test — this requires substantial progress to have been made towards the execution of the criminal design. The test considers how much progress has been made as well as how much remains to be accomplished. Again, vagueness is a problem.
5. The '*unequivocality*' test — this requires an act that unequivocally indicates an intention to commit the offence. Any conduct which is susceptible to an innocent interpretation is excluded, even though the intention to commit the offence could be proved through other evidence such as a confession or similar fact evidence. Like the 'last step' test, the 'unequivocality' test is precise but is generally considered too restrictive. In *De Silva* (19.39C), the majority followed authority to the effect that unequivocality is a useful guide but 'not the only relevant test': at [23]. Holmes JA (at [29]), however, expressed some attraction for the test in light of the specific terms of Code s 4 (Qld).

19.17 Increasingly, judges have stressed that no single test can provide conclusive answers. Each case requires a judgment on the particular facts in light of the nature of the particular offence in issue. An example of this kind of reasoning is offered in *Deutsch v R* [1986] 2 SCR 2 at 22–3, where Le Dain J said:

> It has been frequently observed that no satisfactory general criterion has been, or can be, formulated for drawing the line between preparation and attempt, and that the application of this distinction to the facts of a particular case must be left to common sense judgment … In my opinion the distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished.

19.18 In *R v Campbell* [1991] Crim LR 268, the English Court of Appeal suggested that it was doubtful whether a person could ever commit an attempt before arriving at the place where the offence was to be executed. In that case, the accused approached to within 30 yards of the post office where the robbery was to occur, carrying an imitation gun and a threatening note. It was held that this did not constitute an attempted robbery. However, there are other cases in which an attempted offence has been committed before the accused arrived at the scene for executing the principal offence. A Canadian example is *Henderson* [1949] 2 DLR 121, where there was held to have been an attempted robbery when persons were stopped by police when driving towards a bank and carrying guns.

In *R v Aston-Brien* [2004] QCA 23, the Queensland Court of Appeal held that an attempt had not yet been committed when housebreakers were found 360 metres from their intended

target. A brief reference was made to the requirement in the Code (Qld) s 4(1) of 'means adapted' to the 'fulfilment' of the offence. There was no discussion of the meaning and range of application of this requirement. It was simply stated that the requirement had not been satisfied.

THE RELATIONSHIP BETWEEN ATTEMPTS AND COMPLETED OFFENCES

19.19 When a completed offence has been charged but an attempt is all that is proved, there can be a conviction of the latter: Codes s 583 (Qld)/s 10D (WA). The possibility of an alternative verdict must be raised at trial in a way that does not prejudice the accused: see *Quinn v R* (1991) 55 A Crim R 435 at 444–5.

There can be a conviction on a charge of an attempt even though the evidence establishes that the complete offence has been committed: *Barbeler* [1977] Qd R 80, discussed in **19.9**; see also the Criminal Code (Cth) s 11.1(4)(b).

19.20 A person cannot be convicted of both attempting an offence and actually committing the same offence: *R v Lee, Tan and Ong* (1990) 47 A Crim R 187 at 201, 209–10.

However, the same facts may constitute one offence and an attempt to commit another offence: Codes s 4(4) (Qld)/s 4 (WA). For example, a sexual attack could give rise to liability for both assault and attempted rape. The scope for multiple convictions is presumably subject to the general prohibitions on double jeopardy: **Chapter 29**.

LIABILITY FOR CONSPIRACY

19.21 The term 'conspiracy' is not defined in the Codes. A conspiracy has been interpreted as an agreement between two or more persons to achieve a common objective. Parties may enter and leave a conspiracy at different times. The word 'conspiracy' is derived from Latin and means 'to breathe together'.

19.22 The Codes establish structures of general liability for conspiracy: Codes ss 541–543A (Qld)/ss 558–560 (WA). These general schemes are supplemented by specific provisions such as those relating to conspiracy to bring false accusation under s 131 (Qld)/s 134 (WA) and conspiracy to defeat justice under s 132 (Qld)/s 135 (WA). In Queensland, other provisions include conspiracy to murder under Code (Qld) s 309 and conspiracy to defraud under s 430.

Until 1987, the two general schemes were very similar. In that year, however, the Code (WA) was amended in ways that have introduced significant differences from the Code (Qld).

19.23 The Queensland scheme covers not only conspiracies to commit offences under Code (Qld) ss 541–542 but also conspiracies to achieve certain other objects that may be regarded as injurious: ss 543–543A. Indeed, there are general provisions creating an offence to conspire to effect any unlawful purpose or to effect any lawful purpose by unlawful means: s 543(1)(f)–(g). These general provisions reflect the extended scope of criminal liability for conspiracy at common law. At common law, it is a criminal offence to conspire to commit a civil wrong such as a tort and even to commit a moral wrong which is not ordinarily actionable in civil law: *Shaw v DPP* [1962] AC 220. The rationale is that conspiracies are

an appropriate target of the criminal law on grounds other than their inchoate character. This older view of conspiracy has fallen out of favour in most jurisdictions. Moreover, the House of Lords has now decided that the categories of wrongs which can ground liability for conspiracy at common law are closed: *Director of Public Prosecutions v Withers* [1975] AC 842; [1974] 3 All ER 984. Some anchor in the precedents must, therefore, be found for any charge of conspiracy to achieve something which is not of itself an offence. These developments at common law may foreshadow a conservative approach to the interpretation of the Code (Qld) s 543(1)(f)–(g). The general maximum penalty is 7 years for crimes (s 541) and 3 years for other offences: s 542. Therefore, maximum penalties can be greater or lesser than those for corresponding completed offences.

19.24 The Western Australian scheme of liability for conspiracy is relatively straightforward. It parallels developments in several overseas jurisdictions by focusing on the inchoate character of conspiracy and removing certain anomalies. Under the Western Australia scheme, liability attaches to a person conspiring to commit either an indictable or a simple offence: Code (WA) ss 558, 560. The maximum penalty for either category of conspiracy is generally the same as for the completed offence, subject to a ceiling of 14 years.

19.25 Under the Criminal Code (Cth) s 11.5(1), the offence of conspiracy is restricted to conspiring to commit an offence punishable by more than 12 months' imprisonment or by a fine of 200 penalty units or more. A person who commits conspiracy is liable to the same penalty as for the completed offence.

ELEMENTS OF CONSPIRACY

19.26 The common law determines the elements of conspiracy under the state Codes. For Commonwealth offences, the Criminal Code (Cth) s 11.5 provides a statutory definition.

The essence of a conspiracy is an agreement between two or more persons to achieve a common objective: *Mulcahy v R* (1868) LR 3 HL 306; Criminal Code (Cth) s 11.5(2). Thus, the law of conspiracy pushes inchoate liability back towards what would usually be regarded as a mere preparatory act in the law of attempts.

Usually each party will agree to take some action towards achieving the common objective although not necessarily so. Someone can be made liable as a conspirator merely for becoming a party to an agreement, even though another person will carry out the conduct necessary to achieve the common objective.

Under the state Codes, the common law definition applies and liability arises once the agreement is made. Nothing need be done in furtherance of the agreement, although very often the existence of the conspiracy will be proved by inference from what was done: *Western Australia v Marchesi* [2005] WASCA 133 at [14]; 30 WAR 359. For Commonwealth offences, however, at least one of the parties to the agreement must have committed an overt act pursuant to it: Criminal Code (Cth) s 11.5(2)(c).

Making an agreement may well involve one of the parties attempting to procure the other to commit an offence under Codes s 539 (Qld)/s 556 (WA) or inciting the other to commit an offence under Code (WA) s 553; Criminal Code (Cth) s 11.4. However, this connection is not necessary.

19.27 An agreement to pursue a common objective cannot exist without some communication between the parties. However, it is not necessary that all conspirators be known to one another. It is possible for one person to play a central coordinating role, or for communication to pass from one person down a line through several other persons. These scenarios have sometimes been expressed through the metaphors of 'wheels' and 'chains'.

It is essential that all conspirators be committed to a common objective. Where one person operates a broad scheme with a number of participants, it must be determined whether there is one conspiracy or several. Charges which allege the wrong kind of conspiracy can fail: see, for example, *Gerakiteys v R* (1984) 153 CLR 317, discussed in *Peters* at 19.40C.

In addition, conspiracy must be distinguished from what has been called 'conscious parallelism' or 'coincidence of aims' where several persons adopt similar courses of action, in light of expectations of what the others will do, but without an agreement having been made between them. See, for example, *Atlantic Sugar Refineries Co Ltd v Attorney-General of Canada* [1980] 2 SCR 644, where a prosecution for conspiracy to illegally maintain prices failed because there was no evidence of communication between the companies concerned.

19.28 The mental or fault element in conspiracy is intention to achieve an unlawful object: *The Queen v LK* [2010] HCA 17; 241 CLR 177; 266 ALR 399, [67], [110]–[114]. See also *Peters* at 19.40C. Recklessness will not suffice. There is no liability under the law of conspiracy for consequences which are merely foreseen as possible or even probable consequences of carrying out the agreement. Quite apart from any considerations about the proper scope of inchoate liability, a requirement for intention appears to follow from the requirement for an agreement. The notion of agreement carries with it the idea of parties intending to give effect to what has been agreed.

19.29 It is unclear whether the parties to an agreement can be liable for conspiracy to commit offences upon which they have not actually agreed, but which they know are virtually certain consequences of doing what has been agreed: see 4.11 on the two forms of intention. In *Peters* (19.40C) at [69], McHugh J said:

> … although it is wrong to impute a constructive intention to defendants charged with conspiracy, they may have intended to injure or defraud a person even though that person or his or her interests were not the object of the conspiracy.

McHugh J cited the example of *R v Cooke* [1986] AC 909; 2 All ER 985, where the House of Lords held that there was a conspiracy to defraud British Rail when its employees had agreed to sell their own refreshments to passengers. That example, however, does not support the argument. The explicit objective of the conspiracy in *Cooke* may have been to make money rather than to defraud British Rail. Yet defrauding British Rail was a necessary step on the way to making money. Therefore, it was properly to be regarded as part of what had been agreed. Going beyond what has been agreed is a different matter.

A better example of liability stretching beyond the agreement is *Sokoloski v The Queen* [1977] 2 SCR 523. In that case, the Supreme Court of Canada appeared to hold that, if A sells drugs to B, knowing that B intends to sell them again, then A and B conspire with respect to the trafficking by B. The decision in *Sokoloski* has been widely criticised. It does not sit easily with the notions of 'common design', 'common purpose', 'common plot' and 'common objective' which permeate statements on the law of conspiracy.

PARTIES TO A CONSPIRACY

19.30 An agreement necessarily requires at least two parties. There can be no conspiracy if only one person intends to execute the agreement: *The Queen v LK* [2010] HCA 17, 241 CLR 177; 266 ALR 399 [63]. See also *Peters* at **19.40C**; the Criminal Code (Cth) s 11.5(2), which requires that the accused and at least one other person have intended that an offence be committed pursuant to the agreement.

If only one person intended that the agreement be put into effect, can there be a conviction of attempted conspiracy? There is conflicting authority on whether any 'doubling-up' of inchoate liability is permitted. A positive answer seems implicit in the English case of *R v Ransford* (1874) 13 Cox CC 9. Yet, a negative answer was given by Canadian courts in *R v Dungey* (1979) (2d) 51 CCC (2d) 86 and *R v Dery* 2006 SCC 53. In *Dery*, it was said that 'an attempt to conspire amounts, at best, to a risk that a risk will materialize': at [50]. The Criminal Code (Cth) expressly excludes an offence of attempted conspiracy: s 11.1(7).

19.31 The conviction of one conspirator is not precluded just because the other cannot be brought to trial. Moreover, it is possible for one co-accused to be convicted of conspiracy and the other to be acquitted, where the evidence against them differs and the divergent results are not inconsistent: *R v Darby* (1982) 148 CLR 668; 40 ALR 594; the Criminal Code (Cth) s 11.5(3)(d).

19.32 Some persons are not recognised in law as co-conspirators:

1. At common law, a corporation cannot conspire with an individual who is functioning as its sole 'directing mind': *R v McDonnell* [1966] 1 QB 233; 1 All ER 193. For Commonwealth offences, however, the Criminal Code (Cth) s 11.5(3)(b) provides generally that a person may be guilty of conspiring with a body corporate.
2. For offences that necessarily involve two persons, the exemption of one person from the completed offence impliedly also excludes that person from liability for conspiring with the other: Criminal Code (Cth) s 11.5(3)(c). Therefore, for example, the purchaser of illegal drugs does not conspire with the seller to traffic in the drugs; a young person who agrees to illegal sexual relations with an adult does not conspire to commit the adult's offence. Indeed, it would seem wrong in principle that either of the parties to such transactions can be liable for conspiracy. However, there are some cases that hold that the party who can commit the substantive offence can also commit conspiracy with the exempt party: *Duguid* (1906) 75 LJR (KBD) 470, and *Murphy and Bieneck* (1981) 60 CCC (2d) 1. This is also the position under the Criminal Code (Cth) s 11.5(4)(b).

THE RELATIONSHIP BETWEEN CONSPIRACIES AND COMPLETED OFFENCES

19.33 There is no technical bar to convictions for both conspiring to commit an offence and actually committing that offence. There can be certain advantages to the prosecution in proceeding on both fronts. In conspiracy charges there are liberal rules as to when the actions and statements of one accused are admissible as evidence against another accused: *Ahern v R* (1988) 165 CLR 87; 80 ALR 161. Joining a conspiracy charge with a charge of

the completed offence can ensure there is a conviction of at least some offence and can even increase the likelihood of a conviction of the completed offence. There is an obvious risk of prejudice even though the trial judge must instruct the jury as to what evidence is admissible on each charge. Courts everywhere have criticised and sought to discourage the practice. See the discussion in *R v Weaver* (1931) 45 CLR 321; ALR 249. See also *R v Hoar* (1981) 148 CLR 32; 37 ALR 357: the High Court criticised the use of a conspiracy charge by the prosecution instead of a charge of a substantive offence.

Queensland and the Commonwealth have now enacted safeguards:

- Prosecutions under the Code (Qld) ss 541–543 require the consent of the Attorney-General: see subs (2) of each of these sections.
- The consent of the Director of Public Prosecutions is required for a prosecution of a Commonwealth offence: Criminal Code (Cth) s 11.5(8).

IMPOSSIBILITY

19.34 Persons may attempt or conspire to do something that is impossible to achieve. There is no problem about liability as long as the objective is an offence (or another unlawful object recognised under the Code (Qld) s 543).

- The definitions of an attempt in s 4(3) (Qld)/s 4, third para (WA) provide that it is immaterial that circumstances unknown to the actor make it impossible in fact to commit the offence.
- The same rule has been recognised at common law for other forms of inchoate and ulterior liability, including conspiracy: *Director of Public Prosecutions v Nock* [1978] 2 All ER 654 (HL); *Cogley v R* [1989] VR 799 (FC).
- The Criminal Code (Cth) has a similar rule: ss 11.1(4)(a) (for attempt); 11.4(3) (for incitement); 11.5(3)(a) (for conspiracy).

19.35 There is no liability for attempting or conspiring to achieve a lawful object under the misapprehension that it is unlawful. It is sometimes said that, although there can be liability for attempting or conspiring to commit an offence which it is factually impossible to commit, there can be no liability for attempting or conspiring to commit an offence which it is legally impossible to commit: see the discussion of *Willis* (1864) 4 SCR (NSW) 59 in *R v English* (1993) 10 WAR 355 at 19.41C.

19.36 The proper scope of liability for attempting and conspiring to achieve the impossible has been controversial in the history of the common law.

There has never been any problem about liability as long as the reason why the object is impossible to achieve is simply that inefficacious means have been used, such as an inadequate dose of poison in a case of attempted murder. However, although opinion has now swung against restrictions, it has sometimes been suggested that there may be no liability where the objective cannot be achieved whatever means are adopted. There are two types of case in which this problem can occur. In the first type, the absence of some essential element of the completed offence makes it impossible to carry out a plan of action; for example, a person may possess a substance, believing it to be a drug, when it is not: see *R v Lee, Tan and Ong* (1990) 47 A Crim R 187 (WA CCA). In the second type, the plan of action is completed, but the absence of some expected incident or consequence prevents the commission of the offence;

for example, property received may be believed to have been stolen when it has not been: see *English* at 19.41C.

The weight of contemporary opinion appears to be in favour of liability even in cases of impossibility by any means. This approach has been endorsed in *Lee, Tan and Ong*, above, and in *English* at 19.41C. Moreover, the High Court has assumed that there can be an offence of attempting to possess drugs when the police had previously removed them from a parcel: *Tabe* at 20.37C.

19.37 There is no reason to derive any restrictions on the scope of liability for attempting the impossible because of the statutory language of the Code (WA) and the Criminal Code (Cth).

19.38 In Queensland, there may be a restriction on liability for attempting the impossible if the apparent scope of s 4(3) (Qld) is qualified by the provision in s 4(1) that the intention to commit the offence be put 'into execution by means adapted to its fulfilment'. The significance of this provision is uncertain. It has sometimes been viewed as authority for the introduction of the distinction between attempts and mere preparatory acts. It might also be taken as a direction that the means used for an attempt must have the basic capability of achieving the objective, even though its actual achievement may be frustrated by other factors. There may, therefore, be no liability for attempting to kill by witchcraft, or by the administration of a wholly innocuous amount of a chemical which only begins to be poisonous in larger quantities.

It would be odd for the interpretation of a provision dealing specifically with the question of impossibility to be narrowed by reference to such a loose phrase in the earlier subsection. It would be preferable for the matter to be settled through a statutory amendment.

19.39C

R v De Silva

[2007] QCA 301; 176 A Crim R 238
Queensland Court of Appeal

Jerrard JA:

1 On 20 April 2007 Mr De Silva was convicted by a jury of the offence of attempted arson of a dwelling house and of motor vehicles, committed on or about 23 December 2004, at Beenleigh. On 2 May 2007 he was sentenced to 16 months imprisonment, with the 12 days between 20 April 2007 and 2 May 2007 declared as time already served, and the learned judge set a parole release date of 20 December 2007. Mr De Silva has appealed against his conviction, but abandoned an application for leave to appeal against his sentence.

2 His counsel on the appeal, Mr P Nolan, was given leave to amend the grounds of appeal against conviction, which became that the verdict of the jury was unsafe and unsatisfactory, in that the learned trial judge had erred in law by directing the jury that there was no issue with respect to the question of whether or not there had been an attempt. The essence of the argument on appeal was that, although the point had not been raised by either counsel at the trial, and although the learned trial judge was not asked to give any directions on it, the learned judge ought to have directed the jury as to the difference between mere preparation to commit an offence, and an attempt to commit it.

The evidence

3 Mr Nolan readily conceded that the case against Mr De Silva was a strong one. At the time of the alleged offence Mr De Silva was the de facto partner of a Christine Piggott, who was the estranged wife of the complainant David Piggott. The Piggotts had three children from their marriage, and there was at that time an ongoing dispute between the Piggotts as to where and with whom the children should live. On 20 December 2004 an order had been made that they were to live with Mrs Piggott, provided that Mr De Silva did not also live in the same residence. Both Mr De Silva and Mr Piggott, and Mr Piggott's partner, a Ms Ford, and Mrs Piggott were in the Federal Magistrates Court when that order was made. Christine Piggott's evidence was that Mr De Silva was very angry at its terms. Mr De Silva had said on earlier occasions that he did not like Mr Piggott, including to the Crown witnesses Deanne Colby, and Justin Pfeiffer, as well as to Christine Piggott.

4 On 23 December 2004, on Christine Piggott's evidence, Mr De Silva and a friend of his, Nick Carter, came to her residence a little after lunch that day, and both men had been drinking alcohol. They spent most of the time in a barn near the house, in which another friend now living in Western Australia, a Darryl Skjottrup, had left some jerry cans of petrol. At some unidentified time Christine Piggott saw each of Mr De Silva and Mr Carter carrying a jerry can up from the barn, and onto the driveway of the residence. Mr De Silva and Mr Carter left that night together:

> Possibly around 10-ish, half past 9, 10ish, somewhere, maybe,[1]

and Mr De Silva was dressed as if he was going out. Christine Piggott assumed that he and Nick Carter were 'going out drinking'. When he returned home later and came into her bedroom, she noticed that he 'smelt like petrol'.[2]

5 Justin Pfeiffer gave evidence that he was a friend of Mr De Silva, and he also knew Nick Carter. Mr Pfeiffer knew from Mr De Silva that the latter 'hated' David Piggott, and gave evidence that at:

> probably around about 10 o'clock at night perhaps[3]

Mr De Silva and Nick Carter came to his residence one night in late December, and before Christmas, 2004. Mr De Silva was in high spirits. Mr Carter was not, and Mr De Silva asked Mr Pfeiffer if he could borrow a lighter, and some gloves. Mr Pfeiffer asked why Mr De Silva wanted the gloves, and Mr De Silva said:

> Don't tell anyone but we're going to burn David's house down.[4]

Mr Pfeiffer attempted to talk Mr De Silva out of that idea, and Mr Carter said that he did not want to do it, but Mr De Silva said:

> No, it's all good. He deserves it.[5]
>
> The next day Mr De Silva came to Mr Pfeiffer's office, and Mr Pfeiffer asked:
>
> Well, did you go there last night?
>
> and received the answer:
>
> Mate, you don't want to know. We almost got caught.[6]

6 David Piggott gave evidence that on 23 December 2004 he went to bed at 9.30 pm, and awoke to a smell of petrol. He thought someone was stealing it from his car, looked out a

window, and saw fluid on the ground. He ran out and into the carport area, which housed two vehicles, and then onto the road; and when he looked back at the house he saw a person crouched down behind one of the vehicles. That person ran to an awaiting car, which drove off. Mr Piggott described that person as certainly overweight, with long hair, who ran very awkwardly. He did not recognise the person as Mr De Silva from the back. He did find fluid on the floor of the carport, and a jerry can at the place where the person was seen crouching in the carport. It was identified by Mr Skjottrup as one of the jerry cans that Mr Skjottrup had left at Mr De Silva's residence. Mr Skjottrup gave evidence that he had lived for some months in a downstairs room in that house, and left there in November 2003. There was no challenge to his evidence that he had left those cans at the residence in the barn, or to his identification of the one found at Mr Piggott's house, as one which he had left in Mr De Silva's barn. The lid of the can found by Mr Piggott had been removed, and it was about one third full of petrol. There was a strong smell of petrol in Mr Piggott's carport, and petrol had been poured on the timber work.

7 The prosecution called a Mr Jason Colby, who gave evidence that when at a barbeque at Mr Colby's residence in August 2005, Mr De Silva had said that:

> He'd been having troubles with David and he went to David's place at night dressed in black, splashed petrol around his house and his car and tried to light the — light the place up, but was startled by David.

He repeated in evidence that Mr De Silva had said that:

> When he went to light the place up David came out, so he ran off and jumped in the car and took off.[7]

8 Deanne Colby gave evidence that she also heard, on the same occasion (at the barbeque) a statement by Mr De Silva to the effect that he had:

> Tried burning the — had tried burning his [Mr Piggott's] residence

and that:

> Just basically he said that he'd turned up there, he'd spread fuel around, but he obviously got disturbed and then he took off.[8]

Christine Piggott also gave evidence in cross-examination of her having asked Mr De Silva about the smell of petrol that night, and that he had said (apparently the next day) that he had worn a wig so that he would not be recognised when he went to 'David's'.[9] That evidence was challenged (as to the smell of petrol and admission of wearing a wig) on the ground that it was said for the first time at the trial.

9 Mr De Silva gave evidence, denying that he had committed the offence, that he had owned or worn a wig, that he had ever seen jerry cans at his previous residence, or that he had ever admitted being involved in the offence to anyone. That evidence was given even though neither of the Colby witnesses were actually challenged in cross-examination on their account of the conversations with them; the other witnesses were challenged in cross-examination on their accuracy or honesty. Apart from his own evidence denying any involvement, Mr De Silva called evidence from a Peter Braidotti, to the effect that Christine Piggott had asked him if he would give evidence against Mr De Silva, without specifying the evidence she wanted him to give; and Deanne Colby had remarked to Mr Braidotti, about Mr De Silva, that:

He's ruined my life, we're going to ruin his.

(Mr De Silva had previously employed Mr Colby). Likewise, Justin Pfeiffer had also asked him to:

Testify against Dominic,

in exchange for some unspecified benefit that Mr Pfeiffer could give Mr Braidotti.

10 If the jury accepted the evidence of the prosecution witnesses as truthful, there was an overwhelmingly strong case that Mr De Silva had been frustrated at the last moment when about to set fire to at least the carport and cars at Mr Piggott's residence. The defence case was that those witnesses had, for different reasons, all lied, and a number of them had revealed their hostility and duplicity to Mr Braidotti. It was certainly open to the jury to be satisfied beyond reasonable doubt that the circumstantial Crown case was a strong one, and had been made out.

The directions and the argument on appeal

…

12 Mr Nolan concentrated his submissions on the well settled distinction between an attempt to commit an offence, and mere preparation to doing so, described and discussed in *R v Chellingworth* [1954] QWN 35, *R v Edwards* [1956] QWN 16, and *R v Williams ex parte The Minister for Justice and Attorney-General* [1965] Qd R 86; and, of course, elsewhere. Section 4 does not make that distinction, in terms, but it has always been recognised in this State. Mr Nolan's written submission argued:

3. The critical point is whether the uncontradicted evidence of the home owner Mr Piggott (transcript at page 92) is sufficient for a jury to draw the conclusion that there was an attempt as opposed to simply a preparation. Unfortunately the Trial Judge was not directed to this point by either Counsel in his summing up and told the jury that there was no issue as to whether or not the conduct of the person seen running away from Mr Piggott's house amounted to an attempt. It is submitted that in reality, the jury should have been directed that they needed to look at the state of the evidence to determine whether it went far enough to warrant drawing the inference of an attempt.

The submission continued elsewhere, that the verdict was unsafe because of the lack of evidence distinguishing between an attempt and preparation.

13 The learned trial judge was not asked to rule on whether the evidence was capable of establishing an attempt, as opposed to preparation, and no attention was directed to this point at the trial. Mr Nolan did not argue that the learned judge would have been bound to rule the evidence fell short of establishing an attempt; only that the point should have been brought by the judge to the attention of the jury for their consideration. That submission makes this an appeal about an argument which counsel at the trial did not make, and which (different) counsel on the appeal submitted was available.

…

Other decisions

16 In *R v Chellingworth* [1954] QWN 35, Sheehy J ruled as a matter of law that the following circumstances amounted only to preparation to commit an offence, and not to the offence of attempted arson. Mr Chellingworth, who had previously threatened to burn a house down, was found in it at 5.30 am with a half empty tin of petrol in his possession. The walls and floor of

the house were splashed with petrol, and there was an empty tin and bags soaked with petrol. Sheehy J noted that:

> No suggestion was made that the accused had tried to apply a light of any description.
>
> His Honour read from the 31st Edition of *Archbold's Criminal Pleading, Evidence and Practice* at p 1423, to the effect that:
>
> > Mere intention to commit an offence does not constitute an attempt … some act must be proved to have been done by the prisoner immediately connected with the offence;
>
> and quoted also from p 1425 that:
>
> > The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.
>
> That learned judge was not satisfied Mr Chellingworth had gone far enough or beyond preparation. If a factual distinction between that case and this one was necessary, it could lie in the evidence of an admission to Mr Colby of being about to 'light the place up'.

17 A Mr Bradford appeared for the accused in *R v Chellingworth*, and two years later, in *R v Edwards* [1956] QWN 16, Bradford AJ heard a charge that a Mr Edwards had attempted to have carnal knowledge of a bay mare. The Crown case was that Mr Edwards had been disturbed when he was standing naked on a 44 gallon drum, facing the back of the mare, and a further description of the facts in that case, in the report in *R v Williams ex parte The Minister for Justice and Attorney-General* (at 1965 Qd R p 99) included that his penis was erect and in the vicinity of the mare's genitals, when he was interrupted. Bradford AJ held in *R v Edwards* that while there was ample evidence that Mr Edwards intended to commit the offence of having canal knowledge with the horse, the issue, whether he had manifested that intention by means adapted to its fulfilment, required that the means must be immediately connected with the fulfilment of the purpose. His Honour thought those facts did not go far enough.

18 The result in each of those cases was criticised by Stable J, with whom Wanstall J agreed, in *Reg v Williams ex parte The Minister for Justice and Attorney-General* [1965] Qd R 86. That appellant had been convicted of attempted rape, and the evidence included that the complainant, who was staying at a private hotel with a friend, had met the appellant for the first time at a nearby pool, and during the day he had attempted to kiss her. She told him to 'cut it out' and went to her room, removed her swim suit, put on a brunch coat, and went to sleep. She woke to find the appellant grabbing her upper body and when struggling with him she fell on the floor, and he then sat on her. She was naked, and he told her he was going to have her whether she liked it or not, and he pinned her down with his left arm and struck her with his right fist. He grabbed at her groin and inserted his fingers into her vagina, and she managed to scratch his face. He released her and started to cry, and she fled. On appeal, it was argued he had merely prepared himself to rape her, not attempted to. Hanger J found it unnecessary to discuss the cases on the difference between what would be mere preparation and what was an attempt, being satisfied that the facts in that matter constituted an attempt.

19 Wanstall J agreed with the reasoning of Stable J, and with the conclusion by both the other judges, that there was no substance in the argument that there had not been an attempt proved, and with Stable J's criticisms of the decisions in *R v Chellingworth* and *R v Edwards*. As to the latter case, Stable J held that it should have been left to the jury, on the facts available to the Crown. It appears Stable J was satisfied that those did establish a means immediately connected with the fulfilment of the intended purpose.

20 Likewise Stable J noted that the decision in *R v Chellingworth* had drawn criticism, and Stable J adopted as accurate the view expressed by Dr Norval Morris in (1955) Crim LR at 293, that the *actus reus* necessary to constitute an attempt is regarded as complete if the (defendant) does an act which is a step towards the commission of the specific crime, and that act cannot reasonably be regarded as having any other purpose than the commission of that specific crime. His Honour also adopted the view expressed in *R v Barker* (1924) NZGLR 393 at p 397–8, where Salmond J wrote:

> Subsequent authorities make it clear that the [last act test] so suggested and adopted is not the true one. It is now settled law that to constitute an attempt, it is not necessary that the accused should have done his best or taken the last or proximate step towards the completed offence. The suggested rule was definitely rejected by the Court of Criminal Appeal in *R v White* (1910) 2KB 124. It was held that the first administration of poison in a case of intended slow poisoning by repeated doses amounted in itself to attempted murder. It is said by the court – 'The completion of one of the series of acts intended by a man to result in killing is an attempt to murder, even though the completed act would not, unless followed by other acts, result in killing. It might be the beginning of an attempt but would nonetheless be an attempt.'
>
> Although the test adopted by Parke B has been rejected, no definite substitute for it has been formulated. All that can be definitely gathered from the authorities is that to constitute a criminal attempt, the first step along the way of criminal intent is not necessarily sufficient and the final step is not necessarily required. The dividing line between preparation and attempt is to be found somewhere between these two extremes; but as to the method by which it is determined the authorities give no clear guidance.

21 Stable J respectfully adopted that statement. I agree with Stable J that the remarks of Salmond J in *R v Barker* accord with s 4 of the *Criminal Code*, which section describes what constitutes an attempt. There was a very, perhaps unduly, strict application of the long accepted distinction between mere preparation and a completed attempt, in each of *R v Edwards* and *R v Chellingworth*. On the other hand, there was sufficient evidence of an attempt to commit arson in this matter. The jury were entitled to conclude that Mr De Silva had travelled to the premises with the intention of setting fire to them, had taken petrol with him in a jerry can previously stored at his residence, had spread the petrol around in the carport, had been disguised, and had been about to set fire to the premises when disturbed, and forced to flee. His own remarks made later to others did not suggest any abandonment of a fixed intent, but only abandonment of the attempt because he was almost caught in the act. The learned judge could have given the further direction suggested in the *Queensland Supreme and District Courts Benchbook* at Direction 68.2, and giving it would have put this appeal entirely beyond argument. The suggested direction is in these terms:

> The act relied on as constituting the attempt must be an act immediately, not merely remotely, connected with the contemplated offence. What is done must go beyond

> mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is not necessary that the defendant should have done his best or taken the last step towards the intended offence.

Directions given elsewhere

22 That suggested direction accords with the terms of the Code, with the common law as described elsewhere, and with suggested directions elsewhere. In *R v Nicholson* (1994) 76 A Crim R 187 Underwood J also referred to the judgment of Salmond J in *Barker*, and to the comments by Salmond J that:

> An act done with intent to commit to a crime is not a criminal attempt unless it is of such a nature as to be *itself* sufficient evidence of the criminal intent with which it is done.

Underwood J went on to describe what had come to be called the 'equivocality' test for an attempt, namely that the alleged acts unequivocally show an intent to commit a crime. He had concluded that that test was not the only relevant one, to determine whether or not an act or acts could constitute an attempt. His Honour cited from the remarks of Lord Diplock in *DPP v Stonehouse* [1978] AC 55 at 69 that:

> In the crime of attempt the concept of proximity between the acts of the accused and the complete offence that he intended to commit involve this kind of impression; but the impression is limited in its range. At one extreme it can be that the particular acts proved are so remote from the complete offence that no reasonable person could regard them as sufficiently proximate to conform to the definition of an attempt; at the other extreme it can be said that they are so immediately connected with it that no reasonable person could regard them as not conforming to the definition of an attempt.

23 That citation was quoted by Underwood J in *R v Nicholson* in support of His Honour's view that while the equivocality test might be a useful guide in evaluating the acts of a defendant, to see if those had passed from being the stage of mere preparation to acts that constituted an attempt, it was not the only relevant test …

…

27 … The approach taken by Stable J in *R v Williams* accords with that in other States. It is not necessary to establish that the last act possible was done before the completed offence would occur, to prove an attempt to commit that offence; and sufficient was established in this matter. It is usually necessary to instruct a jury to distinguish an attempt from preparation, but that is because the defence has usually advanced that there was only preparation, and no more.

28 On the totality of the evidence Mr De Silva was not deprived of any possible chance of acquittal by the suggested direction not having been given. It is only when a direction not asked for should have been given, that the possibility of a miscarriage of justice arises. It is then for the appellant to show that the direction both should have been given, and that it is reasonably possible that the failure to so direct the jury may have affected the verdict.[14] While the jury were not given the opportunity to consider a defence of mere preparation, that was not the defence Mr De Silva relied on. Failing to direct on the distinction between preparation and an attempt did not alert the jury to a usually relevant matter, but there is no reasonable possibility that the failure to do that may have affected the outcome in this trial, given the evidence led. The evidence relevant to establishing Mr De Silva's presence at Mr Piggott's residence included the evidence relevant to proof of his intent. It follows that directing or not directing the jury

on preparation versus an attempt would have had no significance in determining the verdict returned by the jury,[15] such was the strength of the prosecution case. The appellant has not established the necessary matters to succeed, and accordingly I would dismiss the appeal against conviction.

Holmes JA:

29 I have had the advantage of reading the reasons for judgment of Jerrard JA and am in agreement with his conclusions. I would simply add two general observations in relation to directions on attempt. The first is that the comments of Underwood J in *Nicholson* in relation to the 'equivocality' test may have less force in this State. In Tasmania, attempt is defined by s 2(1) of the *Criminal Code* as –

> an act or omission done or made with intent to commit [the] crime, and forming part of a series of events which if it were not interpreted would constitute the actual commission of the crime.

But the requirements of the s 4 definition of attempt are different, and it is difficult to see how an intention to commit a crime can be manifested by an overt act which is equivocal. To ask in terms of the test formulated by Norval Morris and adopted by Stable J in *R v Williams; Ex parte Minister for Justice & Attorney-General*,[16] whether the act 'cannot reasonably be regarded as having any other purpose than the commission of that specific crime' may therefore be more apposite in this State. I hasten to say, however, that I do not think there was anything equivocal in the spreading of petrol about the premises in this case.

30 Secondly, one starts from the position that the s 4 definition of attempt does not in its terms require that the relevant act or acts go beyond preparation. In some cases, however, there may be a live question on the evidence as to whether the suspected offender has put his 'intention [to commit an offence] into execution by means adapted to its fulfilment' and has performed an overt act manifesting that intention; or whether, despite his intention, his actions have not yet reached that point. In such a case the jury may well be assisted by a direction as to the distinction between preparation and attempt. This was not that case. The jury was instructed as to the elements of attempt; and in the absence of any issue being raised as to whether the spreading of the petrol was an overt act manifesting the intention to commit arson and the beginning of the putting of that intention into execution by means adapted to its fulfilment, there was no reason for the learned trial Judge to direct further.

[**Philippides J** agreed with **Jerrard JA**.]

Footnotes

1. At AR 28.
2. At AR 28.
3. At AR 113.
4. At AR 113.
5. At AR 114.
6. At AR 115.
7. At AR 72.
8. At AR 80.
9. At AR 56, 42 and 29.
14. *Dhanhoa v R* (2003–2004) 217 CLR 1, per McHugh and Gummow JJ at [38] and [49].
15. *Weiss v R* (2006) 223 ALR 662 at [43].
16. [1965] Qd R 86 at 100.

19.40C

Peters v R

(1998) 192 CLR 493; 151 ALR 51
High Court of Australia

For an outline of the facts in this case, see the judgment of **Toohey** and **Gaudron JJ**, at 7.52C. The following extract from the judgment of **McHugh J** deals with the general elements of conspiracy.

McHugh J:

…

55 One of the difficulties in dividing the offence of conspiracy into the traditional elements of an actus reus and a mens rea is that the agreement of the parties to pursue a common and unlawful design is traditionally regarded as the actus reus of the offence. Yet such an agreement, assuming it to be voluntary, necessarily includes a mental element.[81] At the very least, there must be an intention to enter into the agreement,[82] and the present state of the authorities suggests that there can be no conspiratorial agreement unless the accused and his or her co-conspirators also intend that the common design should be carried out.

56 Because intention is involved in the actus reus of the offence, authority in Canada,[83] England[84] and the United States[85] holds that two persons cannot be guilty of conspiracy unless both intend to make an agreement to do an unlawful act and both intend to carry it out. Thus, in *R v O'Brien*[86] the Supreme Court of Canada held that it was open to a jury to find that there was no conspiracy where two persons had agreed to kidnap another person but one of them, Tulley, swore that he never had any intention of carrying it out. A majority of the court held that the trial judge had misdirected the jury by instructing them 'that the offence was complete, if, in point of fact, the accused and Tulley did make the agreement which is charged against him, even though Tulley never at any time had any intention of carrying the agreement into effect' (emphasis omitted). Rand J said:[87]

> [A] conspiracy requires an actual intention in both parties at the moment of exchanging the words of agreement to participate in the act proposed; mere words purporting agreement without an assenting mind to the act proposed are not sufficient.

…

58 In *O'Brien*, the majority of the Supreme Court regarded the lack of any common intention to carry out the kidnapping as preventing the criminal agreement from arising, notwithstanding that both Tulley and the accused had agreed to kidnap the victim. The accused clearly intended to make an agreement to kidnap and also intended to carry it out. The elements of the offence were made out in so far as they concerned the accused's conduct and state of mind. However, the Supreme Court concluded that it was open to the jury to acquit the accused if Tulley never intended to carry out the kidnapping. Arguably, this conclusion means that Tulley's lack of intention went not merely to his mens rea but also to the making of the criminal agreement (ie, the actus reus of the offence with which both Tulley and the accused were charged). However, the conclusion is also explicable on the related ground that there must be at least two conspirators and, if Tulley was not guilty of conspiracy, neither was the accused.

59 In *R v Thomson*,[90] there was evidence on which the jury could conclude that the accused had led his alleged co-conspirators to believe that he was agreeing with them to carry out an

unlawful purpose when he had no intention of assisting in carrying out that purpose. Lawton J seems to have taken the view that the mental reservation of the accused prevented any criminal agreement on his part from coming into existence. His Lordship, after expressing his agreement with the view of the majority of the Supreme Court of Canada went on to say:[91]

> For the purposes of the law of contract, the words or conduct by which a man manifests his assent are binding on him and the law does not allow him to say that his mind did not go with his conduct. The criminal law, however, is concerned with punishing wrongdoing; the essential element in any crime, other than in the limited class of absolute offences, is a guilty mind. Evidence that the accused person acted and spoke as if he was making and had made an agreement may provide cogent evidence of a guilty mind; but it is only evidence and can be rebutted by other evidence.
>
> It follows, in my judgment, that in the crime of conspiracy there must be the element of a guilty mind.

His Lordship's agreement with the majority of the Supreme Court in *O'Brien* and his reference to the law of contract suggest that he saw the lack of intention to carry out the agreement as preventing any criminal agreement arising, notwithstanding his reference to 'a guilty mind'.

…

62 In principle, it seems correct to conclude that there is no criminal conspiracy between two people unless, at the time of making the alleged agreement, both parties intend to carry it out. This is because 'the long established rule that conspiracy requires at least two guilty parties means that as against any particular accused the actus reus will include the existence of the requisite "intent" on the part of at least one other person who has manifested agreement'.[95] If one person has not in fact conspired to do an unlawful act, it is impossible to hold that the only other party to the alleged conspiracy has nevertheless conspired to do that act. As Deane J pointed out in *Gerakiteys v R*:[96] '[t]here must be at least two parties to a conspiracy'. The required intention cannot differ as between the alleged conspirators — if an intention to do an unlawful act is not required of one party, the law cannot require it of the other party. And as Professor Sir John Smith points out[97] a 'conspiracy which no one intends to carry out is an absurdity, if not an impossibility'. In an illuminating article,[98] Dean Harno persuasively argued that Willes J's statement in *Mulcahy*[99] that a 'conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act', should perhaps have emphasised that 'conspiracy consists not merely in the agreement of two or more but in their intention'.

…

64 The decisions in *O'Brien* and *Thomson* are consistent with the view that the reason why the law punishes conspiracies is not so much because parties have made an agreement or have evil minds but because they both intend to achieve some further act that is detrimental to the welfare of society. It is the likelihood that their common intention will be translated into socially undesirable action that prompts the state to intervene. If one of the two parties has no intention of committing the socially harmful act, it lessens the chance that the act will occur. It merely lessens the chance, however, rather than eliminates it altogether. In many cases the encouragement flowing from the agreement may cause the other party to carry out that act. In my view, Dean Harno was right when he said:[102]

> Conspiracy is an inchoate crime for which the essential act is slight. It involves an intent to commit a further act. It is the commission of that act which the state desires to prevent,

> and it is with the intent to commit that act that the state is concerned. The essence of the crime thus lies in the intent.

65 The decision of this court in *Gerakiteys*[103] also emphasises that the conspirators must have a common intention to achieve the same unlawful object. The court held that the accused could not be guilty of conspiring with nine other persons to defraud a number of insurance companies because the evidence did not establish that the accused and the other persons all had a common purpose of defrauding those companies. Rather, the evidence established no more than that the accused and one other person had a common purpose of defrauding a particular company.

66 It would seem to follow from *Gerakiteys* that a person must intend to achieve the carrying out of the unlawful act and that it is not sufficient proof of a criminal conspiracy that he or she realised that the probable consequences of his or her conduct might result in the performance of the unlawful act. Indeed, the editor of Howard's *Criminal Law*[104] declares that the effect of *Gerakiteys* is that 'reckless assistance or encouragement does not amount to a conspiratorial agreement'. Similarly, Dean Harno contended that[105] '[c]riminal conspiracy involves a specific intent to commit a particular act'; and Professor Sir John Smith says[106] that '[r]ecklessness as to circumstances of the actus reus is not a sufficient mens rea on a charge of conspiracy to commit a crime even where it is a sufficient mens rea for the crime itself'. More importantly, Wilson, Deane and Dawson JJ took the same view in an obiter comment in *Giorgianni v R*.[107] Their Honours said:[108]

> For the purposes of many offences it may be true to say that if an act is done with foresight of its probable consequences, there is sufficient intent in law even if such intent may more properly be described as a form of recklessness. There are, however, offences in which it is not possible to speak of recklessness as constituting a sufficient intent. Attempt is one and *conspiracy* is another. (Emphasis added)

67 One difficult area of intention in cases of conspiracy to injure or defraud arises where relevant harm is suffered only by a person whose person or interests were not the object of the agreement. In principle, it is clear that the court cannot attribute a constructive intention to the defendants. Consequently, in *Attorney-General's Reference (No 1 of 1982)*[109] the English Court of Appeal held that the defendants could not be indicted in England where they had agreed to defraud persons in Lebanon by selling bottles of whisky on which they had fraudulently placed the labels of an English company (the 'X company'). For jurisdictional reasons,[110] they could not be indicted for conspiracy to defraud the purchasers, and, since harm to the X company was not the object of their agreement, the Court of Appeal held they had not conspired to defraud that company. Delivering the judgment of the court, Lord Lane CJ said:[111]

> It may well be that if the plan had been carried out, some damage could have resulted to the X company. But that would have been a side effect or incidental consequence of the conspiracy, and not its object. There may be many conspiracies aimed at particular victims which in their execution result in loss or damage to third parties. It would be contrary to principle, as well as being impracticable for the courts to attribute to defendants constructive intentions to defraud third parties based on what the defendants should have foreseen as probable or possible consequences. In each case to determine the object of the conspiracy, the court must see what the defendants actually agreed to do.

68 But this statement, although correct so far as it goes, overlooks the fact that a jury could find that the X company must inevitably have suffered loss or been prejudiced[112] by the conspiracy and that the defendants knew it. It is no misuse of language in that context to say that the defendants intended to cause damage to the X company. At all events, a jury could find from those facts that the defendants intended to cause harm to the X company. No doubt when a person intends to do something, ordinarily he or she acts in order to bring about the occurrence of that thing. But a person may intend to do something even though it is the last thing that he or she wishes to bring about.[113] Intention in this context is broader than a person's inclination to act to achieve a result that he or she believes is desirable. If a person does something that is virtually certain to result in another event occurring and knows that that event is certain or virtually certain to occur, for legal purposes at least he or she intends it to occur.[114] …

69 For present purposes, it is sufficient to say that, although it is wrong to impute a constructive intention to defendants charged with conspiracy, they may have intended to injure or defraud a person even though that person or his or her interests were not the object of the conspiracy. This seems to have been accepted by the House of Lords in *R v Cooke*[117] where, surprisingly, no reference was made to *Attorney-General's Reference (No 1 of 1982)*.[118] In *Cooke*, the House held that employees of the British Rail Board could properly be convicted at common law of conspiring to defraud the Board 'by making sales of food and drink not the property of the … Board to customers of the … Board and by failing to account to the … Board for the proceeds of sale thereof'.[119] The accused, who were crew members of a train with a refreshment service, had brought their own tea and coffee powder and cheese and beefburgers onto the train and sold them to passengers.

…

Footnotes

81. Note, 'Developments in the Law: Criminal Conspiracy', 72 *Harvard Law Review* 920 at 935 (1959).
82. Harno, 'Intent in Criminal Conspiracy', 89 *University of Pennsylvania Law Review* 624 at 631 (1941).
83. *R v O'Brien* [1954] SCR 666.
84. *R v Thomson* (1965) 50 Cr App R 1.
85. *Woodworth v The State* 20 Tex App 375 (1881); *Delaney v State* 51 SW 2d 485 (1932).
86. [1954] SCR 666.
87. [1954] SCR 666 at 670

…

90. (1965) 50 Cr App R 1.
91. (1965) 50 Cr App R 1 at 3–4.

…

95. Orchard, 'The Mental Element of Conspiracy', (1985) 2 *Canterbury Law Review* 353 at 357.
96. (1984) 153 CLR 317 at 334.
97. Smith and Hogan, *Criminal Law*, 8th ed (1996) at 282.
98. 'Intent in Criminal Conspiracy', 89 *University of Pennsylvania Law Review* 624 at 629–30 (1941).
99. (1868) LR 3 HL 306 at 317.

…

102. 'Intent in Criminal Conspiracy', 89 *University of Pennsylvania Law Review* 624 at 646 (1941).
103. (1984) 153 CLR 317.

104. 5th ed (1990) at 370–1.
105. 'Intent in Criminal Conspiracy', 89 *University of Pennsylvania Law Review* 624 at 635 (1941).
106. Smith and Hogan, *Criminal Law*, 8th ed (1996) at 287.
107. (1985) 156 CLR 473.
108. (1985) 156 CLR 473 at 506.
109. [1983] QB 751.
110. By the English common law, a conspiracy to commit a crime abroad is not indictable in England unless the crime is one for which an indictment would lie in England: *Board of Trade v Owen* [1957] AC 602.
111. [1983] QB 751 at 757.
112. The potential loss of sales or injury to reputation as the result of the defendants passing off a different and presumably cheaper product.
113. In *R v Moloney* [1985] AC 905 at 926, Lord Bridge of Harwich gave an example of the distinction: 'A man who, at London Airport, boards a plane which he knows to be bound for Manchester, clearly intends to travel to Manchester, even though Manchester is the last place he wants to be and his motive for boarding the plane is simply to escape pursuit.'
114. *Giorgianni v R* (1985) 156 CLR 473 at 506 and cf *The Macquarie Dictionary*, 2nd ed (1991) at 915: 'intent … 3. Law. the state of a person's mind which directs his actions towards a specific object.'
117. [1986] AC 909.
118. [1983] QB 751 at 757.
119. [1986] AC 909 at 921 per Lord Mackay of Clashfern quoting from the particulars of the offence charged.

19.41C R v English

(1993) 10 WAR 355
Western Australia Court of Criminal Appeal

Murray J: In May 1992, in the Morley Used Car Yard of Metro Motors, there was a white V8 Holden Commodore sedan, a 1990 model, valued at just under $20,000. On 22 May 1992, when the used car sales manager arrived for work at about 7.30 am, the vehicle remained in the yard, but the ignition had been tampered with and the steering lock had been broken and it was apparent that an attempt had been made to steal the vehicle. A little later the used car manager, on behalf of the owner of the motor vehicle, was approached by police officers. There is no direct evidence of the detail of what passed between them, but the upshot of their discussion was that a police undercover operation was to be mounted with the consent of the owner of the vehicle and involving a person named Maxfield, who was apparently a person involved in the attempted theft of the car. Maxfield did not give evidence at the trial.

The arrangement made was that a police officer, Detective Turner, would travel in the car with Maxfield. They were to go to what was obviously a prearranged destination which was in fact the car-park of a video hire store in Belmont. Indeed on the way, Maxfield made a telephone call to some other person. The scheme was clearly one designed to apprehend a person or persons who would have received the vehicle when stolen. It was also arranged that a female officer, Detective Lofthouse, would park in the car-park in plain clothes in a different vehicle, and would then be in close proximity to the position where the Commodore was parked.

Shortly after those two vehicles were in place, the respondent arrived in a third vehicle. The evidence was that he alighted from his car and went to the Commodore, leaning in through the driver's window. According to Turner, the respondent asked Maxfield who he was and he was introduced as a friend. The respondent then said 'So this is it? It looks all right. Has it got air cond?' There was further discussion in relation to the payment by the respondent of the sum of $1,200 to acquire the Commodore. It was arranged that $700 would be paid to Maxfield and the remaining $500 paid to a person named as 'Ralph'. When the respondent asked how long Maxfield had had the vehicle and was told that he had obtained it only that morning, the respondent commented: 'It's pretty hot property then.'

At one point the respondent retired to the rear of the Commodore and made a telephone call on a mobile telephone. His end of the conversation was overheard by Detective Lofthouse. He spoke to a person identified as 'Ralph'. Ultimately the respondent left in his car for the ostensible purpose of obtaining the money and working out where he would store the Commodore when he took delivery of it from Maxfield. While he was away an unsuccessful attempt was made to start the car. Shortly afterwards the respondent returned to the car-park and assisted to start the Commodore using jumper leads which were in fact borrowed from Detective Lofthouse. He explained to Maxfield that he wished him to keep the vehicle safe for up to 24 hours while he worked out where he would store the vehicle and the respondent was then allowed to leave.

A week later, at police invitation, he attended at the CIB Motor Squad office and spoke with a Detective Sergeant Brandham and Detective Pagels. In effect he agreed that he had been present with Maxfield in the car-park of the video store, but he said he had only been there on the one occasion because he had been asked to go and assist to start the vehicle. He denied that he had been there on two occasions. Detective Lofthouse was brought into the interview room and the respondent then admitted that he had in fact borrowed the jumper leads from her. Although he admitted that he had looked into the driver's window of the Commodore, he denied noticing any break in the mechanisms of the steering column. When he was asked why he had not taken jumper leads to the car-park himself if he had been asked to attend there to help start the Commodore, he declined to speak further with the investigating police officers. He was subsequently charged.

The respondent was ultimately presented to the District Court for trial on an indictment alleging that:

> On 22 May 1992 at Belmont [he] attempted to receive a motor vehicle the property of Metro Motors Pty Ltd which he believed to have been stolen.

He pleaded not guilty and his counsel from the outset foreshadowed that at the conclusion of the Crown case he would submit that there was no case to answer on the ground of legal impossibility in that the vehicle was not stolen …

But as to the question of impossibility, the learned trial judge upheld the submission made. After discussing relevant authorities which had been cited to him, his Honour concluded his reasons for the view that the respondent had no case to answer by holding that the crucial factor was that, even had the respondent got possession of the vehicle and completed the alleged attempt, the respondent could not have been convicted of receiving the vehicle because it would not indeed have been stolen. And so his Honour considered that the case was one of impossibility at law. Upon the taking of the directed verdict of acquittal the respondent was discharged on 29 March 1993.

The Crown appeals against the directed verdict of acquittal (Criminal Code (WA), s 688(2)(b)) on the ground that:

> His Honour erred in law in holding that the Crown had to prove that the motor vehicle was stolen whereas what the Crown had to prove was that [the respondent] believed the motor vehicle to have been stolen.

…

It is clear that in the context of this case the indictable offence by which the property was to have been obtained by the person from whom it is argued the respondent was to receive it, was stealing, the offence defined by s 371 which, again so far as material, would require that the car was established to have been fraudulently taken in that the taking was accompanied by an intent to permanently deprive the owner of the car or its property in it.

It is the case therefore, having regard to the provisions of s 414, that the act of receiving which under the section may be established by proving:

> … that the accused person has, either alone or jointly with some other person, had the thing in his possession, or has aided in concealing it or disposing of it …

is the act which constitutes the commission of that offence, if done with respect to property of a particular character, ie, in this case that it has been stolen.

The mental element involved in the completed offence of receiving is the knowledge that the property had been so obtained. But in that context 'knowledge' will include an actual belief by the accused that the property was stolen. Provided the tribunal of fact remains focused upon the actual knowledge or belief of the accused, from an evidentiary point of view, to wilfully shut one's eyes to the circumstances which would provide knowledge or affirmative belief may provide good evidence sufficient to satisfy that requirement of the law. But suspicion alone is not enough, and to wilfully shut one's eyes to avoid suspicion hardening into actual belief will be insufficient to satisfy this element of the completed offence: see generally *Schipanski* (1989) 17 NSWLR 618, a decision of the NSW Court of Criminal Appeal in relation to the statutory offence of receiving, defined in similar terms to the Code, s 414, by the Crimes Act 1900 (NSW), s 188. In a different statutory context, the distinctions between suspicion and belief or knowledge were referred to by Wickham J in *O'Brien v Reitze* [1972] WAR 152 at 154–5. Upon that basis it seems to me to have been perfectly proper that the indictment in this case should have particularised the relevant mental element in terms of the respondent's alleged belief that the motor vehicle had been stolen.

Of course it would have been impossible for the respondent to have completed the offence of receiving. He could certainly have received the motor vehicle in that he could have taken it into his possession, and upon the evidence in this case, a properly directed jury may well have concluded beyond a reasonable doubt, that he knew, in the sense that he believed, that the vehicle had been stolen. But in fact there had been no physical taking of the vehicle by a thief. It remained at all times both the property of, and in the possession of, the owner, Metro Motors Pty Ltd.

That being the case, so far as the attempt is concerned, the question becomes whether there was evidence capable of establishing that offence in circumstances where it would have been impossible to commit the completed offence of receiving, or whether it was correct to hold, as did the learned trial judge, that it was legally impossible to commit the completed offence and so legally impossible to attempt to commit it.

That is a question which has engaged the attention of the courts in a variety of factual circumstances for a considerable period. The decisions are particularly those of courts applying the common law. Commentators and the writers of legal texts have discovered many apparent inconsistencies among them. Reference should be made to the House of Lords' decision in *Haughton v Smith* [1975] AC 476; (1973) 58 Cr App R 198 [which] … involves the proposition that it is wrong to hold it to be open to convict of an attempt when the acts done by the accused person are sufficient to constitute the commission of the completed offence …

…

The statement of the law adopted in *Haughton v Smith* was that of Birkett J, giving the judgment of the court in *Percy Dalton* [(1949) 33 Cr App R 102], where he said (at 110):

> Steps on the way to the commission of what would be a crime, if the acts were completed, may amount to attempts to commit that crime, to which, unless interrupted, they would have led; but steps on the way to the doing of something, which is thereafter done, and which is no crime, cannot be regarded as attempts to commit a crime.

In *Haughton v Smith*, Lord Hailsham said of that quotation (at 497; 214):

> I would add to the last sentence a rider to the effect that equally steps on the way to do something which is thereafter not completed, but which if done would not constitute a crime cannot be indicted as attempts to commit that crime.

Lord Reid discussed what he described as the theory (at 498; 215–16):

> … that there can be an attempt to commit an offence although *in fact* that offence could not be committed. It is said that if the accused does not know the true facts but erroneously believes the facts to be such that his conduct would be an offence if the facts had been as he believes them to be, then he is guilty of an attempt to commit the offence. (Emphasis added.)

Lord Reid rejected the validity of that theory sought to be applied in the circumstances of that case where the accused had done all that was necessary or intended for the purpose of committing the offence. At 500; 218–19 his Lordship said:

> The theory confuses attempt with intent. If the facts had been as he believed they were the man would have committed a crime. He intended to commit it. But he took no step towards the commission of a crime because there was no crime to commit. I would not, however, decide the matter entirely on logical argument. The life-blood of the law is not logic but commonsense. So I would see where this theory takes us. A man lies dead. His enemy comes along and thinks he is asleep, so he stabs the corpse. The theory inevitably requires us to hold that the enemy has attempted to murder the dead man. The law may sometimes be an ass but it cannot be so asinine as that.

Shortly after that decision was given the Criminal Attempts Act 1981 (UK) was enacted. Section 1 so far as material, was in the following terms:

(1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

(2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.

The effect of that section fell for the consideration of the House of Lords in *Shivpuri* [1987] AC 1; (1986) 83 Cr App R 178. That was a case where the appellant was indicted with an attempt to have in his possession a prohibited substance, heroin, in circumstances where he had in fact received a package and had it in his possession. But the substance contained in the package was not in fact heroin, but innocent vegetable material. The appellant, according to his statements, obviously believed that what he had in the package was indeed heroin. The House of Lords overruled a previous decision, *Anderton v Ryan* [1985] AC 560; (1984) 80 Cr App R 235, to hold that the appellant had been rightly convicted of the attempt to commit the offence, having regard simply to what was described as the clear wording of the Criminal Attempts Act. Their Lordships did not describe it in such terms, but clearly they regarded the case as one of factual impossibility.

In that regard, Lord Bridge, in particular (at 23; 190–1), accepted that the enactment of the Act had changed the law as it had been stated in *Haughton v Smith*. He recognised that that had evidently been a purpose of the enactment of the statute following the Law Commission's Report No 102, entitled *Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement*. That report expressly adopted as the appropriate principle of the law, that it should be possible to commit an attempt even though the crime which it is sought to commit could not possibly be committed. In *Shivpuri* (at 11; 180), Lord Hailsham, expressing his agreement with the conclusion that the appellant had been rightly convicted, referred to his discussions with Lord Reid, by then deceased, and the fact that in his view, the law as stated in *Haughton v Smith* had required 'that Parliament should use its legislative power to rescue the law of criminal attempts from the subtleties and absurdities to which I felt that, on existing premises, it was doomed to reduce itself …' That had been achieved, his Lordship agreed, by the Criminal Attempts Act. With great diffidence I would express the view that it would be a shame indeed if the law of criminal attempt as stated in the Code should be reduced to such a state.

In Australian common law jurisdictions it would seem that the debate continued. *Britten v Alpogut* [1987] VR 929; (1986) 23 A Crim R 254 is a case like *Shivpuri* where the charge was the attempted importation of a prohibited substance thought by the defendant to be cannabis, but found ultimately not to be that substance and not in fact to be a prohibited import at all. The defendant had in fact brought the substance into the country concealed in the false bottom of a suitcase. On those facts, the Full Court of Victoria, applying the common law, concluded that the defendant should not have been acquitted, and in so doing the court declined to follow *Haughton v Smith* as stating the common law in Victoria applicable to criminal attempts. The final conclusion of Murphy J, with which Fullagar and Gobbo JJ agreed, was expressed (at 938; 264) in the following terms:

> … at common law a criminal attempt is committed if it is proven that the accused had at all material times the guilty intent to commit *a recognised crime* and it is proven that at the same time he did an act or acts (which in appropriate circumstances would include omissions) which are seen to be sufficiently proximate to the commission of the said crime and are not seen to be merely preparatory to it. The 'objective innocence' or otherwise of those acts is irrelevant. Impossibility is also irrelevant, unless it be that the so-called crime intended is not a crime known to the law, in which case a criminal attempt to commit it cannot be made. (Emphasis added.)

In similar factual circumstances the same view of the common law has been taken by the Court of Criminal Appeal of Western Australia in *Lee* (1990) 1 WAR 411; 47 A Crim R 187, the difference being that like the present case, the attempt to import the prohibited substance, heroin, was defeated by the interception of the parcel by Customs officers and the removal from it of the bulk of the material, which was in fact heroin, which it contained. Malcolm CJ (at 423–4; 198–9) considered that in Western Australia, *Britten v Alpogut* should be followed in preference to the decision of the House of Lords in *Haughton v Smith*. He considered that it mattered not in the slightest that the attempt had been prevented from being successful simply by the intervention of the Customs officers to remove prohibited material from the parcel before possession was taken of it. The same view was taken by Kennedy J (at 433; 208–9) …

…

It is difficult I think, to find examples of cases where the courts have been concerned with true impossibility of a legal character, sufficient to prevent the alleged attempt being so defined. One such case may be that of *Willis* (1864) 4 SCR (NSW) 59 in which it was held that because a boy under the age of 14 could not at law be convicted of the offence of rape, he could not be charged with and convicted of the offence of attempted rape, because to so charge him was to charge him with the attempt to commit an offence not known to the law in the way in which the age limitation was then expressed.

So far as this case is concerned, in my opinion, the position reached by the application of the relevant provisions of the Code is the same as that which would apply at common law, and incidentally, the same as that which would apply under the Criminal Attempts Act upon which the Criminal Code, s 4, in its present form, is apparently modelled. …

Of course this appeal is not about the acts allegedly done by the respondent and the point is not whether they were more than merely preparatory to the commission of the offence of receiving a stolen motor vehicle. That element of the first paragraph of s 4 and the content of the second paragraph, which goes to the question of the proximal nature of the acts alleged when they do not include that act which would be the last required of the accused for the successful commission of the offence, do not require further consideration.

But so far as the mental element of the attempt alleged is concerned, there is no doubt that there was evidence within the Crown case capable of establishing, if it was accepted by the jury, that the respondent intended to commit the offence known to the law as receiving defined by the Code, s 414, in that he intended to take possession of the motor vehicle in question then knowing, in the sense that he believed, that it had in fact been stolen by Maxfield. He intended to commit that offence, the word 'offence' being defined by the Code, s 2 in terms of an act or omission which would render the person doing it liable to punishment. It was expressly immaterial then, that by reason of the circumstance that Maxfield had not in fact, by taking the vehicle with intent to permanently deprive the owner of it, stolen it, that circumstance not being known to the respondent, it was impossible for him in fact to commit the offence.

In my opinion, within the framework of the Code itself, the law may quite appropriately be stated in terms of the passage from the judgment of Murphy J in *Britten v Alpogut* which I have quoted above. The appeal should be allowed, and the case remitted to the District Court for a new trial with appropriate consequential orders.

[**Franklyn J** in a separate judgment allowed the appeal for reasons generally similar to those of **Murray J. Scott J** dissented on the basis that what was being attempted was in an objective and absolute sense impossible.]

Secondary Liability

CHAPTER 20

PARTIES TO AN OFFENCE

20.1 A single criminal offence may be committed by one or more offenders.

An accused may have personally performed all the elements of the offence, either acting alone as a sole 'principal' or together with other 'joint principals' who have also each performed all the elements of the offence. Alternatively, joint principals acting together may perform different elements of an offence. For example, in a robbery one person may threaten violence while another person takes the property. They can both be liable as joint principals if they are working to a common design, depending on the scope of the common design and on the participants' foresight as to the possible incidents of carrying out the common design: *Gillard v R* [2003] HCA 64; (2003) 219 CLR 1; 202 ALR 202.

Sometimes, one person will perform all the elements of an offence with another person assisting or otherwise contributing as, what is variously known as, an 'accomplice', 'accessory' or 'secondary party'. The Criminal Codes of Queensland (Code (Qld)) and Western Australia (Code (WA)) (the Codes) ss 7–9 set out a framework by which a person may attract criminal liability even though that person did not necessarily perform any of the acts or omissions which constitute the offence.

20.2 Secondary parties may be convicted of the offence to which they have contributed as if they were principals and are therefore liable to the same penalties. The Codes expressly provide that a conviction for counselling or procuring entails the same consequences as a conviction for actually committing the offence: Codes s 7(3) (Qld)/s 7 (WA). The same is true by implication for the other forms of secondary participation.

20.3 The Codes recognise several forms of participation in offences.

The Codes s 7(1) (Qld)/s 7 (WA) list certain persons who are 'deemed to have taken part in committing the offence and to be guilty of the offence':

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence.

Under the Codes s 8, liability is extended to an offence that is a probable consequence of an unlawful purpose entered into by two or more people.

Under s 9, a person counselling another to commit an offence is liable for any other offence which is a probable consequence of carrying out the offence counselled.

20.4 For Commonwealth offences, the Criminal Code (Cth) s 11.2(1) recognises four basic forms of secondary participation: aiding, abetting, counselling and procuring. Section 11.2A has recently introduced 'joint commission' as a new form of participation which has no parallel in state law: see **20.25**, **20.26**.

20.5 Parties to an offence do not include 'accessories after the fact'. An accessory after the fact is someone who, after an offence has been committed, helps the offender to escape punishment: Codes s 10. An accessory after the fact is not a party to the original offence but commits a separate offence, with much reduced penalties: Codes ss 544–545 (Qld)/ s 562 (WA).

CHARGES AND VERDICTS

20.6 Secondary parties can be charged and convicted as if they were principals. For example, a woman can be charged with the rape of another woman and convicted of the offence on the basis that she assisted the male principal. Alternatively, a particular mode of secondary participation may be charged. The Codes s 7(2) (Qld)/s 7 (WA) expressly mention these alternatives with respect to counselling or procuring. The same alternatives are available for the other modes of secondary participation under common law principles.

Where the charge specifies a particular mode of participation, that mode must be proved. Where the charge does not specify a mode of participation, the prosecution can argue any mode in the alternative: see, for example, *Beck v R* (1989) 43 A Crim R 135 (**20.34C**), where the charge was murder and the prosecution argued for liability under the Codes s 7 and s 8 in the alternative. A jury that decides to convict returns a general verdict of guilty, without specifying the mode of participation. Indeed, it is possible for the jury to disagree about the mode of participation and yet be unanimous in the general verdict of guilty. Whether they should be directed that they may do so depends on whether the alternative bases of responsibility 'involve materially different issues or consequences': *R v Leivers* [1999] 1 Qd R 649 at 662.

20.7 It has sometimes been suggested that, when the prosecution alleges secondary participation, the particular mode of participation should be indicated in the charge: *DPP (Northern Ireland) v Maxwell* [1978] 3 All ER 1140 (**20.36C**) and *Giorgianni v R* (1985) 156 CLR 473 at 497; 58 ALR 641 at 658. The argument for indicating the mode of participation is that the accused should be given notice of the precise case which will be alleged. However, this can be done in ways other than by specification in the charge. Requiring a mode of participation to be specifically charged would be unfair to the prosecution in a case where it can prove participation but not a particular mode.

AIDING

20.8 The Codes recognise two forms of aiding the commission of an offence:

1. Section 7(1)(b) (Qld)/s 7(b) (WA) deems every person 'who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence' to be a party to the offence.
2. Section 7(1)(c) (Qld)/s 7(c) (WA) deems every person 'who aids another person in committing the offence' to be a party to the offence.

Paragraph (b) focuses on the purpose of aiding whereas para (c) focuses on the fact of aiding. As long as there was the purpose to enable or aid, para (b) does not require that the offence actually be enabled or aided by the conduct of a secondary party. There can be a conviction under this provision in cases where an attempt to render aid was ineffective or frustrated, if the offence was nevertheless committed. In contrast, para (c) requires the principal to have actually been aided in the commission of the offence but does not require the purpose to do so. The mental element of para (c) is discussed at **20.12**.

For Commonwealth offences, only one form of aiding is recognised, aiding an offence: Criminal Code (Cth) s 11.2(1). Section 11.2(2)(a) confirms that the offence must in fact have been aided. The aiding must have been intended: s 11.2(3).

20.9 Aiding under the Codes includes providing not only material assistance but also encouragement or support, as long as this is offered at the scene of the offence: *Beck* at 20.34C. Encouragement beforehand constitutes counselling under the Codes s 7(1)(d)(Qld)/s 7(d) (WA). On the other hand, providing material assistance beforehand amounts to aiding under s 7(1)(b) or (c) (Qld)/s 7 (b) or (c) (WA).

The explanation of this anomaly turns on the relationship between the Code provisions and their antecedents at common law. At common law, a distinction was drawn between 'aiding and abetting' at the scene of an offence and 'counselling and procuring' beforehand: *Giorgianni* (1985) 156 CLR 473 at 480–1, 500–1; 58 ALR 641 at 646–7, 660–1. Within this scheme, 'abetting' meant encouraging at the scene. However, the distinction between participating at the scene and beforehand was not consistently maintained and the term 'aiding' was commonly used to refer to the provision of material assistance at any time. The common law scheme is reflected in the Codes s 7, but no mention is made of abetting. Abetting might be subsumed either under aiding or counselling but the courts have chosen the former alternative.

'Abetting' has been retained as a separate form of participation under the Criminal Code (Cth): s 11.2(1).

20.10 Section 7 in each Code refers to aiding by omission as well as by act. However, mere passive presence during the commission of an offence does not amount to aiding. *R v Coney* (1882) 8 QBD 534, 557–8:

> It is no criminal offence to stand by, a mere passive spectator of a crime, even of murder. Non-interference to prevent a crime is not itself a crime.

The reference to omissions in s 7 should, therefore, be taken in a restrictive sense, to mean omissions which make some positive contribution to the commission of an offence. For

example, the entry of thieves into a building may be facilitated by a security guard accomplice who fails to lock a door.

In *Peterson v Fleay* [2007] WASC 230; 176 A Crim R 148 at [17], the concept of a 'positive omission' was applied to a person who allowed cannabis to be grown on land which was under his 'dominion and control'.

20.11 Although it is well-established that mere passive presence does not constitute secondary participation, the application of this rule can cause difficulty. Passive presence must be distinguished from an act of deliberately making oneself present, which can amount to aiding by encouragement. Passive presence must also be distinguished from presence under circumstances from which readiness to help if necessary would be inferred: see the discussion in *Beck* at **20.20C**. For passive presence to amount to encouragement, the prosecution would have to prove also that the person had an intention to encourage by remaining present.

20.12 There is a mental element to aiding:

- The Codes s 7(1)(b) (Qld)/s 7(b) (WA) require proof of assistance being given for the *purpose* of aiding the commission of the offence.
- Section 7(1)(c) (Qld)/s 7(c) (WA) does not expressly specify any mental element. It has nevertheless been held that 'aids' means 'knowingly aids': see *Beck* (**20.34C**) and *Jervis v R* [1993] 1 Qd R 643. In *Jervis*, the Queensland Court of Appeal suggested that 'aids' is a word which carries a mental element within itself. Other words which imply a mental element include 'assault' (see **5.12**) and 'possess': see **8.18**.
- There is also a requirement for intention in the Criminal Code (Cth) s 11.2(3).

20.13 Traditionally, it has been held that a person will not be guilty of aiding an offence if that person merely perceives the risk of aiding the commission of an offence. In other words, recklessness is an insufficient mental state for aiding. See, for example *R v Witsen* [2008] QCA 316; 189 A Crim R 147 at [51]. In *Ward v R* (1997) 19 WAR 68, it was held that there must be actual knowledge of the facts amounting to the offence in respect of which aid is being lent, as opposed to merely a suspicion that those facts exist, albeit that knowledge might be inferred from proof of exposure to the obvious.

The exclusion of recklessness is in line with the view taken of the common law of secondary participation by the High Court: *Giorgianni* (1985) 156 CLR 473 at 481–2, 487, 194–5, 500–1, 506–7; 58 ALR 641 at 646–7, 651, 656–7, 661, 665–6. The rationale for insisting on intention may be that, because the conduct of the secondary party can be relatively innocuous, a high level of culpability should be required for a conviction.

Nevertheless, the courts have not always been consistent in requiring intent. In *R v Da Costa* [2005] QCA 385, a case of aiding a wounding, it was suggested that recklessness will suffice for aiding. Douglas J said at [32]: '… the knowledge required by the participant is of the wounding of the complainant or, in my view also, the foresight that wounding may occur'.

20.14 It is sufficient that a secondary party under the Codes s 7 contemplates the kind of crime to be committed by the principal. It is not necessary that its precise details be known: *Ancuta v R* [1991] 2 Qd R 413. In that case, the accused was convicted of unlawful possession of specified motor vehicles on the basis that he had supplied compliance plates for use on stolen vehicles, even though he did not know on which specific vehicles they would be used.

20.15 It has also been held that if one person aids another (for example, as a driver), knowing that some offence is to be committed but not knowing which particular one is to be committed, the aider is liable for the commission of any of the alternatives that were actually contemplated: *Maxwell* at **20.36C**. *Maxwell* can be contrasted with *Kirby* (WACCA, Nos 92 and 93 of 1991, unreported), where the conviction of a 'getaway driver' in a bombing was quashed because the trial judge had failed to direct the jury to consider whether the bombing or some other unlawful act was within the driver's contemplation.

It has sometimes been suggested that the ruling in *Maxwell* involves imposing liability on the basis of recklessness because the secondary party in such a case is aware that the principal offence may be committed but does not know that it will be committed. This approach is reflected in the Criminal Code (Cth) by s 11.2(3), which provides that a person may have either (a) intended to aid the offence committed or (b) intended to aid some offence and been reckless with respect to the offence actually committed.

However, liability in cases like *Maxwell* can be imposed without invoking the concept of recklessness. It can be said that the secondary party in such a case has a *conditional intent* to aid whichever of the contemplated offences will actually be committed by the principal: see **19.13** on the concept of conditional intent. The same analysis can be made of a case such as *Miller v R* (1980) 32 ALR 321, where the secondary party drove the principal on a series of occasions knowing that murders would be committed on some of these occasions but not knowing on which particular occasions the murders would be committed. The driver was not only aware of the risk that his conduct might aid the commission of an offence; he was prepared to help in the event that an offence would be committed.

20.16 As a matter of general principle, the mental element of aiding attaches to all elements of the offence. Secondary participation, like attempt, has its own mental element. The mental element does not vary for each offence to reflect the mental element of the principal offence. However, there are some exceptions.

In cases where there was an intention to aid some offence but a more serious offence resulted, courts have sometimes held there to be an aiding of the more serious offence. For example, in a manslaughter case in Queensland, it was said to be sufficient for liability that there was an intention to aid an assault which happened to cause death: *R v Johnson* [2007] QCA 76 at [26], [51]. See also *R v Brown* [2007] QCA 161; 171 A Crim R 345 at [32]. This seems inconsistent with the special requirements for liability under the 'common purpose' rule in s 8, where any additional offence must be a 'probable consequence' of carrying out the common purpose. However, there is a similar rule respecting manslaughter in Canada: see *Cluett v The Queen* [1985] 2 SCR 216 at 229–30; *R v Jackson* [1993] 4 SCR 573 at [16]–[20]. See also *Giorganni* (1985) 156 CLR 473; 58 ALR 641. In issue in *Giorganni* was a New South Wales offence of culpable driving causing death. It was said to be sufficient for secondary liability to prove intention to aid just the culpable driving, because there would then be an intention to aid an unlawful act.

Under the Criminal Code (Cth) s 11.2(3)(b), liability can also extend beyond the offence which was intentionally aided. However, there must be recklessness with respect to the further offence.

20.17 The policy underlying a specific statutory provision in Queensland has been held to justify an exception to the general principle that the mental element of aiding attaches to all elements of the offence. In *Tabe v R* [2005] HCA 59; (2005) 225 CLR 418; 221 ALR 503 (20.37C), the offence in issue was possession of drugs in a parcel. As was noted in **19.13**, a

majority of the High Court held that the Drugs Misuse Act 1986 (Qld) s 129(1)(d) removed any need to prove a state of mind with respect to what was in the parcel. Section 129(1)(d) provides that a defence of honest and reasonable mistake of fact is excluded unless the accused proves that such a mistake was made. The majority of the High Court held that this provision impliedly extends to both secondary and inchoate liability and that it deals comprehensively with claims of mistake of fact.

COUNSELLING AND PROCURING

20.18 The terms 'counselling' and 'procuring' are used to describe cases where the secondary party does something which encourages or induces the principal to commit the offence rather than something which facilitates its commission. These terms are not defined in the Codes s 7(1)(d) (Qld)/s 7(d) (WA):

- 'Counselling' involves encouraging the commission of the offence by word or deed.
- 'Procuring' involves intentionally causing the commission of the offence. In *Humphry v R* [2003] WASCA 53; 138 A Crim R 417, the Western Australia Court of Criminal Appeal approved the trial judge's direction that 'procure' meant to produce by endeavour, and that one procured a thing by setting out to see that it happened. Offering material inducements for someone to commit an offence is an obvious example of procurement.

20.19 A person who induces the principal to commit the offence by means of a threat or a trick is sometimes categorised as a procurer. However, in such instances where the 'principal' may well have a defence, the doctrine of causation (see **3.14–3.19**) is sometimes used to establish direct liability for the procurement without resort to liability for secondary participation. Under the Commonwealth Code, this is called 'commission by proxy': see s 11.3.

20.20 No mental element is specified for counselling or procuring under the Codes ss 7(1)(d) (Qld)/s 7(d) (WA). It has been said that the implicit requirement that 'aiding' be done 'knowingly' (see **20.12**) applies also to counselling and procuring: see *Jervis* [1993] 1 Qd R 643. The reasoning in *Jervis* was that the conditions of liability under the various provisions of s 7 should be the same because these provisions often overlap in practice.

Under the Criminal Code (Cth), intention is expressly required for counselling or procuring an offence, although there can be further liability when the aider was reckless with respect to the commission of an additional offence: s 11.2(3).

20.21 The Codes s 9 makes it immaterial:

> … whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled, or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.

This runs together two provisions:

1. In the first limb, it is said to be immaterial whether the offence committed is the same as that counselled or a different one as long as what occurs is a probable consequence of carrying out that which is counselled. This extends the scope of liability beyond that established by the Codes s 7. For example, if X counsels Y

to assault Z and Y is a person with a record of violence, X may well be liable not only for assault but also for any bodily harm inflicted by Y. The test for liability is objective not subjective. The further offence must be a probable consequence but it need not be foreseen as such or even foreseen as a possibility by the counsellor. The meaning of 'probable' is discussed below in relation to the common purpose rule: see **20.24**.

2. In the second limb, it is said to be immaterial whether the offence is committed in the way counselled or in a different way as long as what occurs is a probable consequence of carrying out that which is counselled. The law would be the same even without this express provision: see **20.14** regarding the position on aiding. A secondary party need not foresee the precise details of the principal offence.

The Criminal Code (Cth) extends liability for counselling or procuring only on the basis of 'recklessness': s 11.2(3)(b). The possible commission of the additional offence must, thus, have been foreseen.

THE COMMON PURPOSE RULE

20.22 The Codes s 8 extends the scope of secondary liability in cases where 'two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another'. The common purpose or plan may have the parties acting as joint principals or one acting as the principal and the other as a secondary party. All participants to the common purpose are liable for an offence committed by any one of them 'of such a nature that its commission was a probable consequence of the prosecution of such purpose'.

What must be probable is the commission of an offence of some type, not the detailed manner in which the offence is committed: *The Queen v Keenan* [2009] HCA 1; 236 CLR 397; 252 ALR 198 at **20.38C**. The test is an objective test, not a subjective test: *Stuart v R* (1974) 134 CLR 426 at 442; 4 ALR 545. It is immaterial that the participants did not foresee the commission of the offence.

20.23 Liability under the Codes s 8 generally attaches when one of the parties goes beyond the common unlawful design or plan. In *The Queen v Keenan*, it was said at [102]: 'The purpose of s 8 is to extend the criminal responsibility of the parties to a common purpose to an offence other than that which was intended to be committed'. For example, where a murder is committed in the course of an armed robbery, s 8 may operate to make all the robbers liable for the murder even though murder was an unplanned consequence of the common purpose of robbery.

If the parties are within the common plan, liability for principal and secondary parties is generally determined by application of the Codes s 7. However, s 8 has sometimes been invoked where there was a plan to commit some general type of offence and a specific offence was committed in pursuance of that general plan. See, for example, *The Queen v Keenan*, where a general plan to inflict serious physical harm led to the commission of an offence of intentionally causing grievous bodily harm under Code s 317 (Qld). In such cases, it seems likely that there would also be liability under s 7.

20.24 In *Darkan v R* [2006] HCA 34; 227 CLR 373; 228 ALR 334 at [81] (**20.39C**), the High Court held that a 'probable consequence' is an outcome that 'could well have happened'.

The High Court rejected the view that a consequence would be 'probable' if it was just 'a substantial or real chance'.

It has been suggested that, where a plan contemplates contingencies, the issue is simply whether the offence was a probable consequence of carrying out the contingent plan: see *Hind & Harwood v R* (1995) 80 A Crim R 105 at 116–17, 141–2. The likelihood of the contingency eventuating can be discounted.

JOINT COMMISSION IN COMMONWEALTH OFFENCES

20.25 The Criminal Code (Cth) does not contain a 'common purpose' rule, based on acting in conjunction with another person, as in the state Codes.

The Code (Cth) s 11.2A has a form of participation in offences, called 'joint commission', based on agreement to commit an offence. A person who is a party to the agreement may become liable even though there is no personal involvement in putting it into effect. Section 11.2A(7)(b) expressly provides that there may be guilt even though 'the person was not present when any of the conduct constituting the physical elements of the offence was engaged in'. Joint commission under Commonwealth law is therefore distinguishable from the traditional doctrine of joint-principalship, which applies where persons working together perform different elements of an offence.

Liability for joint commission draws on the doctrine of 'joint criminal enterprise liability' in international criminal law, which has been developed by the International Criminal Tribunals for the former Yugoslavia and for Rwanda.

20.26 Under s 11.2A(1), a person who is a party to an agreement to commit an offence is liable for: (i) an offence committed in accordance with the agreement; or (ii) an offence committed in the course of carrying out the agreement. These are called 'joint offences'. The person and at least one other party to the agreement must have intended that an offence would be committed under it: s 11.2A(4). The agreement may consist of a non-verbal understanding and may be entered into at the time the joint offence was committed: s 11.2A(5).

- An offence is committed in accordance with the agreement if it is of the same type as the offence agreed to: s 11.2A(2).
- An offence is committed in the course of carrying out the agreement if the person is 'reckless' about its commission: s 11.2A(3). Recklessness under Commonwealth law requires awareness of a risk and taking the risk when this is unjustifiable under the circumstances known to the person: Code (Cth) s 5.4.

THE NON-RESPONSIBLE PRINCIPAL; THE LESSER PRINCIPAL; THE GREATER PRINCIPAL

20.27 A secondary party may be convicted even though the principal is not convicted. In some unusual circumstances, there need not even be a person who could be convicted as the principal. Cases can arise where the person who plays the role of the principal has some special defence not available to the secondary party. For example, the person who plays the role of the

principal may be insane, or there may be threats from the secondary party making the defence of compulsion or duress available to the person playing the role of the principal. The secondary party can still be liable in such cases as long as the participation amounts to procurement. The Codes expressly provide that anyone who procures another to do something which would have constituted an offence if done personally is guilty as if it had been done personally: Codes s 7(4) (Qld)/s 7 (WA); Criminal Code (Cth) s 11.3.

The terms of these provisions could also cover a case where the principal does commit some offence but the secondary party has greater culpability and, therefore, commits a more serious offence. For example, a secondary party may procure the infliction of bodily harm or death on a victim; the principal may then attack the victim; but the harm may be inflicted accidentally rather than deliberately or without intention to commit the more serious offence. The secondary party may then be convicted of an offence aggravated by the intent, while the principal commits a lesser offence.

20.28 In Queensland, there is a special provision in Code (Qld) s 304A(3) covering cases where two or more persons kill someone. It provides that the availability of a defence of diminished responsibility for one party does not prevent the others being guilty of murder.

20.29 There has been some controversy over whether the Codes ss 7–9 make it possible for a secondary party to be convicted of a lesser offence than that committed by the principal. The question would arise in a case where one person knowingly aided an attack upon a victim without realising that the principal intended to kill or to cause grievous bodily harm. If the victim died, could the person aiding be convicted of manslaughter as a secondary party even though the offence committed by the principal was murder?

- In Queensland, the question has been resolved with an affirmative answer by the introduction of Code (Qld) s 10A. Section 10A(1) deals with liability under s 7 and provides that a party may commit not only the offence committed by the principal but also 'any statutory or other alternative to that offence'. Under this provision, a secondary party may be convicted of any offence which could be an alternative verdict to a conviction of the offence committed by the principal. Alternative verdicts are specified in the Code (Qld) ss 575–589. Section 10A(2) deals with liability under the common purpose rule and simply provides that a person can be convicted of any offence which is a probable consequence of carrying out the common purpose 'regardless of what offence is proved against any other party to the common intention'.
- The position is probably the same in Western Australia, although there is no express provision in the Code (WA). In *R v Barlow* (1997) 188 CLR 1; 144 ALR 317, the High Court interpreted the references to being a party to an 'offence' to mean only the conduct elements of an offence. Reliance was placed on the definition of an offence in the Codes s 2 as an 'act or omission' which makes a person liable to punishment. In the result, the High Court held that a secondary party can be convicted of manslaughter even though the principal has committed murder. Although *Barlow* was a decision on appeal from Queensland before the Code (Qld) s 10A was enacted, it settles the interpretation of the Code (WA) ss 7–9. The position adopted in *Barlow* had previously been taken in Western Australia: *Warren v Ireland* [1987] WAR 314; *Nicolakis, Nicolakis & Franich v R* (1988) 32 A Crim R 451.

EXEMPT PARTIES

20.30 There is some uncertainty about the application of the law of secondary participation to offences involving transactions between more than one party where the express terms of the offence apply only to one of the parties: for example, the offence of supplying drugs. Is the party who is exempt from liability as a principal also exempt from liability as a secondary party? In some cases, the view has been taken that liability under the law of secondary participation would be inconsistent with the exemption from liability as a principal. Thus, in *R v Starr* [1969] QWN 23, it was held that a child was not an accomplice to the commission of an offence of incest upon herself.

In *Maroney v R* [2003] HCA 63; 216 CLR 31; 202 ALR 405, a majority of the High Court upheld the conviction of a person for procuring the supply of drugs to himself even though the offence was described in the Drugs Misuse Act 1986 (Qld) s 6 as supplying 'to another'. The appellant had, however, procured one person to supply drugs to another as a preliminary step towards on-supplying the drugs to himself and the Drugs Misuse Act (Qld) s 4 deems 'supply' to include 'any act preparatory to, or in furtherance of, or for the purpose of, any act of supply'. The conviction was upheld with respect to this earlier transaction.

WITHDRAWAL

20.31 Unlike the law of inchoate liability (see 19.9), the principles of secondary liability generally recognise defences of withdrawal from participation. In some instances, there is an express statutory recognition of withdrawal; in other instances, the courts have interpreted the Codes to provide an implicit defence of withdrawal:

- An instance of express recognition occurs in the Code (WA) s 8(2). This provides a defence of withdrawal from a common purpose, although under strict conditions that, in practice, are not easily met. The defence is available only where the withdrawal has been communicated to all other parties to the common purpose and all reasonable steps have been taken to prevent the commission of the offence: s 8(2)(b)–(c).
- Similarly, the Criminal Code (Cth) s 11.2(4) provides for withdrawal from all forms of secondary participation if involvement has been terminated and all reasonable steps have been taken to prevent commission of the offence. See also s 11.2A(6), incorporating the same conditions for withdrawal from joint commission.

20.32 In *R v Menniti* [1985] 1 Qd R 520 (20.40C), the majority took the view that certain common law principles respecting withdrawal could be considered in interpreting the scope of all forms of secondary liability. The common law has accepted an exculpatory defence of withdrawal, but subject to the requirement that the contribution must be cancelled out or, according to some looser versions, that at least the secondary party must have done everything that could have reasonably been expected to neutralise the contribution and matters must not have progressed so far that the withdrawal action was incapable of being effective. There is a discussion of the problem of withdrawal in relation to the commission of an offence through an innocent agent in *White v Ridley* (1978) 140 CLR 342; 21 ALR 661.

This general approach is readily applicable to many of the provisions of the Codes ss 7–9. For example, it can be argued that a forceful communication of withdrawal destroys any common unlawful purpose within the scope of the Code (Qld) s 8. Similarly, a material contribution may be later counterbalanced in a way which makes it inappropriate to hold that the offence has been 'aided' within the meaning of the Codes s 7(1)(c) (Qld)/s 7(c) (WA).

20.33 There is a difficulty in accepting a withdrawal as relevant in relation to the Codes s 7(1)(b) (Qld)/s 7(b) (WA), where the liability of the secondary party depends on having done or omitted something for the purpose of enabling or aiding the commission of the offence. On its face, this provision does not permit what has been done to be undone.In *Menniti*, above, however, both Thomas and Derrington JJ held that it would be more sensible to give Code (Qld) s 7(1)(b) an interpretation which would allow withdrawal to negative liability. Thomas J was prepared to accept the looser test of withdrawal at common law where the secondary party need only take such action as is reasonable at a time when withdrawal could conceivably still be effected. Derrington J left open the option of imposing the more stringent requirement that any assistance or encouragement be effectively neutralised.

20.34C **Beck v R**
(1989) 43 A Crim R 135
Queensland Court of Criminal Appeal

Macrossan CJ (**McPherson J** concurring): The Crown case was that Watts the de facto husband of the appellant Beck abducted, raped and murdered a 12-year-old school girl and that the appellant assisted him in this activity.

The appellant when first questioned by the authorities denied involvement but subsequently admitted playing a part in the abduction and rape. At her trial she pleaded guilty to these offences but pleaded not guilty to the count of murder. At the conclusion of her trial the jury found her guilty of murder and she now appeals.

A number of separate grounds are specified in the notice of appeal, but as the matter was argued it comes down to a complaint that there was no evidence to sustain a conviction or, alternatively, that no reasonable jury could have found the appellant guilty upon the evidence presented in the case. It was said that the verdict of the jury was, in the circumstances, unsafe and unsatisfactory …

The appellant when first questioned had provided a handwritten statement to the New South Wales Police (Ex 33), and shortly afterwards a further handwritten statement to the police at Noosa: Ex 18. She then answered questions in the course of an interview by the police which was set out in the form of a record of interview: Ex 20. While she was confined at the Noosa watch house, the police taped a conversation between her and her de facto husband Watts who was in the adjoining cell. While all of this evidence was before the jury, the portion which is of the greatest significance for present purposes is the contents of the record of interview, which, with the inferences which arose from it, provided the important evidence against the appellant. No challenge was made by the defence to the statements which were attributed to the appellant and put in evidence.

Broadly, in the course of the interviews which the police conducted with her, the appellant came eventually to the point of making admissions, in effect, as follows: that her de facto husband, Watts, had some tendency to violent action; he was obsessed with young girls and

the idea of sexually possessing one who could be expected to be a virgin; in the course of discussion between Watts and the appellant a plan was conceived of abducting a young girl so that Watts could rape her; the appellant because of her tie with Watts agreed to go along with this scheme; on the day of the offence a victim who appeared to them to be suitable was located riding her bicycle in a park at Noosa; this girl was forced into the car which Watts and the appellant then had; the girl was driven from the scene in that car with the appellant at the wheel and Watts engaged in restraining the girl; they drove to an isolated forest area where Watts with some elaboration sexually molested the girl and raped her; the appellant assisted Watts in a number of ways at various stages of this activity; the idea of Watts's acting in this fashion was said by the appellant to be to enable Watts to get rid of his frustrations and obsessions; the appellant claimed that throughout the period of time which has been described so far she did not know that the girl would be killed; at the conclusion of the sexual assault and rape and notwithstanding that the appellant remonstrated to an extent against Watts's further action he commenced to strangle the girl and then used a knife to kill her; the appellant although requested by Watts to assist in the killing of the girl played no physical part in that aspect; after the girl was dead, the appellant buried the girl's pants in the sand and she and Watts drove together from the scene; they were still together when first confronted by the police about a fortnight later at The Entrance in New South Wales; in the meantime they had taken steps to change their appearance and had rehearsed together a false story to be given to the authorities should they be apprehended. At the trial, the appellant's counsel admitted that the deceased girl died from multiple wounds inflicted by Watts.

The Crown case against the appellant was based upon ss 7 and 8 of the Criminal Code (Qld). Under s 7 it was said that the appellant had aided Watts to commit murder. Alternatively, under s 8 it was said that the appellant and Watts had formed a common intention to prosecute together the unlawful venture of abduction and rape and in the prosecution of it the murder was committed, it being a probable consequence of the prosecution.

Apart from putting the Crown to proof over a wider area, specific points made for the defence at the trial and on the appeal were that the appellant, in her statements, had said she did not know of any intention on Watts's part to kill the girl and that this action had not been part of the plan to which she agreed and, it was said, there was no evidence to the contrary of these assertions. Further, when Watts at the conclusion of the rape commenced to kill the girl the appellant refused to help and did not lend him any assistance and again, it was said, there was no evidence to the contrary.

The learned trial judge in his summing up directed the jury that, depending upon what they found proved against the appellant, they might find her guilty on either of the two bases — briefly, an aiding of Watts in the murder of the girl or the acting together in the implementation of an unlawful plan which had as a probable consequence the murder of the girl. The strongest attack in the argument for the appellant was made against the suggestion that there was a sufficient case in aiding. It was said that the appellant did nothing at all to help when she saw what Watts was about to do after the rape was concluded. On her own story, and there was no other evidence on this, it was said that she had no foreknowledge of any intention on his part to kill and she did nothing at all to encourage or aid him when he commenced to kill the girl. If these submissions are correct, then the verdict of the jury cannot stand, since, even if the case on s 8 was sufficient, the jury may not have accepted it and may have improperly arrived at a conclusion of guilt on a basis of aiding which was not truly open. It is appropriate to consider first the sufficiency of the case under s 7 …

The portions of the appellant's statement which the defence tended to emphasise and which have been set out above are not the whole story. The appellant at first denied involvement when questioned by the police but later admitted a part in the abduction and rape and pleaded guilty to those offences. Because of this conflict, the jury would have been entitled to act upon its awareness that the appellant was not a wholly truthful person when they came to consider the effect that they should give to the contents of her critical record of interview and, in particular, to the portions where she claimed she played no part in the killing of the girl.

There are further features which could properly have been given weight by the jury. According to the appellant, when Watts was giving vent to an expression of his desires at the time the abduction plan was being formulated, he said that he wanted to choose a young girl and he would 'like to make love to someone and know that he would be the first and last man she had' and he indicated that he wanted to be the 'first and only' man in the life of the young girl. This might seem to indicate that Watts intended that the selected victim should die. Although too much emphasis should not be given to this as a single feature and the appellant herself seemed to indicate an unawareness of a particular significance in this remark, no challenge was made to the police claim that she said that Watts had expressed himself in this fashion. The jury, having in mind other parts of the appellant's description of events, may not have accepted that she had no inkling of what was to come at the conclusion of the rape particularly since she had heard Watts express himself in this fashion. At a later stage, at the scene where the rape and the killing occurred and after the rape was completed but before any actions directed towards taking the life of the girl had been undertaken, the appellant said that she said to Watts 'Can't we just leave her go?' to which Watts replied: 'Don't be so fucking stupid. I can't trust her not to give me up.' Immediately afterwards Watts went to the girl and commenced to strangle her. The jury would be entitled to draw from the appellant's remark an indication of some foreknowledge on her part of Watt's intention to kill the girl.

The girl who was the intended victim was abducted in a Noosa park and forcibly placed in the car which the appellant and Watts were driving. Once within the car, the girl was restrained by Watts while the appellant drove. The girl's mouth was taped but her eyes were not covered. No attempt seems to have been made to shield Watts and the appellant or the car from the girl's view and the possibility of later identification. In the record of interview, the appellant conceded the possibility that the girl may have been able to identify both of her abductors. Once the victim was taken, the appellant drove the car conformably with Watts's wishes, to a lonely forest location where in a protracted and cruel episode Watts, while being assisted in matters of detail by the appellant, committed his elaborate assaults and rape upon their victim. The record of interview further discloses that when Watts commenced to strangle the girl, the dog which the appellant and Watts had at the scene became disturbed and started to bark so the appellant took the dog to the other side of the car so that she and the dog would not be so directly exposed to what was happening. The appellant said that at one stage during the despatch of the unfortunate girl, Watts called out to the appellant to come and help him but she did not go to him and turned away. Whether, if this account was true, she was simply exhibiting squeamishness or something different would have been for the jury to judge. It may be that she harboured a mixture of emotions at that time. She may have wanted the killing to proceed although she may not have had the stomach for a full participation; perhaps she simply accepted the killing without wanting it; she may have disapproved but stopped short of wishing to intervene and prevent it or she may have wanted the killing stopped but lacked the will or was afraid to interfere or express forceful opposition. All of these possibilities were for the jury to assess but if it was true, as she said, that Watts called out for her to help, the jury

might think that this revealed that Watts was continuing to view her as a potential source of assistance and this in turn might provide some insight into how she had acted up to this point on the night itself and how she had disclosed her own position and her attitude and willingness when at an earlier time, the plan had been in the course of formulation. Some further guide to her attitude and conduct at the time of the killing is provided by her admission, in effect, that she did not try to stop Watts kill the girl — she said she did not know why she did not try to stop him. She added that she did not think she could have stopped him. She had an answer when asked why Watts had killed the girl. She said that it was to get rid of the aggression from his body. Whether this was a subsequent reconstruction which had occurred to her or should be regarded as some indication that at the time Watts's acts in killing the girl were anticipated, or not altogether unexpected, was a matter for assessment. In another part, she said that she did not believe Watts was going to kill his victim.

On what has been set out so far it might be thought that there was a substantial case that the accused had been actively aiding an overall plan in which the killing of an abducted victim would occur after she had been raped. If the plan were described in terms simply that the killing might, rather than would, occur after the rape was concluded it might be thought that the case was even stronger. There was no evidence from other sources to contradict the inferences which the jury might think arose from the picture of events resulting from the matters which the appellant herself had admitted and the acceptability of the inferences would be strengthened if the jury were not disposed to accept the self-serving qualifications which the appellant had introduced into her narrative of events. Further, in their consideration of the matter, it might be thought that the jury would not have been limited to choosing between a belief that a killing, or the possibility of a killing, had been contemplated by the appellant either before the abduction occurred, or only after acts specifically directed to the killing of the victim had been put in train, or else not contemplated at all. It was open to the jury to think that, from the time the victim was seized in the Noosa park, it would have become progressively more obvious to the appellant that she was taking part with Watts in an enterprise in which the victim might, or more than might, would, at the conclusion be silenced by killing, that is, if the jury doubted that before the abduction commenced there was a completely formulated plan which involved a killing. It may be important to consider the matter from this point of view, that is in terms of the contents of the mutually agreed initial plan or alternatively the increasing likelihood, as matters proceeded, of the appellant's gaining an awareness of the outcome intended by Watts. This importance may arise for the reason that throughout the enterprise, up until the rape was concluded, the appellant was, on her own admission, assisting Watts by a number of physical actions in aid which she performed.

The degree of likelihood of initial knowledge on the appellant's part, or else the extent to which there would have been progressively a full awareness attained by her, can be assessed by considering the following features of the enterprise. There was the obsessive brooding by Watts as he considered his desires in the matter, the psychotic formulation of a plan to select and rape a young victim who, it was hoped, would be virginal; the violent abduction in circumstances where no attempt was made by the appellant and Watts to mask their identities or that of their vehicle so that, if the victim survived, the chance that they would be apprehended would be increased; the driving of the victim to an isolated spot where no interference could be anticipated and finally the protracted cruel dealing with the victim there, treating her without human consideration.

However, in the summing up it was not explicitly put to the jury for their consideration that the appellant may have actively assisted Watts in the execution of an overall plan which was to

include a killing or which was understood to include the possibility of a killing and if the jury limited their consideration of the case accordingly this would have favoured the appellant. It is clear that the jury for the purpose of deciding guilt or otherwise under s 7 were directed to consider whether the appellant had knowingly aided Watts by encouraging him in the actions which he performed in taking the life of the victim. To find the appellant guilty on this approach, the jury were told that it was necessary for them to find that the appellant had in fact encouraged Watts in these actions designed to take the girl's life and had intended to encourage him. They were certainly directed to consider what wilful encouragement there might have been at the time when, after the rape was concluded, Watts was proceeding to kill the victim. Having considered the terms of the summing up and particularly of a re-direction which was given touching upon the matter, it appears likely that the trial judge understood himself to be imposing a restriction upon the jury's consideration of the case under s 7. Still, he did not ever expressly direct the jury to exclude from their consideration of the s 7 case the possibility that at an earlier time the appellant may have been consciously engaged in active assistance of Watts in an overall plan in the course of which the killing of the victim would, or might, occur.

Early in his summing up, in discussing the characteristics of a relevant encouragement, the trial judge had referred to the necessity that the aider should know what offence was or might be committed and his Honour had certainly not restricted the broad body of the evidence to which the jury might refer in deciding whether there had been wilful encouragement. On the contrary, he had told the jury that they could consider the appellant's conduct before, during and after for the purpose of deciding whether her presence amounted to encouragement. In argument before us, no objection was made to the form of the judge's direction on s 7: the submissions were restricted to challenging the sufficiency of the case against the appellant.

Where it is a question of deciding whether positive assistance or encouragement was given and intended to be given at one particular point of an extended enterprise which may include the commission of more than one offence and there is no acceptable direct evidence to prove the intention of the alleged aider and the effect upon the alleged principal offender at that time, there may not be much practical difference between two circumstantial cases which may be described. One looks at the activity overall, including the acts of assistance of the alleged aider at different times, for the purpose of deciding the total content of the plan which was being aided, the other looks at all of the aider's conduct including his acts of assistance at other points of the total enterprise to see whether he intends and is giving support at the particular moment.

If the jury in the present trial understood themselves on the s 7 case to be restricted to a consideration of the appellant's actions, utterances and failures otherwise to act and speak at the time the killing was being carried out, they would have been adopting an approach potentially favourable to the appellant because, from one point of view, there would be involved a restriction upon the use of other evidence which had been led the tendency of which was adverse to the appellant. In a practical sense such an apparently restricted approach would be likely to make little difference to the jury's conclusion in the present case because they would still, from the form of the direction given to them, have understood themselves as free to judge the appellant's behaviour admittedly in a restricted time period but against the full background of relevant circumstances. The restricted portion of the appellant's behaviour would then take its colour and receive its interpretation from the wider sweep of the evidence. Approaching the matter in this specifically restricted fashion, there was still in my view ample evidence for the jury properly to reach a conclusion of guilt beyond reasonable doubt, that is on the assumption that this was their conclusion on this aspect of the case. Indeed the

arguments to the contrary advanced on the appellant's behalf would only have begun to have substance if attention had been exclusively given to the appellant's behaviour during the restricted period following the completion of the rape without attributing any effect to her behaviour from the wider course of events overall.

In the summing up, the jury were given the substance of the observations of Hawkins J in *Coney* (1882) 8 QBD 534 at 557–8. Intentional encouragement may come from expressions, gestures 'or actions intended to signify approval'. 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 on 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. The fortuitous and passive presence of a mere spectator can be an irrelevance so far as an active offender is concerned. But, on the other hand, 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 will be for the jury to assess. Proof of guilt of the crime of aiding will not ordinarily be established by mere presence if no tell-tale acts are performed by the alleged aider but the intention behind and the effect of the presence of the additional person at the scene may be established by other evidence from which it is possible to say that a case of intentional encouragement or support of the principal offender is made out.

Attention has been drawn to the difference in the language adopted in the subsections of s 7 for example by Philp J in *Solomon* [1959] Qd R 123 at 128.

The intention involved in the criminal activity referred to in s 7(b) [now s 7(1)(b)] emerges from the use of the phrase 'act for the purpose of …'. Similar express words are absent from s 7(c) [now s 7(1)(c)] but as Philp J observed it is hardly possible to aid the commission of an offence without awareness of the offence which is (or might be) committed. From the different points of view adopted in each, the two subsections widen the field which either alone might cover although there can be common ground between them. It is notable that just as s 7(b) is not expressed in such terms as 'does any act which has the effect of enabling or aiding another person to commit the offence', so s 7(c) is not expressed in terms 'does any act which has the effect of aiding any person in committing the offence'. If s 7(c) were so expressed it would catch a lot of innocent people in its net, for example, the taxi driver who innocently drives the passenger part of the way to the place where a crime will be committed by him. For this reason it is obvious enough that 'aids' in subs (c) means 'knowingly aids' and this is the way it has been interpreted in the cases: per Philp J in *Solomon* and per Matthews J in *Wylie Payne and Harper* (unreported, Court of Appeal, Qld, Matthews J, Nos 27 and 28 of 1977).

It is not possible to be an aider through an act which unwittingly provides some assistance to the offender in the commission of the offence and it is not possible to be an aider, whatever the intention, unless support for the commission of the offence is actually provided. In some cases (see *Wylie Payne and Harper; Kenniff* [1903] St R Qd 17 at 43 and *Clarkson* (1971) 35 Cr App R 445) where positive intervening acts in support of the commission of the offence by the principal offender may not have occurred it has been natural to speak of encouragement and this will often be an appropriate word to convey, in the absence of direct physical involvement, the relevant active element in the aiding which has taken place. It is not, however, the word which the statute uses and sometimes it may not be an appropriate word in cases of aiding which occur where the aider stops short of active intervention. Encouragement may have a sense of active incitement which will not always be appropriate. It is possible, after all, to aid someone in the commission of an offence while harbouring feelings

of disapproval of the offence and of the conduct involved in it. This form of aiding could occur because of the strong call of a bond felt by the aider with the principal actor who, for his part, may need no encouragement and is determined, anyhow, to attempt to commit the offence. If the word 'aids' needs any explanation at all, it might, on occasions be better understood in its effect by the use of words such as 'give support to … help, assist': see *Collins English Dictionary* and *Shorter Oxford English Dictionary*. The word which the Code itself uses is 'aids' and it will always be necessary to come back to that. There must be some deliberate positive involvement, if not active physical involvement, when the offence of aiding occurs.

In the present case the trial judge directed the jury on the requirements involved in the offence of 'aiding' by speaking in terms of encouragement and with the accompanying explanation which he gave this seems appropriate enough since the appellant, on her own story, was relatively inactive at the time that the killing occurred. No objection has been made to the terms of the summing up but only to the sufficiency and strength of the case on this aspect. In other circumstances persons relatively uninvolved directly in the commission of an offence have been held guilty of aiding its commission: for example, *Wylie Payne and Harper*. *Clarkson* was on the other side of the line and the convictions were quashed.

…

Once it is understood how his Honour's summing up proceeded and what, it may be accepted, the jury could have found, no objection can properly be made from the appellant's viewpoint.

On the alternative s 8 case, … [n]o forceful arguments were advanced on this aspect of the matter and the case here against the appellant seems strong …

[Appeal dismissed.]

Derrington J:

…

Encouragement does not necessarily amount to counselling or procuring or urging the commission of the offence. It amounts to the objective provision of fortification or the instilling of courage in the other to do that which amounts to the commission of the offence. In the present case, even though she may not have wished the murder, if the appellant intended to convey to her husband that she would aid him as he may need, and if she intended or expected that he would act on it in what he was doing, which at that time she knew to be murder, so that within her intention or expectation he knew that he could proceed in that crime with the support of her aid as required, it cannot be said that she did not intend to provide such encouragement to him in the commission of the offence. From what has been said it will cause no surprise that it is irrelevant whether the communication of support is made expressly or implicitly by present or prior conduct.

…

The principle is classically set out in the following citation from the judgment of Hawkins J in *Coney* (1882) 8 QBD 534 at 557:

> In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, or gestures, or actions intended to signify approval. In the latter case he aids

> and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power to do so, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not.

This statement however must be read in its own context where there is no history of prior conduct of aiding the principal offender in related conduct. It would be wrong to fail to have regard to the appellant's prior active aid to her husband in his immediately antecedent criminal activity which itself was of such gravity as to encourage him to expect continued help in his further criminal activity, particularly if it was a logical and probable development of that which had gone before. This may colour the pale ghost of mere presence into something more substantial and invest it with a deeper significance, and connote a meaning to contemporaneous acts of compliance which might otherwise be neutral or of doubtful force. It is also correct to have regard to the aid which she provided after the event to the extent that it might justify the view that he correctly had an expectation of aid from her at the relevant time and that she was amenable to his view …

If it be suggested that some positive action by the appellant rather than passive presence be technically essential, a proposition which incidentally is in conflict with *Coney* and which is probably correct only in a limited class of case, then the combination of prior aid and continued non-dissociating presence may constitute an implied offer of continuing aid, which is certainly enough to answer the requirement of positive activity on the aider's part. This is all of little value because the matter is one of substance in which the effect of the appellant's conduct is the paramount issue rather than its form, and in that it is impossible to dissociate her presence from the context produced by her earlier conduct …

[His Honour held also that there was evidence on which the appellants could have been convicted under s 8 of the Criminal Code (Qld). He agreed that the appeal should be dismissed.]

Note

20.35 In *Jefferies v Sturcke* [1992] 2 Qd R 392, the Queensland Court of Criminal Appeal discussed the interpretation of the judgment of Macrossan CJ in *Beck*. Dowsett J said, at 396:

> Some of the passages in the extract from the Chief Justice's judgment if taken in isolation, might be thought to suggest that mere presence may be sufficient to constitute aiding. I refer in particular to the sentence, 'Voluntary and deliberate presence during the commission of a crime without opposition or real dissent may be evidence of wilful encouragement or aiding'. However when that passage is read in the context of the whole extract, it is clear that his Honour was saying simply that presence is not of itself aiding. The passage must be understood to have this limited meaning.

20.36C DPP (Northern Ireland) v Maxwell

[1978] 3 All ER 1140
House of Lords

Lord Hailsham of St Marylebone: My Lords, in my opinion this appeal should be dismissed. The appellant was the owner and driver of the guide car in what subsequently turned out to be a terrorist attack by members of the criminal and illegal organisation known as the Ulster Volunteer Force ('UVF'), on a public house owned by a Roman Catholic licensee at 40 Grange Road, Toomebridge, and known as the Crosskeys Inn. The attack was carried out on the night of 3rd January 1976 by the occupants of a Cortina car and took the form of throwing a pipe bomb containing about five pounds of explosive into the hallway of the public house. The attack failed because the son of the proprietor had the presence of mind to pull out the burning fuse and detonator and throw it outside the premises where the detonator exploded either because the fuse had reached the detonator or on contact with the ground.

The appellant was tried on 13th October 1976 on an indictment containing four counts to two of which he pleaded guilty. This appeal is concerned with the remaining two counts (numbered 1 and 2) on which he was convicted at the Belfast City Commission by MacDermott J sitting without a jury. The two counts are as follows:

> FIRST COUNT
>
> STATEMENT OF OFFENCE
>
> Doing an act with intent, contrary to section 3(a) of the Explosive Substances Act 1883.
>
> PARTICULARS OF OFFENCE
>
> James Charles Maxwell, on the 3 January 1976, in the county of Antrim, unlawfully and maliciously did an act with intent to cause by explosive substances, namely a pipe bomb, an explosion in the United Kingdom of a nature likely to endanger life or cause serious injury to property, in that he placed the said pipe bomb with fuse lit inside the premises known as the Crosskeys Inn, at Toomebridge, in the said county.
>
> SECOND COUNT
>
> STATEMENT OF OFFENCE
>
> Possession of explosive substance with intent, contrary to section 3(b) of the Explosive Substances Act 1883.
>
> PARTICULARS OF OFFENCE
>
> James Charles Maxwell, on the 3 January 1976, in the county of Antrim, unlawfully and maliciously had in his possession or under his control a pipe bomb with intent by means thereof to endanger life or cause serious injury to property in the United Kingdom or to enable any other person by means thereof to endanger life or cause serious injury to property in the United Kingdom.

It will be seen that, in the above counts, the appellant was charged, as the general law permits, as a principal, but the real case against him was that, as the driver of the guide car, he was what used to be known as an accessory before the fact. Although no complaint is made about the form of the counts I agree with the view expressed by my noble and learned friend, Viscount Dilhorne, of the desirability in these cases of aiding, abetting, counselling or procuring, of drawing the particulars of offence in such a way as to disclose with greater clarity the real nature of the case that the accused has to answer.

The only substantial matter to be discussed in the appeal is the degree of knowledge required before an accused can be found guilty of aiding, abetting, counselling or procuring. To what extent must the accused be proved to have particular knowledge of the crime in contemplation at the time of his participation and which was ultimately committed by its principal perpetrators? For myself I am content for this purpose to adopt the words of Lord Parker CJ in *R v Bainbridge* [[1959] 3 All ER 200 at 202, [1960] 1 QB 129 at 314] when, after saying that it is not easy to lay down a precise form of words which will cover every case, he observed that 'there must not be merely suspicion but knowledge that a crime of the type in question was intended', and the words of Lord Goddard CJ in *Johnson v Youden* [[1950] 1 KB 544 at 546], endorsed by this House in *Churchill v Walton* [[1967] 1 All ER 497 at 502–3, [1967] 2 AC 224 at 236], that 'Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence'. The only question in debate in the present appeal is whether the degree of knowledge possessed by the appellant was of the 'essential matters constituting' the offence in fact committed, or, to put what in the context of the instant case is exactly the same question in another form, whether the appellant knew that the offence in which he participated was 'a crime of the type' described in the charge.

For that purpose I turn to two passages in the findings of fact of the learned judge. The first is as follows:

> In my judgment, the facts of this case make it clear to me that the accused knew the men in the Cortina car were going to attack the inn and had the means of attacking the inn with them in their car. The accused may not, as he says, have known what form the attack was going to take, but in my judgment he knew the means of the attack, be they bomb, bullet or incendiary device, were present in that car.

In the second passage MacDermott J said:

> In my judgment, the accused knew that he was participating in an attack on the inn. He performed an important role in the execution of that attack. He knew that the attack was one which would involve the use of means which would result in danger to life or damage to property. In such circumstances, where an admitted terrorist participates actively in a terrorist attack, having knowledge of the type of attack intended, if not of the weapon chosen by his colleagues, he can in my view be properly charged with possession of the weapon with which it is intended that life should be endangered or premises seriously damaged.

The learned judge also found, inter alia, that the word 'job' (as used in the appellant's statements) is 'synonymous with military action which raises, having regard to the proven activities of the UVF, the irresistible inference [that] the attack would be one of violence in which people would be endangered or premises seriously damaged'.

There was no dispute that there was ample evidence to support all these findings and it follows that the only question is whether the passages contain some self-misdirection in point of law. As to this I agree with the opinion of Lowry LCJ when he said [see 1162, post]:

> The facts found here show that the appellant, as a member of an organisation which habitually perpetrates sectarian acts of violence with firearms and explosives, must, as soon as he was briefed for his role, have contemplated the bombing of the Crosskeys Inn as not the only possibility but one of the most obvious possibilities among the

jobs which the principals were likely to be undertaking and in the commission of which he was intentionally assisting. He was therefore in just the same situation, so far as guilty knowledge is concerned, as a man who had been given a list of jobs and told that one of them would be carried out.

The only argument attacking this passage of any substance directed to your Lordships on the part of the appellant was to the effect that since at the time of the commission of the offence there was no generalised offence of terrorism as such, the state of ignorance which must be assumed in favour of the appellant as to the precise weapon (eg bomb, bullets or incendiary device) or type of violence to be employed in the concerted 'job' contemplated was such as to make him ignorant of some or all of the 'essential ingredients' of the two offences charged in the particulars of offence in which a 'pipe bomb' is specified, and one at least of which, had it been committed, would or at least might have been laid under a separate penal provision.

I regard this point as frankly unarguable. I would consider that bullet, bomb or incendiary device, indeed most if not all types of terrorist violence, would all constitute offences of the same 'type' within the meaning of *R v Bainbridge* [[1959] 3 All ER 200, [1960] 1 QB 129] and that so far as mens rea is concerned 'the essential ingredients' of all and each of the offences within the other authorities I have cited were each and all contained within the guilty knowledge of the appellant at the time of his participation. The fact that, in the event, the offence committed by the principals crystallised into one rather than the other of the possible alternatives within his contemplation only means that in the event he was accessory to that specific offence rather than one of the others which in the event was not the offence committed. Obviously there must be limits to the meaning of the expression 'type of offence' and a minimum significance attached to the expression 'essential ingredients' in this type of doctrine, but it is clear that if an alleged accessory is perfectly well aware that he is participating in one of a limited number of serious crimes and one of these is in fact committed he is liable under the general law at least as one who aids, abets, counsels or procures that crime even if he is not actually a principal. Otherwise I can see no end to the number of unmeritorious arguments which the ingenuity of defendants could adduce. This disposes of the present appeal, which seems to me to be as lacking in serious plausibility as it is wholly devoid of substantial merits …

[Viscount Dilhorne and Lord Scarman delivered separate judgments dismissing the appeal. Lords Edmund-Davies and Fraser also dismissed the appeal.]

20.37C **Tabe v R**

[2005] HCA 59; (2005) 225 CLR 418; 221 ALR 503
High Court of Australia

…

Callinan and Heydon JJ:

108 This appeal raises questions as to the nature and extent of the knowledge if any, that must be proved by the prosecution to establish the offences of possession and attempted possession of a dangerous drug under s 9 of the Drugs Misuse Act 1986 (Q) ('the Act').[1]

Facts

109 Shortly before 16 November 2001, a parcel addressed to 'Mr Tabler' of '1 Makeri Street' containing methylamphetamine, a dangerous drug proscribed by the Act, arrived at the Bundall mail centre at the Gold Coast in Queensland. It was undeliverable because the address which it bore did not exist. In accordance with ordinary postal practice, an employee opened the parcel to try to discover the true address or the sender. He found a glass jar containing powder in it. Suspicious that the powder might be an unlawful drug, the employee contacted the police, who then collected it. Analysis proved the powder to be methylamphetamine.

110 On 16 November 2001, a man called at the Bundall mail centre to collect the parcel. Another employee told him that the parcel was not there and that it might be at the Robina delivery centre. The employee told the man that the parcel could however be collected after 2 pm at Bundall. The employee saw him leave the centre in a white car.

111 Three days later, a man telephoned the Bundall mail centre. He said that he had unsuccessfully attempted to collect a parcel on 16 November and he would now have a friend collect the parcel for him that day. He was told that some form of identification would be required before the parcel would be relinquished. Police officers were immediately informed of this conversation.

112 Later that day, the appellant and Ms Nicole Briggs called at the Bundall mail centre. While the appellant waited outside in a white car, Briggs went inside to collect the parcel. She spoke with an assistant there who asked her to wait while he retrieved it. The police, who were then present at the mail centre, provided a substitute parcel to be given to Briggs. Briggs produced a collection card signed in the name of Tabler authorising her to collect the parcel. After she was given the parcel she returned to the white car which the appellant entered on the driver's side. Briggs sat in the front passenger seat. At that point, they both alighted from the car as police officers came to arrest them. The parcel was lying unopened on the floor of the car. The car was the same one as the caller at the mail centre had used three days earlier.

The trial

113 The prosecution put the case against the appellant on the basis that the appellant aided, counselled or procured Briggs to collect a parcel containing methylamphetamine from the Bundall mail centre, although the indictment alleged possession, and, on the evidence, a case of possession simpliciter could well have been made out as the appellant conceded in argument during the appeal. The appellant was charged jointly with Briggs. The prosecution also relied on s 44A of the Act, a provision equating an attempt with a completed offence. This was occasioned by the fact that at the time of the offence an innocuous substitute had been made for the dangerous drug. That fact, as will appear, has a further significance for the application to this case of the evidentiary provisions contained in s 57 of the Act. Briggs pleaded guilty before the hearing, and the trial proceeded against the appellant alone.

The appellant's defence

114 The appellant did not give evidence. But he did call evidence, first from Gavin McGuane who said that on 16 November 2001, he and the appellant had been drinking at a tavern on the Gold Coast when they were approached by an acquaintance of McGuane, Geoff Tabler. Tabler asked if he could obtain a lift to collect a parcel from the Gold Coast mail centre. The others agreed. As the appellant had been drinking and McGuane's vision was impaired, it was Tabler who drove the appellant's car to the mail centre. When they arrived, it was difficult to

park, and so the appellant went into the centre to collect the parcel on Tabler's behalf. He returned empty handed. He told Tabler that the parcel was not there, but that it might be at the Robina delivery centre. They then drove to Robina, and again the appellant went in to collect the parcel, this time to be told that it was probably on its way to the 'dead letter office' at Bundall, where it would be opened. The appellant suggested that Tabler telephone the Bundall mail centre on Monday, and gave Tabler a collection card for it. The three men returned to the tavern where Tabler bought each of them a drink before leaving. McGuane said that he had not seen Tabler since.

115 The appellant also called Matthew Eyers who gave evidence that he had met Tabler at the Miami hotel on the Gold Coast on a Saturday. Eyers had raffled a tray of meat there which Tabler won and then returned, as he was, he said, travelling to Sydney. Eyers bought Tabler a drink and when he returned from the bar, he overheard him asking the appellant to collect a parcel for him. He saw Tabler give the appellant a collection card.

The trial judge's directions

116 The trial judge (Mullins J) directed the jury that to establish that Briggs had unlawful possession of methylamphetamine, they needed only to be satisfied that when she collected the parcel, Briggs knew that there was something inside it. Her Honour said:

> Now, there is actually one inference that you are going to have to draw in this case in order to accept the prosecution case and that would be that when Ms Briggs went to collect the envelope, which is Exhibit 1, including its contents that she knew that the envelope had contents. That's an inference that I don't think is really in dispute but you can see that you've had no evidence of Ms Briggs' state of mind, she was the one that actually collected the envelope, but I will be telling you that you need to be satisfied that when she went to collect that envelope she knew that she was going to get something inside the envelope. I'll just add here as a matter of law, the prosecution does not have to prove that Ms Briggs had knowledge that the contents of the envelope were methylamphetamine.

117 The jury were then directed that they could convict the appellant if they were satisfied that the appellant in some way assisted Briggs, or did an act for the purpose of enabling her to commit the offence, knowing that Briggs intended to obtain possession of the parcel and its contents. Her Honour said:

> Now in a nutshell, the Crown's case was that [the appellant] was a party to the offence committed by Ms Briggs and that you would reject the defence of honest and reasonable mistaken belief that the package did not contain methylamphetamine. The defence contends that you would be satisfied on the balance of probabilities — that is, on balance or that it was more likely than not that [the appellant] had an honest and reasonable but mistaken belief that the package did not contain methylamphetamine.
>
> Now, at the outset I told you what the elements of the offence of possession of the dangerous drug methylamphetamine in excess of two grams were and those elements were that the prosecution had to prove beyond reasonable doubt that [the appellant] had possession of the dangerous drug methylamphetamine on 19 November 2001 at the Gold Coast, that that possession was unlawful and that the third element was that the quantity of the dangerous drug methylamphetamine exceeded two grams. Elements two and three are not in dispute. There's no question about the possibility of the lawfulness of the possession that's in issue and Exhibit 5 shows that the quantity of methylamphetamine involved in this matter was just over 13 grams and therefore exceeded two grams.

…

Ultimately, it seems what the Crown is relying on is not that [the appellant] obtained possession or attempted to obtain possession of the package containing the methylamphetamine, but that [the appellant] was aiding Ms Briggs or counselling or procuring her to do the act which amounted to the offence of possession of the dangerous drug methylamphetamine.

It's not only a person who actually does a criminal act, who maybe [is] found guilty of it. Anyone who aids, or assists, or helps that person to do the criminal act may also be guilty of the same offence. The Prosecution seems to contend that although it was Ms Briggs who actually attempted to obtain possession of Exhibit 1, including the drugs, and thus was guilty of the offence of the possession of the dangerous drug methylamphetamine in excess of 2 grams on the basis of attempting to obtain it, and on the basis that Ms Briggs knew that there was something in the package that she was collecting, the Prosecution says [the appellant] is also guilty of that offence because he aided Ms Briggs to attempt to commit the offence, or he did an act for the purpose of enabling Ms Briggs to attempt to commit the offence, or he urged her to go and commit the offence. And it seems that the Crown's relying on the fact that [the appellant] drove Ms Briggs to the Bundall Post Office on the 19th of November, and that he gave her the card which is Exhibit 2, and it's not in dispute on the evidence that certainly by Monday the 19th of November, [the appellant] was in possession of the card, that is Exhibit 2, and that was the card that was used to obtain, or attempt to obtain Exhibit 1 and its contents.

Now, you may find [the appellant] guilty of the offence of possession of the dangerous drug, methylamphetamine in excess of 2 grams, only if you're satisfied beyond reasonable doubt of three things. The first is that Ms Briggs attempted to commit that same offence. The second is that [the appellant] in some way assisted Ms Briggs, or did an act for the purpose of enabling Ms Briggs to attempt to commit the offence. And the third is that when [the appellant] assisted Ms Briggs to do that act, [the appellant] knew that Ms Briggs intended to attempt to obtain possession of the envelope which is part of Exhibit 1, and its contents.

There is evidence that Ms Briggs committed, or attempted to commit the offence of the possession of the dangerous drug, methylamphetamine in excess of 2 grams. You've heard the evidence about how she went to the Post Office on the 19th and handed over the card and got the dummy envelope, and it probably won't trouble you to infer that she knew that when she was collecting the envelope that there would be something in it, and it's not an issue that that possession would have been unlawful and we know that the quantity exceeded 2 grams. So we have Ms Briggs guilty of the offence.

Now, I've mentioned the sorts of acts that the Crown is relying on to say that [the appellant] assisted Ms Briggs to attempt to obtain the envelope and its contents. And the last element wouldn't trouble you, I wouldn't think for very long because that's the one that you've got to be satisfied that when [the appellant] assisted Ms Briggs, if you're satisfied that he did so assist Ms Briggs, he knew that Ms Briggs intended to attempt to obtain possession of the envelope, and that's something that you probably infer from the fact that [the appellant] handed the card to Ms Briggs, or you would infer [the appellant] handed the card to Ms Briggs and infer from that he did so with a view to intending her to attempt to obtain possession of both the envelope and its contents.

118 The appellant was convicted and sentenced to two years' imprisonment.

119 The appellant unsuccessfully appealed to the Court of Appeal …

…

128 The appellant points first to the fact that, although the indictment charged possession without more or qualification, the prosecution, from beginning to end, confined its case to one of aiding, counselling or procuring Briggs to do the act which amounted to the offence committed by her, of attempted possession. In argument in this Court the respondent accepted that this was so.

129 The appellant then submitted that to make out 'possession' within the meaning of s 9 of the Act, the prosecution must prove, as a minimum, that the principal, Briggs, knew of the presence of the drug in the unopened package. Mere knowledge that the package was not empty could not suffice.

…

Disposition of the appeal

143 It can be accepted, on the basis of the statements in this Court in *Williams* and *He Kaw Teh*, that the concept of 'possession' in the criminal law, in the absence of statutory indications to the contrary, involves as an element, awareness, or at least constructive knowledge, in the sense that there would be an awareness, but for an abstention from inquiry, or the suspension of other human tendencies such as suspicion and ordinary curiosity, of the thing possessed.

144 The questions in this case therefore are whether there are legislative indications to the contrary, and the extent of knowledge, if any, of an aider, procurer or counsellor of a principal offender, that must be established to sustain a conviction of the former.

145 Neither s 9 of the Act nor the definition of 'possession' in s 1 of the Code manifests legislative intention to exclude knowledge as an element of possession. Section 57(b) of the Act however makes irrelevant to the question of guilt the actual identity of the dangerous drug. Section 57(c) needs further examination but for present purposes it suffices to say that it reverses the onus of proof, and also makes clear that 'reason to suspect' is to be treated as if it were knowledge. Section 57(d) qualifies the operation of s 24 of the Code. Its practical effect is to require that an accused show, on the balance of probabilities only, that he or she is entitled to be acquitted on the basis of an honest and reasonable belief in the existence of any state of things material to the charge, rather than that which the Code would otherwise require, that the prosecution negative such a belief beyond reasonable doubt.

Section 57(c) of the Act

146 Section 57(c) is concerned with possession and deals expressly with the relevance of knowledge. To be concerned in the management or control of a place where the drug is located is, pursuant to this section, to be in 'possession' of the drug. So much appears in terms in the first part of par (c) which then goes on to provide that unless an accused show that he or she neither 'knew nor had reason to suspect that the drug was in or on that place', he or she will be regarded as being in possession. If knowledge were a necessary element of the charge that the prosecution was bound to prove, then the qualification in s 57(c) requiring the accused to show that he or she lacked the relevant knowledge, or had no reason to suspect that the drug was in or on that place, would be unnecessary and anomalous. Section 57(c) relieves the prosecution of the burden of proving knowledge. It is not only to be presumed, it is also to be conclusively presumed unless the accused demonstrate absence of knowledge, or, of

reason to suspect. If an obligation to prove knowledge on the part of the prosecution were to be implied, s 57(c) would need to be read as if it contained a qualification to that effect. It would need to have implied in it after the words '… in the person's possession' such words, for example, as 'if the prosecution prove that the person knew that the drug was located at that place'. The effect of such a qualification would be to render meaningless, or at least to make contradictory, the express words which actually appear there 'unless the person shows that he or she then neither knew nor had reason to suspect …'. A further purpose of s 57(c) is no doubt to make it clear that the onus is reversed in those cases to which it applies, being cases in which the extended meaning of possession operates.

Section 57(d) of the Act

147 This construction of s 57(c) still leaves some room for the operation of s 57(d) in cases to which the extended meaning of possession applies. Section 57(d) is concerned with an honest and reasonable belief in the existence of *any state of things material to the charge*. 'Any state of things material to the charge' goes beyond and is capable of embracing matters other than knowledge.[2] It is unnecessary to explore the limits of the expression, but it may be, for example, that an honest and reasonable belief in the existence of duress or of an extraordinary emergency (s 25 of the Criminal Code) could suffice to exculpate an accused if he or she could establish that it was held.

148 If a person is charged with an *attempt* to possess, or of aiding, abetting or counselling an *attempt*, and the defence seeks to establish that the offender did not know, or had no reason to suspect that the object in respect of which possession was attempted was an unlawful drug, then s 57(d) of the Act and s 24 of the Code are the only excusatory provisions that can have a relevant operation. This was the case with the appellant, because neither the principal offender, Briggs, nor the appellant himself, ever had possession in fact of the drug. It had been removed by the police and replaced by an innocuous substitute. This appeared clearly from the prosecution case. Deeming a person who is guilty of only an attempt, to be guilty of a completed offence, as s 44A of the Act requires, does not mean that the presumptive provision contained in s 57(c), which is directed towards a principal offender, may apply to a person who attempts to commit an act of possession. On the ordinary construction of s 57(c) of the Act, it could not apply to the appellant, or indeed even to Briggs. The true facts would not satisfy the phrase in the opening words of that section 'a dangerous drug was … in or on a place'. But s 57(d) can and does apply to both an attempt and an aiding, abetting or counselling of an attempt, both being offences within Pt 2 of the Act. The appellant clearly sought to obtain a parcel which did, until it was intercepted, contain the drug. It was the parcel with the contents before interception that the appellant tried to get and possess, and counselled Briggs to possess. Knowledge, or its absence, is a state of things within s 57(d) of the Act and s 24 of the Code. It was for the appellant to show a state of things, absence of knowledge, in order to be acquitted. This he tried to do and failed. Absence of knowledge is not to be singled out as the only state of things which the prosecution is obliged to negative and the appellant to prove. A state of things is a very broad expression. It should be given its ordinary meaning as such. If knowledge and absence of knowledge were intended to be excluded from its operation, s 57(d) should have in terms said so. It did not. If the prosecution were bound to prove even a slight degree of, or indeed any knowledge of a drug intended to be possessed, then there would be no occasion to require the accused to show absence of knowledge which is a state of things

for the purpose of s 57(d). The construction is consonant with the balance of s 57. It is very unlikely that the legislature intended an aider to an attempt to be in a better position because of a fortuitous interception, than a person who has succeeded in gaining actual physical possession of a parcel with something in it. It may be that s 57(d) was inserted to cover cases of ordinary physical possession and not extended cases of possession to which s 57(c) is at least principally directed. Whether that is so does not matter. What is obvious is that the legislature clearly intended to reverse the onus in relation to mistake of fact comprehensively to offences under Pt 2 of the Act.

149 The construction that we prefer of s 57 of the Act accords generally with the construction and approach of Wilson J in *He Kaw Teh* even though the language there is not quite so explicit, and the structure of the relevant provisions differ from those of the Act. The preferred construction also conforms with the legislative intention, in relation no doubt to both attempts and completed offences, expressed in the second reading speech for the Bill[3] introducing the amendments for the insertion of the evidentiary provision s 130J as it appeared in the Health Act with which the Court was concerned in *Williams*. The Minister said:[4]

> Evidence to substantiate a charge of trafficking is difficult to obtain. For these reasons, other countries and some Australian States have adopted in their legislation a departure from the usual approach. The legislation allows for what is called the 'reverse onus' concept. The National Standing Control Committee on Drugs of Dependence strongly recommended this procedure, and it was adopted by a conference of Commonwealth and State Ministers. I realise fully that the existence of legislation in other States and countries does not automatically provide sufficient reason to adopt similar legislation in Queensland. In this case, however, the arguments for such legislation are so cogent that I recommend its adoption here also.
>
> ...
>
> The situation in which the Bill provides for a 'reverse onus of proof' involves matters often exclusively within the knowledge of the person charged. They are factors on which independent evidence is unlikely to be available.
>
> The concept, dear to our law, that he who alleges an offence must prove it should not be used to deny protection to the community against those who prey upon the weakness of immature youngsters. Special cases demand special remedies, and this Bill deals with special cases. Therefore, these provisions are incorporated in the Bill.
>
> With the passage of time, some drugs may change their chemical composition. Recently a person was charged with being in unauthorized possession of the drug heroin, as this was the name on the container. When the analyst examined the substance it was found that the drug had changed to morphia. This is common with this drug. For this reason, it is proposed that the drug in such alleged offences should not be particularised, nor should it be necessary to identify the drug other than as a dangerous drug. It will of course be necessary for the Crown to prove that the substance was indeed a dangerous drug.

150 The National Standing Control Committee on Drugs of Dependence referred to in the speech was convened in 1969 at the request of the relevant Commonwealth and State Ministers, and was required to prepare a report which, among other things, would make recommendations on legislation to '... combat all aspects of the present drug problem in Australia'. The report stated:[5]

> The Working Party examined recent case law in England re-defining the concept of 'possession' and considered deficiencies in Customs and State legislation. In broad

terms, the Committee agreed that reverse onus of proof should be applied to drug offences.

The specific recommendations of this Working Party are set out in Attachment 'A' of the summary record of the meeting of 11 April 1969.

Attachment A of the report relevantly provided:[6]

The following recommendations were made with respect to the amendment of legislation:

(a) it should be provided specifically in relation to the possession of prescribed drugs that a drug is deemed to be in the possession of a person if it is upon land or premises occupied by him or is used, enjoyed or controlled by him in any place whatever unless the person proves that he neither knew nor had reason to suspect that he had a prescribed drug in his possession …;

(b) legislation should provide that an offence is committed by a person occupying or concerned with the management of premises where marihuana is smoked or otherwise used, unless the person proves that he neither knew nor had reason to suspect that marihuana was smoked or used in the premises;

(c) a similar, but separate, offence to that set out above in paragraph (b) should be provided in respect of other prescribed drugs.

…

The consequences for accused persons are heavy ones but as Wilson J pointed out, they flow from a legislative response to what is seen as a very serious crime, hard to prevent and difficult to prosecute.[7]

151 In our opinion therefore, s 57, including s 57(d), does manifest an intention to alter the common law with respect to knowledge as a necessary component of possession. The appellant's submission was that the prosecution was obliged to prove, as an element of the case against the appellant as an aider, abetter or counsellor, that the principal Briggs knew of the presence of the drug in the unopened parcel. The submission fails to pay due regard to the whole of s 57. Let it be assumed, for present purposes, that the innocuous substitute for the dangerous drug had not been made and that Briggs collected a parcel containing the latter and could have been charged as if she had committed a completed offence. There is no doubt that Briggs was a possessor of the parcel and its contents. She held the parcel in her hands and was, at the very least, concerned in the control or management of the place, the floor of the car, where the parcel was at the material time. To the extent then that Briggs' knowledge or reason to suspect the presence of a drug would have been, which we do not think it was, an element of the offence of the appellant as an aider, the prosecution would have had the benefit of the presumption raised by either or both of s 57(c) or s 57(d) of the Act. Such a presumption could only be displaced by evidence in the trial of the appellant showing an absence of the relevant knowledge, or reason to suspect, on the part of Briggs. If the evidence adduced on behalf of the appellant did go so far as to raise a question of absence of knowledge or reason to suspect, on the part of Briggs, it is likely that it was rejected, or would in the case of a completed offence equally have been rejected, having regard to the jury's rejection generally of the appellant's defence. It is hardly likely that the appellant would have conducted the defence on that basis. If he had, it may have been open for the prosecution to prove Briggs' knowledge, by proving her plea of guilty, embracing, as it must have, all elements of the offence including knowledge. The trial judge would have

been right in those circumstances to tell the jury that the prosecution did not have to prove that Briggs knew that the parcel contained methylamphetamine.

152 In the circumstances of this case, however, of an attempt (on the part of both Briggs and the appellant), s 57(c) has no operation for the reasons that we have stated. But s 57(d) can and does have an operation. It left open the opportunity for the appellant to prove that he acted under an honest and reasonable, but mistaken, belief in a state of things (s 24 of the Code), that there was a parcel to be collected that he did not know had contained the, or a dangerous drug. The trial judge was right to tell the jury, as her Honour did, that the prosecution did not have to prove that Briggs had [ever] known that the parcel contained methlyamphetamine. It was for the appellant to disprove that if he could.

153 Contrary to the appellant's submissions however, Briggs' knowledge, whether presumed or actual, was not a necessary element of the case against the appellant. He was charged with possession. Section 7 of the Code deems him to be a principal offender. It was the appellant's knowledge that was relevant, and not Briggs'. The appellant, in calling the evidence that he did, assumed the burden imposed on him by s 57(d) of the Act of proving a relevant excusatory state of things, ignorance of the presence of the drug before interception. In this endeavour, as the verdict demonstrates, he failed.

154 The Chief Justice therefore did no injustice to the appellant when he said in the Court of Appeal that the mental state to be established against the accessory need not be more extensive than that which need be established against the principal offender.[8]

155 The criticism made in submissions by the appellant that the Court of Appeal fell into error in not referring to and closely examining the reasons of this Court in *He Kaw Teh*, is not well founded. In considering, as they did, the reasoning of the Court of Appeal in *Clare v The Queen*,[9] they necessarily had regard to *He Kaw Teh* which was discussed at some length in that case. We are unable to accept that in a case to which s 57(c) applies (which is not this case) the prosecution must prove that a principal offender knows that he or she possesses the thing which is in fact a dangerous drug. Section 57(c) does not require that. Once evidence is adduced that a dangerous drug was in fact at a place occupied by him or her, or in the management or control of that person, regardless of the state of the accused's knowledge, possession is presumed and the onus to disprove knowledge falls upon the accused. Neither *He Kaw Teh*, *Williams*, nor any of the other cases upon which the appellant seeks to rely is however determinative of this one.

156 There was no deficiency in proof of the prosecution case and no misdirection on the part of the trial judge. We would dismiss the appeal.

[**Gleeson CJ** wrote a separate judgment, reaching the same conclusions as **Callinan and Heydon JJ. McHugh J** and **Hayne J** wrote dissenting judgments, on the curious ground that the concept of possession required proof of a belief that the parcel contained drugs. On this issue, see **8.20–8.22**. Note that s 57 of the Drugs Misuse Act 1986 (Qld) has now been renumbered as s 129.]

Footnotes

1. There has since the trial of the appellant been a consolidation of the Act and other Acts and a renumbering of some sections of it. In this judgment, we refer to the Act as it was in force at the time of the offence although the text is generally the same in the renumbered relevant provisions.

2. *Ostrowski v Palmer* (2004) 78 ALJR 957 at 973–4 [82]–[83]; 206 ALR 422 at 443–4.
3. Health Act Amendment Bill 1971 (Q).
4. Queensland, Legislative Assembly, Parliamentary Debates (Hansard), 6 April 1971 at 3582–3.
5. National Standing Control Committee on Drugs of Dependence, Report to Ministers, 1969 at 2.
6. National Standing Control Committee on Drugs of Dependence, Report to Ministers, 1969, Attachment A.
7. *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 562.
8. *R v Tabe* (2003) 139 A Crim R 417 at 420 [18].
9. [1994] 2 Qd R 619.

20.38C The Queen v Keenan

[2010] HCA 35; 271 ALR 219
High Court of Australia

94 KIEFEL J. The respondent Francis Robert Keenan, together with Stephen Edward Booth and Dion Francis Spizzirri, was charged with attempting unlawfully to kill Darren Thomas Coffey and, alternatively, intending to and doing him grievous bodily harm. The jury found the respondent not guilty of attempted murder but guilty of unlawfully doing grievous bodily harm with intent. The prosecution case was that the three co-accused and one Jeramie Jupp were parties to a plan to do serious harm to Coffey, as revenge for a wrong he had done the respondent. In the course of the attack Coffey received bullet wounds to his spine which rendered him a paraplegic. Spizzirri was alleged to have been the person who fired the shots. There was no evidence that the use of a gun had been discussed by the three accused in connection with the proposed attack. There was evidence from which the jury could conclude that the respondent knew that one of the parties to the attack went armed with a baseball-type bat.

95 There was evidence that the respondent was the instigator of the plan to attack Coffey. Coffey had collected some $6,000 or $7,000 on the respondent's behalf and failed to pay it to him. Prior to the attack upon him Coffey's girlfriend, the respondent's niece Vonda Muir, received inquiries from the respondent about the money and their whereabouts. He left text messages on her mobile telephone, in which he said that it was a small world and that he would find Coffey one day; and that 'he was going to cave his [Coffey's] skull in…'.

96 The evidence as to what was said about the planned attack upon Coffey came from Jupp. The respondent came to know of the whereabouts of Coffey through information provided by Jupp to Spizzirri. Jupp then met with Spizzirri and directed him to a house property at Hope Island, in south-east Queensland, where he pointed out the van in which Coffey and Muir then lived. The respondent followed in his motor vehicle. The group drove down the street and discussed their course of action. The respondent had a passenger, the person whom Jupp later identified as Booth. The respondent proposed that he would drive back to the van and let his passenger out. That person would beat up Coffey. Spizzirri and Jupp were to wait further back and drive him away when he had finished.

97 The passenger alighted from the respondent's vehicle carrying a wooden baseball-type bat and approached the van swinging it at Coffey, although Coffey was unable later to say whether the bat struck him. Five or six sounds, described respectively as 'pops' or 'cracking sounds' by Muir and Jupp, were heard. Coffey fell face down to the ground. The respondent and his

passenger rushed back to their vehicle and quickly drove off. Jupp said that Spizzirri ran from behind the van, that they got into Spizzirri's car and drove off. Spizzirri was carrying a shortened rifle or gun. Someone in the respondent's vehicle threw the bat out of the window. A bat, which Jupp said resembled the one used by the respondent's passenger, was recovered by police. The Court of Appeal referred to it as a 'less than full-sized wooden baseball bat but … well capable of being used effectively as a weapon to inflict serious injury'.[102] This is an accurate description of the bat produced on the hearing of this appeal.

98 Under cross-examination, Jupp said that he understood there was going to be some physical violence, but he thought it was to be a 'punch-up' or 'fisticuffs'. He had not heard mention of the use of a gun or a bat. He recalled hearing someone, he thought the respondent, saying that his passenger was to give Coffey a 'touch-up'. It had been intended that Jupp would drive Coffey's van from the scene.

99 The respondent's co-accused were acquitted. Booth was found not guilty by the jury but they could not reach a verdict with respect to Spizzirri, who was retried and found not guilty on both counts. The case against Booth depended upon evidence identifying him as the respondent's passenger; that against Spizzirri required the acceptance of Jupp's evidence as well as that of other witnesses. These outcomes did not affect the case against the respondent, which did not depend upon the conviction of the principal offender, but upon proof of the doing of an act by that person by evidence admissible as against the respondent.[103] And it depended upon the extension of criminal responsibility for offences committed in the prosecution of a common unlawful purpose by s 8 of the *Criminal Code* (Q)[104] ('the Code').

…

102 The purpose of s 8 is to extend the criminal responsibility of the parties to a common purpose to an offence other than that which was intended to be committed. The section limits the extension of that responsibility by requiring that the nature of the offence committed be such as to be a probable consequence of the common purpose. The test of probable consequence reflects the historical approach of the common law. The foundations for provisions such as s 8 may be traced to Sir Matthew Hale[109] and reference to it is made in *Foster's Crown Law*.[110] Responsibility does not depend upon the foresight of the parties to the common purpose. Although the common law has come to embrace such a test, the test in s 8 is an objective one.[111]

103 Section 10A(2) of the Code[112] makes plain that criminal responsibility extends to any offence that is a probable consequence of the prosecution of the common purpose, regardless of what offence is proved against the principal offender.

The reasoning of the Court of Appeal

104 The Court of Appeal (McMurdo P, Holmes JA and Atkinson J) set aside the conviction but did not order a retrial.[113] The Court entered a verdict of acquittal[114] for the offence for which the respondent had been convicted and for the offence of grievous bodily harm simpliciter.[115] The Court held that a jury, properly instructed, could not have excluded an inference that Spizzirri was acting independently of the common planned intention with respect to the attack upon Coffey.[116]

…

108 It was the view of the Court that an ultimate inference of guilt required that the common purpose involve the possession or use of a gun in the attack or that it expressly permit

those actions. At the conclusion of its reasons for making the orders for acquittal the Court said:[121]

> The present case is distinguishable from *Reg v Smith (Wesley)*[122] where the secondary offender knew that the principal offender, who stabbed the deceased, was carrying a knife. Had the grievous bodily harm in the present case been effected with a baseball bat rather than a gun, then s 8 may well have extended [the respondent's] criminal liability for Coffey's injuries … .[123] But that was not the evidence here.

…

112 The starting point in the reasoning of the Court was the two alternative inferences — that the plan may have been only to assault Coffey by the use of fists or that it involved the use of the bat. It followed, in the view of the Court, 'that Spizzirri's use of the gun was entirely outside the unlawful common plan instigated by [the respondent]'.[130] The Court excluded the possibility that there had been a broader plan, one which permitted the participants to use means of their choice, on the basis that there was no evidence of such a plan.[131]

113 The determination of what the common purpose was, and how that determination is reached, are matters for the jury.[132] If there had been a miscarriage of justice arising from misdirection, the Court should not have undertaken those tasks for itself and made the orders for acquittal. It ought to have ordered a retrial. It is necessary then to consider the directions given.

The common purpose

114 The approach taken by the Court of Appeal to a finding of common purpose was doubtless influenced by its view that the proper identification of the offence actually committed was the shooting which caused the grievous bodily harm. That factor informed its opinion of what was necessary for the plan to be carried out, if the respondent was to be held criminally responsible.

115 In answering the questions, as to the nature of the offence committed and what was the common purpose, it is necessary to bear in mind how s 8 operates. The ultimate question which the section poses — whether the offence is of such a nature as to be a probable consequence of the common purpose — is directed to the connection between the offence and the common purpose. It is that connection which is the basis for criminal responsibility. The section's test for connection does not suggest as necessary an approach which imports the act involved in the offence into the finding of common purpose.

…

119 It is not to be expected that every plan involving the infliction of physical harm will be detailed and include the means by which it is to be inflicted. However it may be possible to infer what level of harm is intended and from that point to determine whether the actual offence committed was a probable consequence of a purpose so described.

120 An inference about the level of harm involved in the common purpose to be prosecuted may be drawn from the general terms in which an intended assault is described, the motive for the attack and the objective sought to be achieved, amongst other factors. Three cases usefully illustrate such an approach. In *Varley v The Queen*[144] the intention, similar to that stated in the present case, was to beat or 'rough up' the deceased. It was held that the plan involved such violence as might encompass the use of a baton or cosh by the police

involved. In *Johnston*,[145] it was said that the jury could infer that the plan was to inflict serious harm upon the victim for two reasons: it was intended to punish him for threatening to go to the police and, more importantly, to ensure he did not do so. The inference was therefore possible that 'a probable consequence of the prosecution of this plan would be that serious injury would be inflicted … by whatever means seemed appropriate to achieve those ends'.[146] Those means, it was held, included the use of a weapon such as a knife. And in *R v Jeffrey*[147] it was decided to beat up the victim and then to do so again to prevent him remembering the first attack. It could therefore be inferred that an assault of sufficient seriousness was contemplated such that death was a probable consequence.[148]

121 Where a method by which physical harm is to be inflicted has been discussed, or may be inferred as intended, it does not follow that the use of other means will prevent a person being held criminally responsible. In some cases the means intended to be used may permit an inference as to the level of harm intended. An offence involving such harm may be a probable consequence of such purpose whatever means came to be used. It may be otherwise where the intended means suggest no serious harm was intended and the offence committed well exceeds such a purpose.

122 The author of *Foster's Crown Law* contemplated that criminal responsibility would follow:[149]

> … if the principal in substance complieth with the temptation, varying only in circumstance of time or place, or in the manner of execution ….

In *Markby v The Queen*[150] and in *Varley*[151] the use of the weapon in question was seen to be no more than an unexpected incident in carrying out the common purpose, even if its existence was not known to the secondary offender.[152]

123 In the present case the trial judge was right to direct the jury to consider the common purpose for which the prosecution contended, namely that serious harm was to be visited upon Coffey. Such an inference could be drawn from the evidence identified by his Honour, particularly that concerning the respondent's motive for the attack, vengeance, and the inferences which might be drawn as to his level of hostility to Coffey because of Coffey's duplicity. Far from limiting the inference which might be drawn about common purpose, the evidence with respect to the use of the bat supported one of a general purpose, to inflict serious harm. There can be no doubt that such a weapon is capable of inflicting grievous bodily harm, even if a gun may do so more efficiently. It would be an odd result if the respondent could be criminally responsible for grievous bodily harm inflicted by means of a baseball-type bat but not by means of a gun, when the level of harm intended was achieved.

124 There can be no difficulty, in a case such as the present, in describing the unlawful purpose as the infliction of serious physical harm. In such a case it is not correct to approach the determination of the common purpose by reference to the means and thereby determine the connection to which the objective test in s 8 is directed. Further, the test to be applied under s 8 is as to the probable consequences of the common plan, not what the parties might have foreseen. Even if the respondent had not anticipated that a gun might be used, he may nevertheless be held criminally responsible where it was used and caused the very level of harm that had been intended. In a case involving an objective of this kind the means actually used may not assume importance in the determination of probable consequence.

…

Summary

140 A jury, properly instructed, was not obliged to conclude that the shooting was an act independent of the common purpose. Such a conclusion depended upon the jury's finding as to that purpose. It was not necessary to that finding that the jury determine whether the plan of attack included the possession or use of a gun. It was open to the jury to conclude that the common purpose was to inflict serious physical harm upon Coffey and the trial judge was correct to direct the jury's attention to this inference. The means to be used in the prosecution of that purpose do not assume significance. No further direction was required as to other possible inferences beyond those that were given.

141 A trial judge should identify the offence and its nature for the jury, in connection with the ultimate question posed by s 8. However in this case no miscarriage of justice resulted from the trial judge not mentioning the shooting at this point.

Orders

142 The appeal should be allowed and the orders of the Court of Appeal of Queensland set aside. In lieu thereof it should be ordered that the appeal against conviction to that Court be dismissed. The matter should be remitted to that Court to determine the application for leave to appeal against sentence.

[**Hayne**, **Heydon and Crennan JJ** agreed with **Keifel J. Kirby J** dissented.]

Footnotes

…

102. *R v Keenan* [2007] QCA 440 at [16].
103. *R v Barlow* [1997] HCA 19; (1997) 188 CLR 1 at 11 per Brennan CJ, Dawson and Toohey JJ; [1997] HCA 19, referring to *Hui Chi-ming v The Queen* [1992] 1 AC 34 at 42–43.
104. The *Criminal Code* is set out in Sched 1 to the *Criminal Code Act* 1899 (Q).

…

109. *Darkan v The Queen* [2006] HCA 34; (2006) 227 CLR 373 at 383 [29] per Gleeson CJ, Gummow, Heydon and Crennan JJ; [2006] HCA 34, referring to Hale, *Historia Placitorum Coronae* (1736), vol 1 at 617.
110. Foster, *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; and of Other Crown Cases*, 3rd ed (1809) at 369.
111. *Stuart v The Queen* [1974] HCA 54; (1974) 134 CLR 426 at 442 per Gibbs J, Menzies and Mason JJ agreeing; [1974] HCA 54.
112. Section 10A was inserted by the *Criminal Law Amendment Act* 1997 (Q), Act No 3 of 1997, which relevantly came into operation on 1 July 1997.
113. *R v Keenan* [2007] QCA 440.
114. *Criminal Code*, s 668E(1) and (2).
115. *Criminal Code*, s 320.
116. *R v Keenan* [2007] QCA 440 at [60].

…

121. *R v Keenan* [2007] QCA 440 at [61].
122. [1963] 1 WLR 1200; [1963] 3 All ER 597.
123. Referring to *Varley v The Queen* (1976) 51 ALJR 243; 12 ALR 347.

…

130. *R v Keenan* [2007] QCA 440 at [60].
131. *R v Keenan* [2007] QCA 440 at [60].
132. *Brennan v The King* [1936] HCA 24; (1936) 55 CLR 253 at 261 per Starke J, 266 per Dixon and Evatt JJ; [1936] HCA 24.

...

144. (1976) 51 ALJR 243; 12 ALR 347.
145. [2002] QCA 74.
146. *R v Johnston* [2002] QCA 74 at [29] per Davies JA.
147. [2003] 2 Qd R 306.
148. *R v Jeffrey* [2003] 2 Qd R 306 at 318 per Davies JA.
149. Foster, *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; and of Other Crown Cases*, 3rd ed (1809) at 369 and see *R v Tyler and Price* [1839] EngR 270; (1838) 8 C & P 616 [173 ER 643].
150. (1978) 140 CLR 108; [1978] HCA 29.
151. (1976) 51 ALJR 243; 12 ALR 347.
152. *Varley v The Queen* (1976) 51 ALJR 243 at 246 per Barwick CJ, Stephen, Mason, Jacobs and Aickin JJ agreeing; 12 ALR 347 at 353; *Markby v The Queen* [1978] HCA 29; (1978) 140 CLR 108 at 112 per Gibbs ACJ.

20.39C Darkan v R

[2006] HCA 34; (2006) 228 ALR 334; 227 CLR 373
High Court of Australia

Gleeson CJ, Gummow, Heydon and Crennan JJ:

1 These three appeals were argued together. The appellant in the first appeal is Howard Rodney Darkan ('the first appellant'), in the second Gwendoline Cecily Deemal-Hall ('the second appellant') and in the third Marlow Phillip Andrew McIvor ('the third appellant'). The appellants were jointly tried at Cairns before a jury in the Supreme Court of Queensland (Jones J). They were charged with murdering Kalman John Toth ('the deceased') on 13 January 2003. They were each convicted and sentenced to life imprisonment. Their appeals to the Court of Appeal against conviction were dismissed.[1] The appellants appeal against those orders on a single ground relating to the directions which the trial judge gave the jury on the meaning of the expression 'a probable consequence' as used in ss 8 and 9 of the *Criminal Code* (Q) ('the Code'). In the case of all three appellants, the prosecution relied on s 8. In the case of the second appellant, it relied also on s 9. The appellants contend that the trial judge erred in telling the jury that 'a probable consequence' was one which was 'a real possibility or a substantial cause or a real chance'.

2 That contention is sound. However, each appeal should be dismissed because the proviso should be applied — that is, because 'no substantial miscarriage of justice has actually occurred' within the meaning of those words in s 668E(1A) of the Code.

The factual circumstances

3 The appellants did not give evidence at the trial. Each appellant was interviewed by police officers, but the answers of any particular appellant were only admissible as against that appellant, and the admissions made by the second appellant were far less extensive than those made by the other two. For that reason it is necessary to be careful in assessing the strength

of the case against each appellant in relation to s 668E(1A). However, for present purposes, the primary evidence admissible against all the appellants, largely given by a witness named Bowen, revealed the prosecution case to be as follows.

4 The second appellant had been the de facto wife of the deceased. She had a grievance against him and wanted to cause him some harm. The deceased was aged 58, but he was a large man, and the second appellant saw it as necessary to recruit the services of no fewer than three men to cause him harm — the first appellant, aged 30, the third appellant, aged 23, and Bowen, aged 22. Indeed, she attempted to secure as well the services of a fourth man named Michael James Cobus. The evidence about the nature of the harm she requested will be examined below. For their services, each of the three men recruited was to receive $50, and more the following week.

5 The second appellant took the first appellant, the third appellant and Bowen in a van to Bicentennial Lakes Park, Mareeba, on the evening of 13 January 2003. She dropped them there and later returned with the deceased. The deceased got out of the van, but later went back into it and locked it. The second appellant persuaded him to let her enter it, and to drive it to a shed area. They then alighted and sat down with the first appellant, the third appellant and Bowen. The first appellant began to taunt the deceased and punched him in the face. The deceased stood up and began defending himself, and a fist fight broke out. It continued for some time. The third appellant then hit the deceased on the back of the neck with a pickaxe handle. The deceased fell to the ground and covered his face up as the first appellant and the third appellant, who (at least according to Bowen) were wearing steel-capped boots, began kicking him. They continued to kick him for a good while. Watched by the second appellant, the first appellant then took the pickaxe handle from the third appellant, and hit the deceased for a couple of minutes around the ankles and knees before making his way up the body and hitting the deceased in the ribs. The deceased was crying for help. Bowen took the pickaxe handle from the first appellant and gave it to the third appellant. He told him to get rid of it and not to give it back to the first appellant. However, the first appellant took the pickaxe handle away from the third appellant and began hitting the deceased in the head as if 'he really meant it this time'.

6 The appellants and Bowen then panicked and left the scene. Before he left, Bowen examined the deceased's face and found him to be 'messed up pretty bad'. The deceased asked Bowen to get help, and Bowen told the second appellant of this request before she dropped him at his aunt's house and gave him his $50.

7 The deceased's body was discovered at 6am the following day. A pathologist who conducted a post mortem examination found that, apart from severe bruising of many parts of the deceased's body, there was fracturing of the upper and lower jaw and of many facial bones, that there were many facial lacerations, and that the cause of death was aspiration of blood due to severe facial trauma. The pathologist thought that the injuries could have been caused by the pickaxe handle, if severe force were used.

8 What had the second appellant said to trigger the death of the deceased in this way? On Bowen's account in chief of a conversation between himself, the first appellant and the second appellant, the first appellant said that the second appellant wanted someone to 'fix him up' (ie the deceased), and the second appellant said she would pay whoever would 'fix it up'. Bowen also said in chief that while the second appellant was driving the three men in the van to the park, she said she 'just wanted someone to get into him'. He repeated that evidence in cross-examination. Counsel for the second appellant cross-examined Bowen as follows:

> Mr Bowen, whatever the exact words being used in the conversation were, whatever they might have been, is it the case that what was discussed was a plan to give this fellow a touch-up, is that correct? — Yes.
> And nothing more than a touch-up? — Yes.

Bowen repeated that evidence twice. He also said that there had been no discussion of a plan to kick the deceased or use a weapon on him.

…

The prosecution case as put to the jury

15 As recorded in the trial judge's summing up, the prosecution's case was that either the first appellant or the third appellant or both of them delivered the blows that caused the death of the deceased. It put its case against the first appellant and the third appellant in three ways. The *first* was that each killed the deceased intending to do him grievous bodily harm: s 302(1)(a) and s 7(1)(a). The *second* was that each aided the other, or did or omitted to do an act for the purpose of enabling or aiding the other, to kill the deceased knowing that the other intended to do the deceased grievous bodily harm: s 302(1)(a) and s 7(1)(c). The *third* — and this case was put against the second appellant as well — depended on s 8 of the Code, and will be described as the s 8 allegation. The s 8 allegation was that the appellants formed a common intention to prosecute an unlawful purpose; that the death was caused by an act done in the prosecution of that purpose which was of such a nature as to be likely to endanger human life; and that the act causing death was a probable consequence of the prosecution of the unlawful purpose: s 302(1)(b) and s 8.

16 As recorded in the trial judge's summing up, the prosecution put its case against the second appellant in a manner additional to the s 8 allegation. It will be described below as the s 9 allegation. It was that she counselled or procured the first appellant and the third appellant to assault the deceased; that they engaged in conduct — administering blows to the deceased with intent to do him grievous bodily harm — which constituted murder as defined in s 302(1)(a); and that the delivery of blows with that intent was a probable consequence of the counselling or procuring: s 7(1)(d) and s 9.

17 The s 8 allegation, made against all three appellants, in part depended on the meaning of 'a probable consequence' in s 8. The s 9 allegation, made against the second appellant, depended in part on the meaning of 'a probable consequence' in s 9. The jury was given copies of ss 7, 8 and 9.

The passage complained of

18 The only complaint which the appellants made to this Court about the summing up concerns a single sentence in a summing up, the transcript of which ran to over 40 pages. The sentence appeared after the trial judge had explained the way in which the prosecution put its s 9 allegation against the second appellant, and just before the trial judge explained the way the prosecution put its s 8 allegation against all three appellants. The sentence concerned the meaning of the expression 'a probable consequence' as it appears in s 9. The sentence was:

> Now when I speak of probable consequences, it means that it's a real possibility or a substantial cause or a real chance that that event would happen.

19 Three preliminary points may be made about this direction.

20 First, even if the trial judge actually said 'substantial cause' rather than 'substantial chance' while intending to say 'substantial chance', which is open to question, no appellant submitted that anything turned on that slip. It is accordingly safe to decide the appeals on the assumption that instead of 'cause' the trial judge said 'chance'.

21 Secondly, although this direction was given in relation to s 9, and thus only in relation to the second appellant, in argument before this Court the prosecution did not deny that the jury would or could have taken the direction to apply also to s 8, and hence to the case against all three appellants.

22 Thirdly, none of the counsel appearing for the appellants at the trial asked that the direction be corrected and given in different terms. There would have been no point in asking for this, since the trial judge was bound by the decision of the Queensland Court of Appeal in *R v Hind and Harwood* that the expression 'a probable consequence' in s 8 was satisfied if the consequence was a real or substantial possibility or chance.[2] The Queensland Court of Appeal in the present case held that *R v Hind and Harwood* reflected a 'settled position' on the interpretation of s 8.[3] That proposition is reflected in the Bench Book ordinarily used in Queensland as the basis for formulating directions[4] and it is assumed by the profession in Queensland to be correct.[5] However, the direction was not mandatory, and no counsel asked either that it not be given or that it be withdrawn.

Difficulties in the word 'probable'

23 There are two preliminary points to be made about the use of the word 'probable' in expounding and applying rules of law.

24 The first is that the application of legal tests that turn on questions of probability will vary with the context in which the question is asked. That is, 'probability' can denote a variety of degrees of confidence. Probabilities can be of different degrees of strength. This has been recognised in relation to the construction of criminal statutes.[6] It has been recognised outside that field as well. For example, Kitto, Taylor, Menzies and Owen JJ said in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*[7] that the first question to be addressed in dealing with applications for interlocutory injunctions in patent cases is:

> … whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief … How strong the probability needs to be depends, no doubt, upon the nature of the rights he asserts and the practical consequences likely to flow from the order he seeks. Thus, if merely pecuniary interests are involved, 'some' probability of success is enough.

They quoted the words of Roper CJ in Eq in *Linfield Linen Pty Ltd v Nejain*:[8]

> [T]his being an application for an interlocutory injunction I look at the facts simply to ascertain whether the plaintiff has established a fair *prima-facie* case and a fair probability of being able to succeed in that case at the hearing.

It is also relevant to note an observation made by Kitto J in the course of argument in the *Beecham* case:[9]

> When it is said that the plaintiff must show a probability of success, that does not mean that he must show that it is more probable than not that he will succeed. It is enough that

he show a sufficient likelihood of success to justify in the circumstances the preservation of property.

25 The second preliminary point is that whatever precise meaning the word 'probable' bears in a particular context, it is usually used to establish a contrast to what is 'possible'. Thus the *Concise Oxford English Dictionary* defines 'possible' as that which 'may exist or happen, but that is not certain or probable'.[10]

26 In *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty*[11] Lord Reid said of the word 'probable' as used in judgments:

> It is used with various shades of meaning. Sometimes it appears to mean more probable than not, sometimes it appears to include events likely but not very likely to occur, sometimes it has a still wider meaning and refers to events the chance of which is anything more than a bare possibility.

The New Zealand Court of Appeal said that those shades of meaning could be found in ordinary popular speech as well as in judgments:[12]

> The two most common meanings are 'more probable than not' and what Lord Reid described as 'likely but not very likely'. We prefer, for present purposes, to say that a probable event, in this second sense of the word, means an event that *could well happen*. These two most common meanings are both descriptive of a stronger prospect of the occurrence of an event than is conveyed by the word 'possible'. We see no justification for reading 'probable consequence' in s 66(2)[13] as 'possible consequence'. On the other hand we do not think that it can be said that 'more probable than not' is clearly the primary meaning of the word. It is of course used a great deal in that sense, but so much depends upon the context in which and the purpose for which it is used in any particular case. Our inquiry must therefore be to ascertain the meaning of 'probable' which will best ensure the attainment of the objects of s 66(2).

27 In this case the possible meanings of 'probable' which were referred to were, in descending order of likelihood:

(a) more probable than not;
(b) a probability of less than 50/50, but more than a substantial or real and not remote possibility;
(c) a substantial or real and not remote possibility;
(d) a possibility which is 'bare' in the sense that it is less than a substantial or real and not remote possibility.

The parties agreed that (a) and (d) were incorrect. It was also agreed that (c) was wrong. The appellants contended that (b) was correct. The respondent contended that if (b) was correct, the trial judge's direction did not diverge from it.

28 Before the arguments advanced by the appellants are considered, it is desirable to examine the history of ss 8 and 9 of the Code; the reasoning advanced in the Queensland authorities in support of the direction impugned in this case; the points of construction of ss 8 and 9 on which the parties are agreed; and why the parties are correct in their agreement.

…

40 The history thus briefly set out does not offer any decisive reason for selecting one rather than another construction for 'a probable consequence' in ss 8 and 9 of the Code. But it does serve as a reminder of how great the difference is between s 8 of the Code and the common law as now understood, for the common law stress on the need for '*a crime foreseen* as a *possible* incident of the common unlawful enterprise'[33] is quite different from Sir Samuel Griffith's requirement of a probable consequence. The history illustrates how Sir Samuel Griffith decided to adopt the entirely objective approach in *Foster's Crown Law* for the problem addressed by s 9 and extend it to the problem addressed by s 8. And the history also suggests that the failure of Sir Samuel's Draft Code to take up as an element in any test the mental state of the accused, or what the accused ought to have known, meant that very wide liability would potentially rest on accused persons if 'a probable consequence' were given a meaning extending to any possibility which might be described as real or substantial.

The language of the Code generally

41 The word 'probable' was only used in the original Code in s 8 and s 9(1). It is now also used in s 10A(2), a provision introduced in 1997. Apart from those three instances, it is used in only one place in the Code. That is s 415(1)(a), dealing with the crime of extortion, where the expression 'without reasonable or probable cause' is employed. Like s 10A(2), s 415 did not appear in the original Code. The word 'likely' is used in many parts of the Code — some appearing in the original Code, some added since. But neither s 415 nor the sections using the word 'likely' cast any light on the meaning of 'a probable consequence' in s 8 or s 9.

…

55 The authorities relied on in the Queensland Court of Appeal do not support the conclusion at which it arrived and which trial courts in that state have been applying [that 'a probable consequence' in s 8 means no more than 'a substantial or real chance']. Is it possible nonetheless to justify the conclusion as a matter of principle?

'A probable consequence' is not a consequence more likely to have happened than not

56 The parties agreed that 'a probable consequence' did not mean a consequence likely to happen on the balance of probabilities. They were correct for several reasons.

57 One is that in ss 8 and 9(1) the expression is 'a probable consequence', not 'the probable consequence'. Had the expression been 'the probable consequence', it would have pointed towards a balance of probabilities test. The expression actually used points against that test. The expression 'a probable consequence' is compatible with there being more inconsistent probable consequences than one resulting from the prosecution of a particular purpose or the carrying out of particular counsel; where there are a number of inconsistent 'probable' consequences it is difficult to see how all can be more probable than not.

58 A second reason is that if a balance of probabilities test applied, it would mean that accused persons could escape conviction if the prosecution failed to do more than demonstrate that the risk of the consequence described in ss 8 and 9 was plainly there and that the odds were only just against it.[52] Yet that outcome would appear to be contrary to the structure of the two sections, the function of which is to widen criminal responsibility. That is, the objects of ss 8 and 9 could be frustrated if 'a probable consequence' of an event meant 'a consequence which, judged from the time of the event, was more probably likely to happen than not'.[53]

59 Finally, as counsel for the second appellant submitted: 'The Code could easily read "a consequence that was more probable than not". It does not.'

'A probable consequence' is not a consequence which is barely possible

60 The respondent did not contend for the view that 'a probable consequence' referred to one which was no more than barely possible. In that it was correct. Under the common law rule dealing with the same problem as s 8, criminal responsibility depends 'upon the jury's assessment of whether or not the accessory before the fact must have been aware of the *possibility* that responses by the victim or by third parties would produce the reaction by the principal offender which led to the [crime which the principal offender committed]'.[54] Thus at common law the test is 'subjective', not 'objective'. It depends upon the defendant's awareness of possibilities, and not on the existence, independently of the defendant's awareness, of probabilities. The selection by the legislature of an objective, not a subjective test, and the selection of the language of probability, not possibility (let alone bare possibility), point towards a construction of ss 8 and 9 as excluding the sufficiency of bare possibilities.

'A probable consequence' means more than a 'real possibility or chance'

61 The respondent accepted that 'a probable consequence' meant more than a consequence which was reasonably possible or which had a reasonable chance of coming to pass. That stance was sound, because ss 8 and 9 mark a contrast between establishing what is probable and what is possible, and the contrast is significant. The reasons why that is so are discussed below.[55]

62 It is now necessary to examine the arguments of the parties on the points about which they disagreed.

Did the trial judge err in explaining the meaning of 'a probable consequence'?

63 The first and second appellants submitted that the trial judge had erred in saying anything about the meaning of 'a probable consequence'. They contended that the expression required no elaboration, being well understood by ordinary people,[56] and that attempts to elaborate it are likely to lead to confusion. They referred to a statement by Sir Samuel Griffith: 'A Code ought, if possible, to be so framed as to require no definitions of terms in common use in ordinary speech or writing.'[57]

64 They also relied on various statements in the authorities. One was a statement by Kirby J in a case concerning s 23 of the Code. He said that the provisions of the Code 'should be capable of being explained to a jury, according to their own terms, which (at least in the present connection) are relatively simple in their expression'.[58] Another statement on which the first and second appellants relied was that of Mason, Wilson and Deane JJ in *Boughey v The Queen*:[59]

> A basic objective of any general codification of the criminal law should be, where practicable, the expression of the elements of an offence in terms which can be comprehended by the citizen who is obliged to observe the law and (where appropriate) by a jury of citizens empanelled to participate in its enforcement … The courts should, however, be wary of the danger of frustrating that basic purpose of codification of the criminal law by unnecessarily submerging the ordinary meaning of a commonly used word in a circumfluence of synonym, gloss and explanation which is more likely to cause than to resolve ambiguity and difficulty.

The first and second appellants relied on a model direction given by the Western Australian Court of Criminal Appeal in relation to liability under the Western Australian equivalents of s 8 and s 302(1)(b),[60] which contained no elaboration of the meaning of 'probable'.

65 Finally, the first and second appellants submitted that 'a probable consequence' was an expression like 'beyond reasonable doubt', which this Court has repeatedly said is not to be elaborated upon.[61]

66 The submission that the trial judge erred in saying anything about the meaning of 'a probable consequence' is to be rejected. In *R v Piri*, Cooke P said, correctly with respect, in rejecting a similar argument:[62]

> With some ordinary English words that is a feasible and accepted approach. And with the words 'likely' and 'probable' there are occasions when it is unnecessary for the Judge to expand on their meaning; the Judge can simply leave the case to the jury without elaboration in this respect. But where a critical issue as to the degree of likelihood or probability clearly arises, that may not do. The jury may then be entitled to more guidance.

There is also Canadian authority that it is permissible to explain the meaning of a provision similar (but not identical) to s 8, namely, s 21(2) of the *Criminal Code* (Can).[63]

67 The expression 'a probable consequence' consists of ordinary English words, but they have no single meaning common to lay speakers. Acceptance of the argument advanced by the first and second appellants would mean that trial judges would be precluded from answering questions posed by jurors about the meaning of the expression 'a probable consequence'. In a given case a jury might understandably experience difficulties with the expression 'a probable consequence' while in another case a different jury may not. A rule of law which banned judicial attempts to deal with these difficulties would be perverse. Acceptance of the argument advanced by the first and second appellants would also create a formulaic approach to summing up. The function of a summing up is to furnish information which will help a particular jury to carry out its task in the concrete circumstances of the individual case before it and in the light of the trial judge's assessment of how well that jury is handling its task. It is undesirable for a summing up to assume the character of a collection of hallowed phrases mechanically assembled on a priori principles to be mouthed automatically in all circumstances, whether or not a particular jury actually understands them. If a judge sees it as desirable to explain the meaning of 'a probable consequence' — perhaps because it is perceived that some jurors may think it calls for a balance of probabilities analysis while others may think it refers to relatively remote possibilities — the Code does not prevent this from being done.

68 To reject the argument advanced by the first and second appellants is not to depart from the views of Sir Samuel Griffith or the statements in this Court quoted earlier. Sir Samuel was speaking of how a Code should be framed, not of how a jury should be directed. Kirby J's observations in *Murray v The Queen* were directed to 'relatively simple' provisions: the meaning of 'a probable consequence' is not relatively simple, but differs with context. The observation of Mason, Wilson and Deane JJ in *Boughey v The Queen* about drafting Codes so as to make them comprehensible to juries was qualified by the words 'where practicable', and their warning about not submerging ordinary meanings of commonly used words was a warning only against doing so 'unnecessarily': it is not always practicable to avoid explanations

of 'a probable consequence' and it may be necessary to give them. Indeed, in that very case, Mason, Wilson and Deane JJ, after quoting part of the trial judge's summing up there under challenge in which he offered an account of what 'likely to cause death' meant, said that the passage 'contained helpful and correct guidance for the jury' in making the point that it 'is an ordinary expression which is meant to convey the notion of a substantial or real chance as distinct from what is a mere possibility: "a good chance that it will happen"; "something that may well happen"; something that is "likely to happen"'.[64] Further, the fact that in some cases, such as *R v Seiffert and Stupar*,[65] a direction contained no explanation of 'probable' does not establish that other directions which do seek to explain it are on that ground alone erroneous.

69 The stand which this Court has taken on the expression 'beyond reasonable doubt' — that it alone must be used, and nothing else — has not been shared elsewhere.[66] Even in Australia it is an extreme and exceptional stand. The justification for it rests on several considerations. One is that 'beyond reasonable doubt' is an expression 'used by ordinary people and is understood well enough by the average man in the community'.[67] That is not so of 'a probable consequence'. A second consideration is that departures from the formula 'have never prospered'.[68] That has not been demonstrated to be the case in relation to 'a probable consequence'. A third consideration is that expressions other than 'beyond reasonable doubt' invite the jury 'to analyse their own mental processes',[69] which is not the task of a jury. 'They are both unaccustomed and not required to submit their processes of mind to objective analysis'.[70] Explanation of the expression 'a probable consequence' does not require this of juries. Finally, as Kitto J said in *Thomas v The Queen*:[71]

> Whether a doubt is reasonable is for the jury to say; and the danger that invests an attempt to explain what 'reasonable' means is that the attempt not only may prove unhelpful but may obscure the vital point that the accused must be given the benefit of any doubt which the jury considers reasonable.

There is not in that respect any analogy between 'beyond reasonable doubt' and 'a probable consequence'.

Did the trial judge err in saying more than that 'probable' meant 'likely'?

70 The second appellant in particular then fell back on an argument that, if the trial judge was entitled to say anything, he was entitled only to say that 'probable consequence' meant 'likely consequence'. To go further would involve using other phrases to explain 'probable' and 'likely' which themselves would tend to multiply the risks of confusion and to undercut the benefits at which codification was aimed.

71 The flaw in this argument is that just as the range of possible meanings for 'probable' may justify some explanation of the expression, to offer as an explanation that the word means 'likely' is only to point to a further word which also carries diverse meanings.

What directions may and may not be given?

72 The first and third appellants did not explicitly advance any argument beyond the two just examined. But implicit in their position was a further contention, which eventually was explicitly advanced on behalf of the second appellant: that even if the trial judge did not err in commenting at all on the meaning of 'a probable consequence', and even assuming he did not err in going beyond an equation of 'probable' and 'likely', what he actually said was erroneous. It was erroneous in that he failed to steer a course between saying that a

probable consequence was one which was more likely to occur than not (which would have been unduly generous to the appellants), and saying that a probable consequence was a real or substantial possibility or chance (which he in fact said, and which was unduly harsh to the appellants).

73 This criticism is sound, for the following reasons.

74 First, the context in which the expression 'a probable consequence' appears must be borne in mind. While it is true that ss 7, 8 and 9 apply to many offences other than murder, the crime charged here was murder. Section 305(1) of the Code provides that conviction carries a mandatory and single penalty, the highest known to the law — life imprisonment. Further, the form of liability for murder under consideration is accessorial. Accessorial liability is old, but it is an exception to the general rules of criminal responsibility. Persons liable under s 7, s 8 or s 9 need not be present at the scene of the crimes for which they are convicted, and the fact that those crimes might be committed by the principal offender may never have entered their heads. In construing 'a probable consequence' in ss 8 and 9, the extent to which it is likely that Parliament has created strict or vicarious liability in accessories must be considered.

75 Secondly, the key word in ss 8 and 9 is 'probable', not 'possible'. The word 'probable' has diverse meanings, but all common usages of it suggest a more exacting standard than 'possible'.[72]

76 Further, whatever the common law in the late 19th century was in relation to the problem dealt with by s 8 of the Code, it is clear that now at common law an accessory is liable if the principal offender's crime is 'foreseen as a possible incident of the common unlawful enterprise'.[73] Although the law has long recognised accessorial liability, it has also long attempted to lay down limits to the accessorial liability of a person who shared a common purpose with a wrongdoer, or who instigated a wrongdoer to commit a crime. The alleged accessory is not to be liable for everything a principal offender did, either vicariously or absolutely. Over time the law has employed different techniques for placing accessorial liability within just limits while continuing to give it substantial room for operation. The common law protects against excessively wide liability by demanding actual foresight, albeit of a possibility. Under ss 8 and 9 of the Code the function of protecting against excessively wide liability turns on the need for probability of outcome, independently of the alleged accessory's state of mind. If under ss 8 and 9 of the Code the expression 'a probable consequence' were construed so as to make a possible consequence sufficient, there would be liability in the accessory for whatever the principal offender did, since the fact that the principal offender did it shows that it was possible, and there would be no protection against excessively wide liability.

77 Authority in other jurisdictions with similar legislation stresses the contrast between 'probable' and 'possible'. Thus, the New Zealand Court of Appeal, applying s 66(2) of the *Crimes Act* 1961, which turns on what is 'known to be a probable consequence', could 'see no justification for reading "probable consequence" in s 66(2) as "possible consequence"'.[74] The same court stressed the need for the summing up to emphasise that the consequences were 'probable, not merely possible'.[75] In Canada, too, where s 21(2) of the *Criminal Code* centres on whether the accessory 'knew or ought to have known that the commission of the offence would be a probable consequence' of the carrying out of the unlawful purpose, it is customary to distinguish between what is probable and what is possible.[76]

78 The difficulty in defining 'a probable consequence' is that once it is accepted that 'probable' does not mean 'on the balance of probabilities' and that it means more than a real or substantial possibility or chance, it is difficult to arrive at a verbal formula for what it does mean and for what the jury may be told.

79 The expression 'a probable consequence' means that the occurrence of the consequence need not be more probable than not, but must be probable as distinct from possible. It must be probable in the sense that it could well happen.[77]

80 In this case, the s 8 question is whether 'the offence' — murder by killing the deceased with intent to do some grievous bodily harm — was 'a probable consequence' of the prosecution of the common intention of the appellants to prosecute the unlawful purpose of assaulting the deceased. In this case, the s 9 question is whether 'the facts constituting the offence actually committed' — the killing of the deceased with intent to do some grievous bodily harm — are 'a probable consequence' of carrying out the second appellant's counsel.

81 It is not necessary in every case to explain the meaning of the expression 'a probable consequence' to the jury. But where it is necessary or desirable to do so, a correct jury direction under s 8 would stress that for the offence committed to be 'a probable consequence' of the prosecution of the unlawful purpose, the commission of the offence had to be not merely possible, but probable in the sense that it could well have happened in the prosecution of the unlawful purpose. And where it is desirable to give the jury a direction as to the meaning of the expression 'a probable consequence' in s 9, a correct jury direction would stress that for the facts constituting the offence actually committed to be 'a probable consequence' of carrying out the counselling, they had to be not merely possible, but probable in the sense that they could well have happened as a result of carrying out the counselling.

Did the trial judge's directions comply with the necessary criteria?

82 The respondent contended that the trial judge's direction in this case did not fail to comply with these criteria. The respondent's argument was that the word 'possibility' in the impugned part of the summing up was qualified by the word 'real' and the word 'chance' by the words 'substantial' and 'real'. On this basis, the respondent submitted that the jury would not have been left with the impression that the appellants could be found guilty in relation to outcomes that were merely possible. That may be true, but the trial judge's direction, compelled by authority as it was, carried the risk of leaving the jury with the impression that the appellants could be found guilty in relation to outcomes which, while more than merely possible, in that they were substantial or real, were not probable. Hence, contrary to the respondent's submissions, the direction that was given by the trial judge was flawed in that it did not convey the idea that the consequence to be looked for was 'a probable or likely outcome'.

83 Each appellant has established that the summing up was wrong in law. The point raised by each appeal is thus to be decided in favour of each appellant. The question remains whether the appeals should be dismissed on the ground that 'no substantial miscarriage of justice has actually occurred' within the meaning of s 668E(1A) of the Code.

The proviso: general considerations

84 An appellate court invited to consider whether a substantial miscarriage of justice has actually occurred is to proceed in the same way as an appellate court invited to decide whether a jury verdict should be set aside on the ground that it is unreasonable, or cannot be

supported having regard to the evidence. The appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the natural limitations that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty.[78]

85 A statement of Keane JA in the Court of Appeal in this case provides a starting point. As a matter preparatory to explaining why the second appellant's appeal to the Court of Appeal on the ground that her conviction was unreasonable should be rejected, he said that the nature and extent of the injuries inflicted on the deceased compelled the conclusion that whoever inflicted them did so with the intention of at least doing grievous bodily harm to the deceased.[79] With respect, that is correct …

[Despite their conclusions respecting s 8, their Honours dismissed the appeals on the ground that there had not been any substantial miscarriage of justice. **Kirby J** delivered a separate dissenting judgment, on the ground that the proviso should not have been applied.]

Footnotes

1. *R v Deemal-Hall, Darkan & McIvor* [2005] QCA 206.
2. *R v Hind and Harwood* (1995) 80 A Crim R 105 at 116–17 per Fitzgerald P and 141–2 per Pincus JA. In fact that decision was a case in which the issue turned not on jury direction but on whether the verdict was reasonable. On a strict view it might be said that the case is not an authority on jury direction. But underlying both the issue of jury direction and the issue of reasonableness of verdict is a common question — what does 'a probable consequence' mean?
3. *R v Deemal-Hall, Darkan & McIvor* [2005] QCA 206 at [55] per Keane JA, Williams JA and Muir J concurring.
4. At 71.6 and 71.11.
5. For example, *R v Chan* [2001] 2 Qd R 662 at 663 [3]; *R v Jeffrey* [2003] 2 Qd R 306 at 317.
6. *Boughey v The Queen* (1986) 161 CLR 10 at 20 per Mason, Wilson and Deane JJ.
7. (1968) 118 CLR 618 at 622. The force of what was said in this case is not diminished by the fact that the test now preferred in relation to the grant of interlocutory injunctions is different.
8. (1951) 51 SR (NSW) 280 at 281.
9. (1968) 118 CLR 618 at 620.
10. 11th ed (2004).
11. [1967] 1 AC 617 at 634–5.
12. *R v Gush* [1980] 2 NZLR 92 at 94 per Richmond P, Richardson and O'Regan JJ (emphasis in original).
13. Crimes Act 1961 (NZ), s 66(2), the equivalent to s 8 of the Code. …
33. *Chan Wing-Siu v The Queen* [1985] AC 168 at 175 (emphasis added). …
52. See *R v Piri* [1987] 1 NZLR 66 at 78 per Cooke P, McMullin and Somers JJ concurring.
53. See, for example, *R v Gush* [1980] 2 NZLR 92 at 95 per Richmond P, Richardson and O'Regan JJ; *R v Hagen, Gemmell and Lloyd* unreported, Court of Appeal of New Zealand, 4 December 2002 at [46] per Tipping, McGrath and Anderson JJ.
54. *Johns v The Queen* (1980) 143 CLR 108 at 118 per Stephen J (emphasis in original); see also at 130–1 per Mason, Murphy and Wilson JJ.
55. See at [72]–[81].
56. Relying on *R v Salmon & James* [2003] QCA 17 at [45] per McMurdo P, Jerrard JA concurring at [69] and Helman J at [70].
57. 'An Explanatory Letter to the Honourable the Attorney-General', in Draft of a Code of Criminal Law prepared for the Government of Queensland, (1897) at viii.
58. *Murray v The Queen* (2002) 211 CLR 193 at 218 [78].

59. (1986) 161 CLR 10 at 21.
60. *R v Seiffert and Stupar* (1999) 104 A Crim R 238 at 247–8 per Pidgeon J, Kennedy and White JJ concurring.
61. For example, *Thomas v The Queen* (1960) 102 CLR 584 at 595 per Kitto J; *Dawson v The Queen* (1961) 106 CLR 1 at 18 per Dixon CJ; *Green v The Queen* (1971) 126 CLR 28 at 32–33 per Barwick CJ, McTiernan and Owen JJ.
62. [1987] 1 NZLR 66 at 79, McMullin and Somers JJ concurring.
63. *R v Cribbin* (1994) 89 CCC (3d) 67 at 77 per Morden ACJO, Catzman and Arbour JJA.
64. *Boughey v The Queen* (1986) 161 CLR 10 at 22.
65. (1999) 104 A Crim R 238 at 247–8 per Pidgeon J, Kennedy and White JJ concurring.
66. *Walters v The Queen* [1969] 2 AC 26 at 29 per Lord Diplock; *Ferguson v The Queen* [1979] 1 WLR 94 at 99; [1979] 1 All ER 877 at 882 per Lord Scarman (in general it is wise to employ 'beyond reasonable doubt', but 'other words will suffice, so long as the message is clear'). In New Zealand it is permissible to elaborate on the words to some extent (*R v Harbour* [1995] 1 NZLR 440 at 448 per Richardson, Casey, Hardie Boys, McKay and Tompkins JJ), as by contrasting a reasonable doubt with a 'vague or fanciful doubt': *R v Speakman* (1989) 5 CRNZ 250 at 260. To similar effect are cases in Canada (*R v Lifchus* [1997] 3 SCR 320 at 327–30 [15]–[22] per Lamer CJ, Sopinka, Cory, McLachlin, Iacobucci and Major JJ (La Forest, L'Heureux-Dubé and Gonthier JJ concurring)) and the United States (*Victor v Nebraska* 511 US 1 at 26 (1994) per Ginsburg J).
67. *Dawson v The Queen* (1961) 106 CLR 1 at 18 per Dixon CJ; *Green v The Queen* (1971) 126 CLR 28 at 31 per Barwick CJ, McTiernan and Owen JJ.
68. *Dawson v The Queen* (1961) 106 CLR 1 at 18 per Dixon CJ.
69. *Thomas v The Queen* (1960) 102 CLR 584 at 606 per Windeyer J.
70. *Green v The Queen* (1971) 126 CLR 28 at 33 per Barwick CJ, McTiernan and Owen JJ.
71. (1960) 102 CLR 584 at 595.
72. See also *R v Crabbe* (1985) 156 CLR 464 at 469–70 per Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ.
73. *Chan Wing-Siu v The Queen* [1985] AC 168 at 175.
74. *R v Gush* [1980] 2 NZLR 92 at 94 per Richmond P, Richardson and O'Regan JJ.
75. *R v Waho* unreported, Court of Appeal of New Zealand, 27 April 2005 at [31] per Hammond, Robertson and Potter JJ. See also *R v Rapira* (2003) 20 CRNZ 396 at 413–14 [53] per Elias CJ, Gault P and McGrath J.
76. *R v Kirkness* [1990] 3 SCR 74 at 110 per Wilson and L'Heureux-Dubé JJ (dissenting, but not on this point).
77. *R v Gush* [1980] 2 NZLR 92 at 94 per Richmond P, Richardson and O'Regan JJ; *R v Hagen, Gemmell and Lloyd* unreported, Court of Appeal of New Zealand, 4 December 2002 at [46] per Tipping, McGrath and Anderson JJ.
78. *Weiss v The Queen* (2005) 80 ALJR 444 at 454–5 [41] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ; 223 ALR 662 at 673–4.
79. *R v Deemal-Hall, Darkan & McIvor* [2005] QCA 206 at [10].

20.40C R v Menniti

[1985] 1 Qd R 520
Queensland Court of Criminal Appeal

Thomas J: The principal offence was committed by one Amato who supplied about four and a half pounds of cannabis to one Knapp at a place north of Maryborough on 7 March 1983. The applicant Menniti was convicted because of his involvement in the dealings that led to that sale. The evidence against him was that he made various arrangements with Knapp

(a police agent) over the telephone between 2 and 6 March, some of which were taped. Those conversations show Knapp in the role of intending purchaser and the applicant in the role of person who would arrange for his needs to be met. The evidence shows an arrangement for them to meet, and that the applicant in due course introduced him to Amato, the eventual supplier. It shows an intention on the applicant's part to be paid for his services to the extent of about $50 per pound of cannabis supplied. On 7 March, by arrangement the applicant and Knapp drove to Aspley where they met Amato who was in another vehicle. By further arrangement they met at a service station at Carseldine where the applicant strip-searched Knapp in the toilet. They then proceeded with their journey to Maryborough where the settlement of the transaction was to take place, Knapp driving in his vehicle, and the applicant travelling with Amato in Amato's vehicle.

At Maryborough they met in a Pizza Hut and Amato went away presumably to obtain a sample of the cannabis. The applicant at this stage showed signs of nervousness, claiming that they had been followed during their journey by a Commodore vehicle, and expressing alarm about a police vehicle that had driven by the Pizza Hut. When Amato's vehicle returned the applicant ran out onto the road and told him to go because he thought there were police in the area. Amato drove off but returned soon after whereupon the applicant got into Amato's vehicle and apparently tried to dissuade him from proceeding. Knapp followed in his vehicle. They eventually stopped in a parking area and there was conversation about calling the whole thing off on the basis that police were in the area. There was reassurance from Knapp. Knapp told the applicant to get out of Amato's car and to wait while he and Amato went on to complete the deal. They arranged to come back and pick him up in about five minutes. They then drove to a place near the Maryborough Crematorium. Amato obtained the cannabis from a place nearby and produced two bags to Knapp. Police vehicles then arrived and Amato was taken into custody.

The defence case was that the applicant was never interested in dealing and that he had only passed messages at Knapp's insistence. He admitted introducing Knapp to Amato but said that this and other actions on his part were done to get Knapp 'out of his hair', and that he had reluctantly agreed to go to Maryborough as a passive passenger. He said that at Maryborough he was trying to stop the transaction and to encourage the other parties not to close the deal.

In summing up his Honour told the jury that the only case against the applicant was that of doing acts for the purpose of enabling or aiding Amato to supply cannabis to Knapp. He also told the jury that if the applicant was guilty of an offence at all that offence was complete before he left Brisbane, and that his conduct after leaving Brisbane did not help to establish the commission of an offence by him. In my view these directions erred against the Crown. Inter alia his Honour could have directed the jury that they could convict him on the alternative basis of counselling or procuring.

The applicant claims that these directions erred against him too, because they deprived him of the opportunity of presenting his defence of 'timely withdrawal or countermand'. In so far as he complains of being deprived of a defence to an alternative Crown case that was not allowed to go to the jury, the claim is without substance. In so far as he complains that he had a defence to the Crown case that did go to the jury, and that such defence was not put, he has an arguable and interesting ground of appeal. It raises the point whether the so called defence of timely withdrawal or countermand is available to an accused person who has already done acts to aid or enable the commission of an offence.

The defence is well recognised, although not altogether clearly defined, by the common law. Recent expositions appear in *White v Ridley* (1978) 140 CLR 342 and *Becerra* (1976) 62 Cr App R 212. The threshold question is whether there is room in the Queensland Criminal Code for the application of these common law principles.

There is no express reference to any such principles in the Code. The starting point is that the Code was intended to replace the common law (*Brennan* (1936) 55 CLR 253, 263) but this does not mean that the common law can not be resorted to in aid of construction of the Code. 'It may be justifiable to turn back to the common law where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning, or on some such special ground': per Gibbs J in *Stuart* (1974) 134 CLR 426 at 437. I do not think that there are any relevant provisions of doubtful import, or that any of the above criteria apply to the provisions of the Code with which I am concerned, notably ss 7 and 8. However I do think that evidence of withdrawal may be directly relevant to questions which arise under those sections. By evidence of withdrawal I mean evidence capable of raising the same sort of issues as are discussed in the common law cases. To take the example of aiding, evidence of withdrawal may be relevant to the issue whether an accused aided another in committing the offence. He may initially have committed acts capable of amounting to aid, but may subsequently have taken effective action to cancel out the effect of his aid before the principal offender went on to commit the offence. If the question of cancellation, withdrawal or countermand fairly arises, I see no reason to refrain from using such light as is cast upon the topic by discussion in the common law cases. The only necessary reservation is that such views must be disregarded if they are in any way inconsistent with the discerned meaning of the Code.

Under s 7 or s 8 no offence is committed by anyone until the principal offender does the final act that constitutes the offence. In the present case this occurred when Amato supplied the cannabis to Knapp and not before. Until that moment, leaving aside the question of attempts amounting to separate offences in themselves, the assistance given by an accessory does not amount to an offence. A man who has given assistance in the early stages of preparation for a crime may change his mind and attempt to frustrate the venture to such an extent that he counterbalances whatever assistance he gave in the early stages. If he effectively counterbalances his earlier acts before the offence is committed, it would be very difficult to say in the end that he has aided another person in committing the offence. In one sense the clock can never be turned back, and no single act can ever be undone. But I do not think that semantics require the criminal law to hold that a person has aided another in committing the offence if, before the offence is committed, he has effectively undone the benefit of the earlier aid. In short, a person is not guilty under s 7(b) [now s 7(1)(b)] of the Code if he undoes the effect of an act previously done by him for the purpose of aiding another person to commit the offence.

The above statement is consistent with the application of the principles of timely withdrawal or countermand. It seems accepted that such principles are relevant in questions that arise under s 8 of the Code: *Saylor* [1963] QWN 14. I see no reason why they may not be also relevant to questions which arise under s 7. Different considerations will apply to the different ways in which liability can arise under those sections, just as they do in their common law counterparts or analogues. The effect of counselling may be relatively easily reversed by further counselling. Cases of procuring commission of an offence through an innocent agent (of which *White v Ridley* affords an example) may be less easily reversed,

as the case demonstrates. Cases of aiding may produce circumstances in which extremely difficult action is required before its effect can be removed: *Becerra* (1976) 62 Cr App R 212 and *Whitehouse* (1941) 1 DLR 683 afford examples. If events have gone too far for effective withdrawal of the aid, then the countermand or withdrawal are not timely. Cases of participation in a common purpose will normally be readily susceptible to withdrawal. This is because the destruction (by countermand or otherwise) of the common purpose may mean that the eventual crime was not committed in the prosecution of that common purpose, and hence criminal liability on the part of the accessory may be avoided: cf *Saylor*.

I therefore conclude that evidence of withdrawal or countermand may be relevant to questions on criminal liability which arise under s 7 or s 8 of the Code.

It is necessary to state the principles that emerge from the cases before considering their possible application to the present case. A useful summary of the common law principles has been compiled by Professor Lanham in his article 'Accomplices and Withdrawal' (1981) 97 *LQR* 575 at 591–2. The main question seems to be whether the principles stated by Gibbs J or by Stephen and Aickin JJ in *White v Ridley* are to be preferred. Gibbs J held that an accessory may withdraw before the crime is committed; but that if his withdrawal is to save him from criminal liability, it must be evidenced by action or countermanding that is capable of being effective and it must be accompanied by such action as he can reasonably take to undo the effect of his previous encouragement or participation. The view of Stephen J (with whom Aickin J agreed) is more stringent. The countermanding action, in order to avoid criminal liability, must be effectual to eliminate the accused's own actions as a cause of the eventual crime. In effect, it requires him effectively to cancel his part in the commission of the offence, to such an extent as to demonstrate that if the offence still happens it can be ascribed to the intervention of some new cause for which the accused was not responsible. Different reasons were given by the other two members of the court (Jacobs and Murphy JJ), although it is clear that all five judges would have come to the same conclusion on the facts. There is no clear majority expression of any particular view, and it is open to this court to follow the view which it thinks preferable. There are considerable problems in treating the issue as one of causation, some of which were mentioned by Gibbs J at 351. The English and Canadian cases do not treat the subject in this way, and I think that this court should accept principles as stated in the judgment of Gibbs J.

The remaining question is whether the evidence in this case was such as to require that issue to be left to the jury. If the circumstances are incapable of satisfying the appropriate tests then it should not go to the jury. His Honour did not let it go to the jury, because he considered that the actions in Brisbane were the basis of the Crown case, and, in effect, that the unsuccessful attempts at withdrawal in Maryborough were of no relevance.

…

On the views of Stephen and Aickin JJ the applicant's position on the present facts is hopeless. The evidence is simply incapable of showing that there was any new intervening cause that displaced the effect of the applicant's earlier work in setting up the transaction. However, as I have indicated, I think that Gibbs J's tests are the ones to be applied. The first question is whether the applicant took such action as he reasonably could to undo the effect of his previous participation.

The countermand must have been manifested by words or conduct sufficiently clear to bring it home to the mind of the agent that the accused no longer desires the agent to do what he was previously asked to do; a vague, ambiguous or perfunctory countermand would

not be enough. And the accused must have done or said whatever was reasonably possible to counteract the effect of his earlier request.

Although the applicant in that case had sent a clear revocation to his agent in time to make it possible to prevent the goods being carried, this was held to be insufficient. Gibbs J pointed out that he did not disclose to the airline that the box contained cannabis, and that this would have been a far more effective way of stopping the carriage. In similar vein, it may be said that the present applicant did not try physically to prevent the other actors from going through with the deal, nor did he provide any effective counsel on the matter. In fact his conduct is consistent with a desire for postponement so that he personally could dissociate himself. It fell a long way short of reversing the effect of the aid or acts of enablement which he had previously performed.

The remaining question is whether the issue of timely withdrawal should have been allowed to go to the jury. That must be decided in the same way as a judge decides whether to allow any defence to go to a jury. It is a special issue tantamount to a confession and avoidance in the alternative. Whilst the onus remains on the Crown to establish the aiding, enabling, counselling or concert (as the case may be) to the necessary standard, this issue avoids an otherwise inexorable result and may conveniently be considered as a matter of defence. Of course the prosecution has to negative any issue which would afford a defence, but no issue as such should go to the jury unless there is evidence in the case which fairly raises it.

Whether the issue be one of accident (s 23), mistake (s 24), self-defence, provocation, or other matters that go to justification or excuse, the same general principles apply. They all raise issues that are conveniently referred to as 'defences' notwithstanding that when fairly raised the onus remains on the prosecution to exclude them beyond reasonable doubt: cf *Brimblecombe v Duncan* [1958] Qd R 8 at 28, *Chan Kau* [1955] AC 206 at 213, *Lobbell* [1957] 1 QB 547 at 551, and *McDougall* [1983] 1 Qd R 89 on other points. The position seems now to be well established to the following effect:

(1) Whether there is evidence fit to go to a jury on such an issue is a question of law. If it is not fairly raised on the evidence, the judge does not allow it to go to the jury and counsel may not address upon it as an exonerating factor.
(2) If there is such evidence, the jury is told so, and is given appropriate directions on the law and appropriate comments on the facts bearing upon that issue.
(3) The jury is told that the onus remains on the prosecution throughout and that if it is not satisfied beyond reasonable doubt that the prosecution has excluded that defence, then it should acquit.

The so-called defence of timely withdrawal is not a recognised justification or excuse under the code, and is not in truth a defence of the above kind. It is really one aspect of a question of fact, that is to say an aspect of the central factual issue whether an accused has aided, counselled or otherwise done the acts which constitute the offence on his part. Once again the single example of aiding may be taken for the purposes of discussion. If there is evidence that can satisfy a jury that an accused is guilty as an aider, and if there is also evidence capable of showing a subsequent withdrawal or countermand by him such that the effect of the earlier acts is cancelled or counterbalanced, then there are two preliminary questions of law involved. Although there is only one issue, the judge must decide whether there is evidence fit to go to the jury upon each aspect of it. One is the issue of aiding and the other is the effect of the countermand. It will only be in special cases, of which the present is one, that the issue divides into these two aspects. In such a case, to fail to recognise the two aspects and to fail

to give the jury proper guidance on the question of withdrawal would be to leave the matter to speculation.

Evidence of an accused's attempts at withdrawal (whether adequate or otherwise) will normally be in evidence as part of the narrative or because it casts light on other parts of the evidence. Such evidence can be used for whatever it is worth, but it should not go to the jury as a reason for destroying the effect of the accused's earlier involvement unless it is capable of meeting the tests recognised by the courts.

The question whether there was evidence capable of showing a timely withdrawal arose directly in the present case. The effect of his Honour's ruling and summing up was that the evidence was not so capable. For reasons different from those of his Honour I have concluded that the belated attempts at withdrawal in this case could not properly be held by the jury or anyone else to have amounted to a timely withdrawal, and that it was appropriate that this issue was not left to the jury as a reason for acquittal …

I would grant leave to appeal and order that the appeal be dismissed.

Derrington J:

…

The first thing to observe is that s 7 refers to 'when an offence is committed …'. This expression has no temporal connotation: *Wyles*. However, it means that the section is brought into operation by the commission of the offence (ibid) and the significance of the expression in the present context is its implied requirement, flowing from that proposition, that the whole of the acts of the person to be brought under the section, in so far as they relate to the committed offence, should be taken into account. With that indicator, if it be necessary, the next step is to examine the relevant parts of the section in order to discern any general feature which might influence a particular construction.

As procuring has more obvious exponential features on the point it is best to deal with that first. Because procurement involves a necessary causal nexus between the act of procuring and the result, it is easy to understand that if the procuring conduct is discontinued and countermanded completely before the offence so that no residual effect of it remains, then the section has no application. There is simply no procurement because the conduct does not procure or bring about the result. If the offence proceeds it is *ex hypothesi* brought about by another cause. The notable feature for the purpose of this discussion is that the whole conduct, including the countermand, is relevant though the earlier conduct may have resulted in a procuring if it had not been countermanded. This is a matter of construction. Similarly if an earlier counselling is discontinued and effectively neutralised, it cannot be said that, on the commission of the offence the former counsellor has on the whole counselled the principal actor to commit the offence. If however there is still an operative residue of the procurement or counselling, then the section has application. The question for the jury, in such a case is whether, taking all the circumstances into consideration, including the original conduct and the quality and effect of the countermand, the person charged as an accessory has, in some way procured or counselled the commission of the offence. It is possible that, despite the countermand, yet by reason of his earlier conduct, he has still procured it; or that, despite some later reverse counselling the final effect of his whole conduct is that he has still counselled the commission of the offence.

A similar mode on construction applies to subs (c) in respect of aiding. Where an act which would provide aid in the commission of an offence if it were allowed to continue to be effective is however rendered ineffective before it begins to have effect then the result is that no aid is in fact provided to the principal offender in the commission of the offence. Although

at the moment of performance of the act the expected result would aid the principal offender in the commission of the offence, if when the circumstances as a whole are considered no aid has in fact been given, the necessary criterion is not met. However, to this end it is necessary that the original act be rendered totally nugatory, for if some residue remains that would constitute aid, this requirement of the section is met.

More difficult is s 7(b) which refers to the doing of an act for the purpose of enabling or aiding another to commit an offence, for on one reading it might appear that the definition of criminal responsibility is totally answered when the act is performed for the purpose stated providing that the offence is committed at some time. Such a construction would allow for no *locus poenitentiae* though the person concerned may have later completely rendered ineffective his former conduct. In this it is inconsistent with that construction which is more clearly identified in the remainder of the section and which was said in *Saylor* to apply to s 8. Moreover it would fail to have regard to the conduct of the person as a whole up to and including the time of the commission of the offence.

More consistent in principle with cognate parts is the alternative construction that the conduct of the person must be looked at as a whole in relation to the commission of the offence. There is nothing in logic or justice which would deny this approach, nor is it an insult to the ordinary meaning of the words used. For example, if an accomplice servant were for the purpose of aiding a burglar outside, to leave unlocked a door which he should have locked, but within a minute of his failure and long before the burglar enters he repents and locks the door, can it be said that he has omitted to lock the door for the purpose of aiding the burglar to commit the offence? On one reading of the words it can, but on a more reasonable reading it would not. Exactly the same reasoning applies, as it should, to an act rather than an omission: that is, in the example, the servant unlocks a door but soon after he repents and locks it. The conclusion is that the defence is available in respect of criminal responsibility which relies upon subs (b) and upon this section generally.

On this analysis of the section, there is a common requirement that in order that the original conduct be saved from criminality by the counteractive conduct it is necessary that those effects of the former conducing towards the crime be totally neutralised by the latter. It is not to the point that the position may have been reached which is beyond recovery by the accomplice, for the effect of the section provides that if his conduct has in fact conduced to the crime in one of the modes proscribed, then his guilt follows from the objective result rather than his final subjective wish. Presumably the rationale is explicable on two bases. It is probably more amenable to judgment that the issue be on the objective plane rather than the subjective. Moreover, if the accessory permits the effect of his contribution to go beyond his power of recall, then he has contributed to the offence and he must bear the consequences; and so he must make his decision at a stage when his counteractivity can still be effective.

…

In *Whitehouse* [1941] 1 DLR 683 at 685 in a passage cited with approval by the Court of Appeal in England in *Becerra* (1975) 62 Cr App R 212 at 218 and *Saylor*, and referred to in *White v Ridley* (1978) 140 CLR 342, there is reference to the degree of dissociation necessary to amount to the defence in the case of common design. It says:

> What is 'timely communication' must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw.

> The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences.

That statement would seem to require that for the withdrawal to be a defence there be an effective destruction of the common design, the destruction of the conducing force of the prior conduct. This view was taken by Stephen and Aickin JJ in *White v Ridley*. Although his views diverged in the different event that the accused had not lost the power to prevent the offence, Gibbs J (as he then was) at 351 said: 'The countermand will not have been timely if it was given when it was too late to stop the train of events which was started by his request.' It is also the view of the learned author on the subject in *Halsbury's Laws of England* (4th ed 1976), vol 11, par 44, that guilt of the offence lies upon such a person 'unless before its commission he has effectively countermanded or nullified the incitement'.

When his conduct has irretrievably conduced to the criminal act, it is not open to a person whose conduct is within s 7 to enjoy the luxury of resiling, knowing that the offence may still be committed, yet that he is totally absolved because of his ineffective countermand. The scheme provided by the section is logical, practical and just. If there is genuine remorse and the accessory does all that could reasonably be expected of him but is unsuccessful, then that would have a mitigating effect on sentence; but if his conduct has had any effect leading to the offence then he is held responsible in the same way as for example a principal offender who commits sufficient of his purpose to constitute an attempt to commit an offence, but abandons the venture before complete consummation of it — s 4 of the Criminal Code.

In the present case, on the application of the above standard, the defence was not open to the appellant because either the circumstances had reached the stage where the recall of the benefit of his assistance was no longer open to him or alternatively he failed to take adequate steps to prevent the commission of the offence …

[**Connolly J** in a separate judgment also dismissed the appeal.]

Capacity to Commit Offences

CHAPTER 21

INTRODUCTION

21.1 This chapter deals with the legal capacity of particular categories of persons to commit offences. The issue will be examined with respect to the capacity of children and corporations.

CHILDREN

21.2 Under the Codes of Queensland and Western Australia, there are two significant ages that define criminal responsibility — an age below which there is a total exemption from criminal responsibility, and a higher age under which there is an exemption unless the child is proved to have had the capacity to know that he or she ought not to have engaged in the conduct:

1. The total exemption applies to children under 10: Codes s 29(1) (Qld)/s 29 (WA). See also Criminal Code (Cth) s 7.1.
2. The other exemption, dependent upon the actual capacity of the child, applies to children under 14: Codes s 29(2) (Qld)/s 29 (WA). See also Criminal Code (Cth) s 7.2. Children between 10 and 13 can be liable for an offence if they are proved to have had the capacity to know that they ought not to have done the act or made the omission. The test here is whether the child knew that the conduct was wrong according to the standards of ordinary people: *R v M* (1977) 16 SASR 589. The burden of proof is on the prosecution.

21.3 The immunity of certain children from criminal liability does not mean that they may commit with impunity what would otherwise be offences. It simply means that action cannot be taken against them for offences within the framework of criminal law. Their conduct may still give rise to proceedings under specific child welfare legislation. See the provisions relating to children in need of care and control: Child Protection Act 1999 (Qld) Pt 4; Children and Community Services Act 2004 (WA) Pt 4.

21.4 A child who has capacity for the purpose of criminal responsibility is subject to the same substantive criminal law as an adult. However, there are marked differences in the trial process and the applicable penalties. Queensland and Western Australia have each established a regime to deal with the detention, trial and disposition of young offenders: Juvenile Justice Act 1992 (Qld); Young Offenders Act 1994 (WA). Each has also established a Children's Court to deal with young offenders: Children's Court Act 1992 (Qld); Children's Court of Western Australia Act 1988 (WA).

CORPORATIONS

The scope of corporate liability

21.5 Corporations as well as natural persons can commit criminal offences. There are no formal limits on the offences that a corporation can commit. Although there are some offences which it is practically inconceivable for a corporation to commit, corporate liability is not confined to commercial offences. For example, a corporation can, in principle, commit an offence against the person such as manslaughter, especially if the corporation is shown to have caused death in a grossly negligent manner. In modern times there has been a proliferation of regulatory offences such as those relating to occupational health and safety, fair trading and licensing, all matters that may involve corporations.

Extension of criminal liability to corporations is found not in the Codes but in the Acts Interpretation Act 1954 (Qld) s 46 and the Interpretation Act 1984 (WA) s 69. Obviously corporations cannot be imprisoned. Fines are prescribed in substitution for terms of imprisonment: Penalties and Sentences Act 1992 (Qld) s 181A(1); Sentencing Act 1995 (WA) ss 42(4), 43(4), 40(2).

A corporation can also be a victim of crime. The terms 'person' or 'owner', when used with reference to property, include corporations: Codes s 1. There is a procedure for corporations to enter pleas and be represented in court: Code (Qld) s 594A; Criminal Procedure Act 2004 (WA) Div 6.

21.6 The attribution of corporate liability in both Queensland and Western Australia remains a matter of common law: see **21.7–21.12**. Nevertheless, the standard provisions relating to criminal responsibility in the Codes apply equally to corporate bodies. The Codes s 36 apply the provisions of Pt V dealing with criminal responsibility to all persons charged with criminal offences, including corporations: *Grain Sorghum Marketing Board v Supastok Pty Ltd* [1964] Qd R 98 at 21.17C.

A detailed scheme of corporate liability is set out in the Criminal Code (Cth) ss 12.1–12.6. This scheme is radically different from the traditional scheme at common law, substantially expanding the scope of corporate liability: see **21.13–21.16**.

Liability for state offences

21.7 A corporation can only act through its personnel. In determining whose actions can be attributed to a corporation, the courts have decided that the doctrine of vicarious liability, recognised as part of the civil law of torts, is not compatible with the provisions of the Codes. Vicarious liability involves attributing to an employer what employees do in the course of their employment. Historically, there have been a few instances where vicarious liability

has been recognised in criminal law but, generally, common law jurisdictions have rejected it. With respect to the Codes, it has been said that vicarious liability would make a person responsible for acts occurring independently of the exercise of the will and would therefore violate s 23(1)(a) (Qld)/s 23A (WA): *Grain Sorghum Marketing Board v Supastok Pty Ltd*, above (21.17C); see also the discussion at 11.3.

21.8 Courts in Queensland and Western Australia have adopted common law principles for attributing criminal liability to corporations. These are principles of 'identification liability'. Liability can flow to a corporation only from a range of management personnel who are identifiable with it, constituting its 'directing mind and will'. These persons must also be acting within the scope of their authority or employment. This does not mean that there must be some instruction or authorisation to engage in the conduct. It means no more than that the conduct must fall within an assigned area of operation and perhaps must be linked to a benefit for the corporation: *Canadian Dredge & Dock Co v The Queen* [1985] 1 SCR 662. The conduct may be disguised from other corporate personnel and may even be in breach of corporate policy.

The personalisation of the corporation through its 'directing mind and will' applies not only to attributions of liability but also to claims for defences. Therefore, where a corporation seeks to rely on a defence of reasonable mistake under the Codes s 24, the mistake must be made by a directing officer: *G J Coles & Coy Ltd v Goldsworthy* (**12.15C**), where it was said that any mistake made by the subordinate who made the physical sale was immaterial.

21.9 Under the traditional formulation of identification liability, the only person whose acts and mental states can be attributed to a corporation is a person who is its 'directing mind and will': *Grain Sorghum Marketing Board v Supastok Pty Ltd* at 21.17C. An influential, albeit restrictive, statement has been that of Lord Reid in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153; [1971] 2 All ER 127:

> Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instruction from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company.

This restrictive test evidently excludes many persons who direct the day-to-day operations of corporations, even when they are given some measure of discretion respecting how these operations are to be conducted. Subordinates can only make the corporation liable when they are given full discretion to act independently, so that the functions of management have been effectively delegated to them.

21.10 The traditional conception of limited corporate liability is complicated by the relative ease with which corporate liability is accepted for offences where the proscribed conduct is described by words such as 'permitting' or 'selling': for example, *G J Coles & Coy Ltd v Goldsworthy* at 12.17C. In offences using the word 'permitting', the offence descriptions target a failure to prevent something from happening. Such offences are easily applied to the directing officers of corporations who can, in turn, make the corporations themselves liable.

In those offences using the word 'selling', the courts appear to have recognised two senses in which a sale can be said to be made:

1. by the person who physically makes the transfer; and
2. by the owner who authorises the transfer: see D Ormerod, *Smith and Hogan: Criminal Law*, 11th ed, Oxford University Press, Oxford, 2005, pp 230–1, 234.

A corporation, acting through its directing officers, can 'sell' in the second sense, even though the physical act is performed by a subordinate employee.

21.11 The line of traditional authority on corporate liability was reviewed by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500; 3 All ER 918 at 21.18C. The Privy Council took the view that 'directing mind and will' is not a universal test, but is rather one of a range of options between which the courts can choose. The choice is to be made as a matter of statutory construction, considering language, context and policy with the aim of determining whose conduct is to be identified as that of the corporation for the purposes of the relevant statute. In some instances, it might be confined to the 'directing mind and will'; in other instances, subordinates could make the corporation liable. In *Meridian Global Funds* itself, it was decided that a corporation could be convicted of offences relating to failure to disclose dealings in publicly quoted securities, even though employees who individually committed these offences may not have constituted its 'directing mind and will'.

The authority of *Meridian Global Funds* could be used to expand the scope of corporate liability in Queensland and Western Australia. It is doubtful, though, that its approach would be applied outside the realm of commercial statutes to offences in general statutes such as the Codes. For traditional criminal offences, courts might be expected to decide that only the conduct of the 'directing mind and will' is intended to be identifiable with the corporation. This was the conclusion in *Attorney General's Reference (No 2 of 1999)* [2000] QB 796; 3 All ER 182. The English Court of Appeal held that a corporation could only be liable for manslaughter through attribution from the liability of its 'directing mind and will'.

21.12 There is widespread concern that the common law principles for attributing corporate liability are too narrow. Increasingly, it has been argued that corporations should be vicariously liable for the acts and omissions of all employees acting within their scope of employment unless the corporation proves that it exercised due diligence to prevent the conduct. It has also sometimes been proposed that due diligence should require action to create and maintain a 'corporate culture' of compliance with regulatory statutes.

Concern has also been expressed about the relationship between corporate and individual liability. Identification liability and vicarious liability are both forms of derivative liability. They both require an offence to have been committed by an individual, with corporate liability then being derived from the individual liability. This can cause difficulties in cases where the standard of criminal negligence is in issue. No matter how pervasive negligence may have been throughout a corporation, the corporation cannot be liable if no single individual's negligence amounted to criminal negligence.

Such concerns lay behind the radically different scheme of corporate liability introduced by the Criminal Code (Cth) for Commonwealth offences.

Liability for Commonwealth offences

21.13 The scheme of corporate liability under the Criminal Code (Cth) ss 12.1–12.6 represents a major shift away from common law principles and a substantial widening of the scope for corporate liability.

The rule for attributing conduct to a corporation has been dramatically widened. The conduct of any employee, agent or officer is attributed to the corporation as long as it is within the actual or apparent scope of employment or authority: s 12.2. The rules for attributing fault for all categories of offence have also undergone dramatic change: ss 12.3–12.5.

21.14 For offences where intention, knowledge or recklessness is required, that fault element is attributed to a corporation that 'expressly, tacitly or impliedly authorised or permitted the commission of the offence': s 12.3(1). Authorisation or permission can be attributed to a body corporate under various conditions:

1. if the board of directors or a 'high managerial agent' committed the offence (s 12.3(2)(a)) — a 'high managerial agent' is defined as someone with such responsibilities that his or her conduct may fairly be assumed to represent the corporation's policy (s 12.3(6));
2. if the board of directors or a 'high managerial agent' expressly, tacitly or impliedly authorised or permitted the commission of the offence (s 12.3(2)(b)) — unless the corporation proves that it exercised due diligence to prevent the conduct, or the authorisation or permission (s 12.3(3));
3. if a corporate culture existed that directed, encouraged, tolerated or led to non-compliance with the relevant provision (s 12.3(2)(c)) — 'corporate culture' is defined as 'an attitude, policy, rule, course of conduct or practice' (s 12.3(6));
4. if the body corporate failed to create a corporate culture of compliance: s 12.3(2)(d).

The general thrust of these provisions is to recognise corporate equivalents of individual intention, knowledge and recklessness. Section 12.3(2)(d), however, allows offences to be established through a form of corporate negligence, even though individual liability for the same offences would require proof of some subjective state of mind.

21.15 For offences of negligence, s 12.4 allows the corporation to be negligent even when no individual has the required fault element. The negligence of the corporation can be established by viewing its conduct 'as a whole' — 'that is, by aggregating the conduct of any number of its employees, agents or officers': s 12.4(2). This is particularly relevant where criminal negligence is in issue but simple negligence is all that can be established against any single individual.

21.16 For offences of strict liability, a defence of mistake of fact is available only if both the person who carried out the conduct was under a reasonable mistake and the corporation proves that it exercised due diligence to prevent the conduct: s 12.5.

21.17C Grain Sorghum Marketing Board v Supastok Pty Ltd

[1964] Qd R 98
Full Court, Supreme Court of Queensland

Stable J: The Grain Sorghum Marketing Board laid six complaints against the company relating to alleged breaches on the 15th and 16th May, 1961, by the company of s 15(3) of The Primary Producers' Organisation and Marketing Acts, 1926 to 1957. Three of the said complaints were of buying grain sorghum part of the commodity grain sorghum, namely, 'all grain sorghum, the produce of the soil within any part of the state of Queensland' declared by the Governor in Council under the said Act to be a commodity under and for the purposes of such Acts, from a person other than the Board, and which grain sorghum was not exempted by the Board from the operation of s 15 of the Acts. The other three complaints were of receiving the same grain …

The stipendiary magistrate decided as follows:

> I do not think there is sufficient evidence to implicate the defendant company on any of the charges.
>
> I am impressed with the evidence of Mr Brown and I am of the opinion that there is no evidence that the defendant company authorised or ratified any transaction which might have been made. All six complaints are dismissed. The defendant company is allowed 40 guineas professional costs and £15 7s witnesses' expenses.

From this decision the Board appeals on a number of grounds of fact and law adding up to the submission that on all of the evidence before him the stipendiary magistrate should have been satisfied beyond all reasonable doubt of the company's guilt and should have convicted it.

…

The evidence by which it was sought (apart from the usual averments) to prove the charges consisted largely of statements in the nature of admissions made to one of the Board's inspectors, Bergin, by servants of the company.

The evidence indicated that one Downie was at all relevant times the company's manager at Warwick. The registered office of the company was in Brisbane. The magistrate apparently accepted the evidence of Brown, in the decision which I have quoted, that he, Brown, was the general manager of the company and of the parent company of which it was a wholly owned subsidiary. The respondent company carried on business at Warwick as a manufacturer of Supastok Stock and Poultry Food. Brown attended meetings of the boards of the two companies and got his instructions from the board. He swore that he gave Downie instructions to buy all sorghum grain grown in Queensland from the complainant Marketing Board, and that further requirements were to be the produce of New South Wales. He said that he told Downie in May, 1961, that it was clear that the Marketing Board could not supply a fraction of the grain the company wanted and that he was to go into New South Wales and buy some grain. Downie reported to him orally and by inter-office memo. He spoke to Brown by telephone during various times he was in New South Wales in May, 1961. He did not at any time in May, 1961, suspect that Downie was not carrying out instructions, he said he had no reason to believe it and did not suspect it.

…

The respondent company argues that if the acts complained of were done then upon the evidence which the magistrate accepted they were done independently of the exercise of its

will. The evidence to which I refer is that of Brown. It is undoubted that 'person' includes 'company' in this context.

Upon this aspect the question, bluntly expressed is, does the decision of this court in *Hunt v Maloney; Ex parte Hunt* ([1959] Qd R 164) apply to a company? The appellant argues, as I understand and summarise it, that a company, unlike a human employer, literally never sleeps and never has its back turned, so that it is liable for the acts of its servants, in this case Downie, all the time. It was submitted that, Brown being the general manager of the company, for the purposes of the company's day to day operations at Warwick its will was the will of Downie the resident manager at Warwick. It was argued that the respondent through Downie intended to buy grain sorghum and that the acts following the formation of that intention did not occur by accident or independently of the company's will. In a sense this is tantamount to saying that a corporate body has as many wills as it has employees, or, rather, employees in the position of branch managers whose authority has been limited by orders from the corporate body's directing centre. In my view that concept is too wide. I respectfully adopt the words of Denning LJ (as he then was) in *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* ([1956] 3 All ER 624, at 630), Hodson and Morris LJJ (as they then were) agreeing:

> A company may in many ways be likened to a human body. They *(sic)* have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by law as such … So here the intention of the landlord company can be derived from the intention of their *(sic)* officers and agents. Whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case. (The underlining is mine.)

The magistrate, accepting Brown, could well regard Downie as a mere tool without power to move save in accordance with orders. The argument must go so far as to assert that if the publican in *Hunt v Maloney* (supra) had been a company then the will of the disobedient servant would have been its will, for he was the company's agent for the purpose of serving glasses of beer, and the company must have been convicted and punished for his disobedient omission. That would be going a long way to holding that a company can seldom or never have the protection of that part of s 23 of the Criminal Code which refers to acts or omissions occurring independently of the exercise of the will. I do not accept this.

In my view the decision of *Hunt v Maloney* (supra) applies to companies, and it is implicit in the magistrate's decision that it applies to the facts of this case.

The orders to review should be discharged with costs.

Gibbs J: I have had the advantage of reading the reasons prepared by Stable J, and I agree with him that on the view the magistrate took of the facts, this case is governed by *Hunt v Maloney; Ex parte Hunt* ([1959] Qd R 164) and that the complaints were rightly dismissed.

…

It is clear that a master is liable in a civil suit for a wrongful act done by a servant in the course of his employment, although the act done by the servant was one that he had

been expressly forbidden by his master to do. This rule applies to bodies corporate as well as to natural persons. However in *Hunt v Maloney; Ex parte Hunt* (supra) this court held that in Queensland a master is not criminally responsible for the act of his servant, done within the apparent scope of his authority, if the act done was contrary to the master's instructions. In coming to this conclusion all members of the court relied on s 7 of the Criminal Code and in addition Stanley and Mack JJ relied on s 23 of the Criminal Code. Stanley J said at 170:

> In the present case the barman's act of serving beer in unwashed glasses contrary to instructions and despite the presence of the proper washing machine, seems to be an act which occurred independently of the exercise of the respondent's will.

The respondent in *Hunt v Maloney; Ex parte Hunt* (supra) was a natural person, but I can see no reason why the principle of that decision should not apply where the person charged is a body corporate.

Section 36 of the Criminal Code provides that the provisions of Ch V 'apply to all persons charged with any offence against the Statute Law of Queensland'. It would indeed be anomalous if the criminal responsibility of bodies corporate must be determined by the application of the rules of the common law that have been replaced, so far as natural persons are concerned, by Ch V, and I am satisfied that this is not the intention. 'Persons' in s 36 in my opinion includes bodies corporate. The definition of 'person' in s 1 of the Criminal Code does not indicate an intention that the definition of 'person' in s 36 of the Acts Interpretation Act of 1954 should not apply to the provisions of Ch V (cf *Smith v Trocadero Dansant Ltd* ([1927] St R Qd 39 at 45)). It follows that a corporation, like a natural person, is not criminally responsible for an act which occurs independently of the exercise of its will (s 23), including, on the authority of *Hunt v Maloney; Ex parte Hunt* (supra) an act done by a servant in violation of his instructions …

Of course a corporation can only exercise its will through its human agents. As Viscount Haldane LC said in *Lennard's Carrying Company Limited v Asiatic Petroleum Company Limited* ([1915] AC 705 at 713):

> My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.

It was submitted by the appellant in the present case that for the purpose of the day to day operations of the respondent company at Warwick, the mind and will of Downie, who was the company's manager at Warwick, was the mind and will of the company and that when Downie purchased and received on behalf of the company, and otherwise than from the Board, sorghum grown in Queensland, the purchase and receipt of the sorghum was not an act which occurred independently of the exercise of the will of the company. To accept this submission, however, it is necessary to reject the evidence of Brown, the general manager of the respondent company, which the magistrate expressly accepted. If Brown's evidence be accepted it is not possible to hold that Downie represented the directing mind and will of the company and controlled what it did. Brown said that he himself had the sole control of the company's activities, subject to the board of directors, and that he gave instructions as

to the purchase of sorghum which Downie, who was later dismissed, in fact disregarded. On this evidence, Brown's will was the will of the company, and the purchase and receipt of the grain occurred independently of the exercise of the company's will …

[His Honour agreed with **Stable J** that the orders to review be discharged with costs. **Jeffriess J** dissented, on the ground that Downie was operating as the mind and will of the company.]

21.18C Meridian Global Funds Management Asia Ltdv Securities Commission

[1995] 2 AC 500; [1995] 3 All ER 918
Privy Council (England)

Lord Hoffman delivered the judgment of the court.

Lord Hoffman: In 1990 a group of people in New Zealand, Malaysia and Hong Kong tried to gain control of a cash-rich publicly listed New Zealand company, Euro-National Corporation Ltd ('ENC'), and use its assets for their own purposes. The predators included a New Zealand businessman called David Lee Sian Mun, two Hong Kong investment managers called Norman Koo Hai Ching ('Koo') and Norman Ng Wo Sui ('Ng'), who were employed by the appellant company, Meridian Global Funds Management Asia Ltd ('Meridian'), and members of a Malaysian sharebroking firm called Hwang & Yusoff Securities Sdn Bhd ('Hwang & Yusoff'). Their scheme required the purchase, through apparently respectable New Zealand merchant bankers, of a 49 per cent controlling holding in ENC for NZ $18.2m. The intention was to fund this purchase out of ENC's own assets, but bridging finance was needed to fill the gap between buying the shares and gaining control of the company's money. This was provided by Koo and Ng out of funds managed by Meridian. Meridian is a substantial Hong Kong investment management company, a subsidiary of National Mutual Life Association of Australasia Ltd. Koo was its chief investment officer, Ng a senior portfolio manager. Their Lordships do not know exactly how they were to receive their share of the spoils. But they funded the scheme by improperly using their authority to buy and sell Asian shares. They contracted on behalf of Meridian, through Hwang & Yusoff, to buy a parcel of shares in Malaysian and Indonesian companies from ENC for $21m and at the same time to resell the same shares to ENC for a slightly greater price. Payment for the purchase was made to Hwang & Yusoff on 30 October and payment for the resale was to be made by ENC on 19 November. ENC did not own the shares in question and the persons who purported to sell on its behalf had at that stage no authority to do so, but Meridian paid the money and on 9 November Hwang & Yusoff used $18.2m to buy the shares in ENC. But the scheme to pay Meridian back out of ENC's money on 19 November was frustrated by the independent directors of ENC; who imposed conditions on the use of the company's funds with which the predators could not comply. Unable to get their hands on the company's money, they had to unwind the scheme as best they could. It is unnecessary to go into the details of how the participants tried to extricate themselves except to notice two matters. First, that on 10 December 1990 Koo, on behalf of Meridian, agreed to release its rights under the original funding arrangements and accept instead a payment and undertakings from Hwang & Yusoff. Secondly, that the net result was that the funds under Meridian's management suffered a loss, which the Australian parent company had to make good to the beneficial owners of the funds when the affair was discovered some six or seven months later.

Stockmarket regulators have found that one way to help boards and investors to resist such raids is to require immediate disclosure to the target company and the stock exchange of the identity of anyone acquiring a substantial interest of any kind in the company's shares. This enables the board and the investors to know who is behind the respectable nominees. Part II of the New Zealand Securities Amendment Act 1988 was intended, among other things, to introduce such transparency into dealings in publicly quoted securities. The relevant duties of disclosure are contained in s 20(3) and (4):

> (3) Every person who, after the commencement of this section, becomes a substantial security holder in a public issuer shall give notice that the person is a substantial security holder in the public issuer to — (a) the public issuer; and (b) any stock exchange on which the securities of the public issuer are listed.
> (4) Every notice under subsection (3) of this section shall — (a) be in the prescribed form; and (b) contain the prescribed information; and (c) be accompanied by, or have annexed, such documents, certificates, and statements as may be prescribed; and (d) be given in the prescribed manner; and (e) be given as soon as the person knows, or ought to know, that the person is a substantial security holder in the public issuer.

A 'public issuer' means a company listed on the New Zealand Stock Exchange and 'substantial security holder' means a person who has a 'relevant interest' in five per cent, or more of the voting securities in the public issuer. The definition of 'relevant interest' in s 5 is both complicated and comprehensive, but there is no need to examine its terms because, although the matter was disputed in the courts below, Meridian has accepted before their Lordships' Board that the effect of the transaction was to give Meridian a relevant interest in the 49 per cent holding in ENC between 9 November 1990, when its money was used to buy it, and 10 December 1990 when the scheme was unwound. It gave no notice under s 20(3).

Section 30 of the Act provides that where there are 'reasonable grounds to suspect' that a substantial security holder has not complied with, among other provisions, s 20, the court may, on the application of the Securities Commission, make one or more of a number of orders mentioned in s 32. These range from ordering the substantial security holder to comply with the Act to forfeiting the shares in which he has an interest. After holding its own inquiry in March 199l, the commission applied for orders against various participants in the scheme. Meridian was not among the original defendants but was joined a few days before the trial began.

Heron J held that Meridian knew on 9 November that it was a 'substantial security holder' in ENC for the purposes of s 20(4)(e). He arrived at this conclusion by attributing to Meridian the knowledge of Koo and Ng, who undoubtedly knew all the relevant facts. He did not go into the juridical basis for this attribution in any detail. It seemed obvious to him that if Koo and Ng had authority to enter into the transaction, their knowledge that they had done so should be attributed to Meridian. It had therefore been in breach of its duty to give notice under s 20(3). In view of the fact that its relevant interest had ceased on 10 December 1990 the judge made no order against Meridian except that it should pay $50,000 towards the commission's costs and $15,000 towards the costs of a minority shareholder in ENC. The finding that Meridian was in breach was incorporated in a declaration made by the judge at the request of Meridian so that it could have an order against which to appeal. The Court of Appeal ([1994] 2 NZLR 291) affirmed the decision of Heron J on somewhat different grounds. It decided that Koo's knowledge should be attributed to Meridian because he was the 'directing mind and will' of the company. The Court of Appeal received some evidence about how Meridian functioned.

The members of the board lived partly in Hong Kong and partly in Australia and met only once a year for the formal business before the annual general meeting. Other matters which required a board resolution were circulated by post. Koo used to be managing director but was replaced by a Mr Armour on 1 August 1990. Although Koo thereafter in theory reported to Mr Armour, in the matter of buying and selling securities he went on in the same way as before. The ENC purchases and sales were openly recorded in the books but Koo did not specifically report them to Mr Armour, who only found out about them after Koo had left. Nor did Koo report anything else and there was no evidence that Mr Armour or the other members of the board tried to supervise what he was doing. By leave of the Court of Appeal, Meridian now appeals to their Lordships' Board. It says that its only directing mind and will was that of its board, or possibly of Mr Armour, but not Koo, whom the Court of Appeal, at 301, correctly described as 'under Mr Armour' in the corporate hierarchy.

The phrase 'directing mind and will' comes of course from the celebrated speech of Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 713 ...

[Their Lordships noted the relevance of the set of rules ('the rules of attribution') which determine those acts on the part of individuals that constitute acts of the company.]

The fact that the rule of attribution is a matter of interpretation or construction of the relevant substantive rule is shown by the contrast between two decisions of the House of Lords, *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 and *Re Supply of Ready Mixed Concrete (No 2)* [1995] 1 AC 456. In the *Tesco* case [1972] AC 153 the question involved the construction of a provision of the Trade Descriptions Act 1968. Tesco were prosecuted under s 11(2) for displaying a notice that goods were being 'offered at a price less than that at which they were in fact being offered ...'. Its supermarket in Northwich had advertised that it was selling certain packets of washing powder at the reduced price of 2s 11d, but a customer who asked for one was told he would have to pay the normal price of 3s 11d. This happened because the shop manager had negligently failed to notice that he had run out of the specially marked low-price packets. Section 24(1) provided a defence for a shopowner who could prove that the commission of the offence was caused by 'another person' and that: 'He took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control'. The company was able to show that it owned hundreds of shops and that the board had instituted systems of supervision and training which amounted, on its part, to taking reasonable precautions and exercising all due diligence to avoid the commission of such offences in its shops. The question was: whose precautions counted as those of the company? If it was the board, then the defence was made out. If they had to include those of the manager, then it failed.

The House of Lords held that the precautions taken by the board were sufficient for the purposes of s 24(1) to count as precautions taken by the company and that the manager's negligence was not attributable to the company. It did so by examining the purpose of s 24(1) in providing a defence to what would otherwise have been an absolute offence: it was intended to give effect to a 'policy of consumer protection which does have a rational and moral justification': per Lord Diplock, at 194–5. This led to the conclusion that the acts and defaults of the manager were not intended to be attributed to the company. As Lord Diplock said, at 203:

> It may be a reasonable step for an employer to instruct a superior servant to supervise the activities of inferior servants whose physical acts may in the absence of supervision result in that being done which it is sought to prevent. This is not to delegate the employer's

> duty to exercise all due diligence: it is to perform it. To treat the duty of an employer to exercise due diligence as unperformed unless due diligence was also exercised by all his servants to whom he had reasonably given all proper instructions and upon who he could reasonably rely to carry them out, would be to render the defence of due diligence nugatory and so thwart the clear intention of Parliament in providing it.

On the other hand, in *Re Supply of Ready Mixed Concrete (No 2)* [1995] 1 AC 456, a restrictive arrangement in breach of an undertaking by a company to the Restrictive Practices Court was made by executives of the company acting within the scope of their employment. The board knew nothing of the arrangement; it had in fact given instructions to the company's employees that they were not to make such arrangements. But the House of Lords held that for the purposes of deciding whether the company was in contempt, the act and state of mind of an employee who entered into an arrangement in the course of his employment should be attributed to the company. This attribution rule was derived from a construction of the undertaking against the background of the Restrictive Trade Practices Act 1976: such undertakings by corporations would be worth little if the company could avoid liability for what its employees had actually done on the ground that the board did not know about it. As Lord Templeman said, at 465, an uncritical transposition of the construction in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153:

> … would allow a company to enjoy the benefit of restrictions outlawed by Parliament and the benefit of arrangements prohibited by the courts provided that the restrictions were accepted and implemented and the arrangements were negotiated by one or more employees who had been forbidden to do so by some superior employee identified in argument as a member of the 'higher management' of the company or by one or more directors of the company identified in argument as 'the guiding will' of the company.

…

Once it is appreciated that the question is one of construction rather than metaphysics, the answer in this case seems to their Lordships to be as straightforward as it did to Heron J. The policy of s 20 of the Securities Amendment Act 1988 is to compel, in fast-moving markets, the immediate disclosure of the identity of persons who become substantial security holders in public issuers. Notice must be given as soon as that person knows that he has become a substantial security holder. In the case of a corporate security holder, what rule should be implied as to the person whose knowledge for this purpose is to count as the knowledge of the company? Surely the person who, with the authority of the company, acquired the relevant interest. Otherwise the policy of the Act would be defeated. Companies would be able to allow employees to acquire interests on their behalf which made them substantial security holders but would not have to report them until the board or someone else in senior management got to know about it. This would put a premium on the board paying as little attention as possible to what its investment managers were doing. Their Lordships would therefore hold that upon the true construction of s 20(4)(e), the company knows that it has become a substantial security holder when that is known to the person who had authority to do the deal. It is then obliged to give notice under s 20(3). The fact that Koo did the deal for a corrupt purpose and did not give such notice because he did not want his employers to find out cannot in their Lordships' view affect the attribution of knowledge and the consequent duty to notify.

It was therefore not necessary in this case to inquire into whether Koo could have been described in some more general sense as the 'directing mind and will' of the company. But their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company. It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company. Sometimes, as in *Re Supply of Ready Mixed Concrete (No 2)* [1995] 1 AC 456 and this case, it will be appropriate. Likewise in a case in which a company was required to make a return for revenue purposes and the statute made it an offence to make a false return with intent to deceive, the Divisional Court held that the mens rea of the servant authorised to discharge the duty to make the return should be attributed to the company: see *Moore v I Bresler Ltd* [1944] 2 All ER 515. On the other hand, the fact that a company's employee is authorised to drive a lorry does not in itself lead to the conclusion that if he kills someone by reckless driving, the company will be guilty of manslaughter. There is no inconsistency. Each is an example of an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule …

Criminal Procedure

PART 5

Principles of Criminal Procedure

CHAPTER 22

INTERESTS IN THE CRIMINAL JUSTICE PROCESS

22.1 The principles of criminal procedure have been developed to satisfy aims that are not always harmonious. Whenever they conflict, the law must provide a reasonable balance between the interests at stake. The two most obvious aims of the criminal law are, on the one hand, the detection of crime and the conviction of guilty persons and, on the other hand, the protection of innocent persons from wrongful conviction. To some extent, these can be harmonious objectives. For example, rational processes of fact-finding will serve both the conviction of the guilty and protection of the innocent. But there is also the potential for conflict. This is perhaps most dramatically illustrated in the rules relating to the burden of proof (see Chapter 2), where the requirement that the prosecution prove its case beyond reasonable doubt serves to protect innocent persons, but at the cost of risking acquittals of persons who are guilty.

22.2 In the criminal justice process, the societal interest in detecting crime and convicting guilty persons is traded off against a set of other societal interests:

1. the need to protect innocent persons;
2. privacy — measures that might lead to the identification of offenders may be eschewed because they are too intrusive. An example is the searching of dwellings by police officers on the suspicion that offences are being committed or that evidence can be found. The law has imposed various safeguards respecting warrants in order to limit the investigative powers of police in the interest of protecting the privacy of ordinary people: see Chapter 24. In the protection of this interest, there is a cost to law enforcement;
3. the need to ensure equality before the law, in the sense that all persons who have committed offences are exposed to a similar risk of detection and conviction. This requires various measures to protect persons who may be disadvantaged by factors such as intellectual disability or mental disorder. The spectre of the law being enforced more vigorously against some sectors of society than others can be avoided only at some cost for law enforcement;
4. the need for the rule of law to be respected in the operations of the criminal justice system, so that the system can command the loyalty of the community. This means that

agents of the system, such as police, prosecutors and judges, must themselves obey the law governing their work. They must operate within the framework of whatever rules have been laid down, even if this means forgoing convictions in particular cases.

22.3 The balance of competing interests is not always struck in a way that favours the innocent person. Any system of prosecutions and trials carries a risk of wrongful convictions and some degree of this risk must be accepted if any guilty person is ever to be convicted. Moreover, the procedural protections for innocent persons may need to be limited in the interests of economic efficiency. Therefore, Australia has evolved a two-tier system of criminal justice: see 28.1–28.13. The more elaborate trial procedure, with access to trial by jury, is reserved for the more serious offences carrying higher penalties. Less serious offences are handled through a system of summary justice in Magistrates Courts in which greater priority is placed on the speedy and cheap disposition of cases.

SOURCES OF THE LAW OF CRIMINAL PROCEDURE

22.4 The sources of the law of criminal procedure are diverse. Originally, most of the principles of criminal procedure were established by the courts. Parliaments have now legislated extensively. In some areas, though, the principles developed in the courts, especially the High Court, remain important. The common law continues to play a role in relation to matters such as the exclusion of wrongfully obtained evidence and the dimensions of the right to a fair trial.

The investigative powers of police, including search, seizure, arrest and the conduct of forensic procedures, are governed by the Police Powers and Responsibilities Act 2000 (Qld), the Criminal Investigation Act 2006 (WA) and the Crimes Act 1914 (Cth).

The conduct of criminal proceedings in courts is governed in Queensland by the Code (Qld) and the Justices Act 1886 (Qld), and in Western Australia by the Criminal Procedure Act 2004 (WA) and the Criminal Appeals Act 2004 (WA). The Commonwealth has made the procedural schemes of the states generally applicable to Commonwealth offences committed within their boundaries: Judiciary Act 1903 (Cth) s 68(1).

22.5 In recent years, the High Court has taken increasing interest in the principles of criminal procedure. The distinctive contribution of the High Court has been the articulation of certain fundamental principles of criminal procedure and the fashioning of remedies to ensure that the principles are observed. The High Court has been concerned with both principles for the investigation of offences and principles for the trial process. The gaps in the legislation of all jurisdictions mean that there has been considerable scope to develop a common law of criminal procedure for all Australia.

22.6 The fashioning of remedies by the High Court has perhaps been more important than its articulation of the principles.

The general principles which govern criminal procedure are largely uncontroversial. They include such basic propositions as that an accused has a right to a fair trial and that illegal or improper means should not be used to collect evidence of criminal offences. Such propositions have long been asserted as self-evident truths. Historically, however, they have contained a substantial component of empty rhetoric. The contribution of the High Court in recent years has been to insist that the principles be taken seriously and to fashion remedies for their breach.

Once remedies can be pursued, it becomes necessary to define more precisely what is at stake. It is one matter to assert that the accused is entitled to a fair trial; it is another matter to decide when unfairness requires that a trial be stopped or a conviction set aside and a new trial ordered. As an example, in *Libke v R* [2007] HCA 30; (2007) 235 ALR 517, the judges of the High Court differed in their conclusions on whether a prosecutor's improper cross-examination of an accused infringed the right to a fair trial in the circumstances of the case. Moreover, while it is easy to subscribe to a prohibition on using illegal or improper means to collect evidence, it is more difficult to decide what should be made illegal or viewed as improper and when someone who has committed a serious offence should be allowed to walk free because the evidence that could prove the offence has been wrongfully obtained.

INVESTIGATION OF OFFENCES

Police powers in Queensland

22.7 A codified scheme of police powers in Queensland was first introduced in 1998. That initial scheme was then replaced by the Police Powers and Responsibilities Act 2000 and the Police Powers and Responsibilities Regulation 2000. The principal function of the Regulation was to enact the Police Responsibilities Code 2000, which forms Sch 10.

The Act has expanded greatly and been reorganised since its introduction, with the result that the numbering of sections has changed radically. Caution therefore needs to be exercised with respect to references in early case authorities (and earlier editions of the present text).

22.8 The Police Powers and Responsibilities Act 2000 sets out the overall scheme for the special powers of the Queensland police to do things which would be unlawful for other people. Its provisions deal with various matters, including:

- excluding other people from crime scenes;
- demanding identification;
- establishing road blocks;
- directing people to move from particular places;
- searching people or vehicles without a warrant;
- obtaining warrants to search places;
- seizing evidence;
- arresting suspects;
- questioning suspects in custody;
- taking fingerprints and DNA samples;
- holding identification parades;
- performing medical or dental procedures in the course of searching persons in custody;
- using surveillance devices; and
- conducting undercover operations.

Section 809 authorises the making of regulations. Under this authority, the Police Responsibilities Code specifies in more detail the responsibilities of the police when exercising some of their powers, such as questioning suspects in custody.

When an officer contravenes either the Act or the Code, the potential consequences include the possible exclusion of evidence obtained as a result of the contravention: see **22.12–22.21**.

22.9 The Act and the Code together supersede most of the pre-existing law, although there are still some operative provisions under other statutes. The Police Powers and Responsibilities Act 2000 s 12(1) expressly preserves powers or responsibilities of police officers under certain Acts specified in Sch 1. These include the Bail Act 1980, the Domestic and Family Violence Protection Act 1989 and the Juvenile Justice Act 1992.

The Police Powers and Responsibilities Act does not formally repeal those pre-existing laws on police powers which are excluded from Sch 1. Instead, s 11(3) merely provides that the Act 'prevails' over other Acts 'to the extent of any inconsistency'.

Despite the qualified terms of s 11(3), Sch 1 does essentially specify the statutes which continue to operate alongside the Police Powers and Responsibilities Act. The function of Sch 1 is to give continuing recognition to some other statutes which prescribe additional police powers or lowered responsibilities for specific purposes. Where statutes excluded from Sch 1 confer greater powers or lesser responsibilities than the Police Powers and Responsibilities Act, the latter Act prevails as a matter of law. Where another statute confers the same powers or responsibilities as the Police Powers and Responsibilities Act, reference should always be made for the sake of convenience to the codified scheme under the Police Powers and Responsibilities Act.

Police powers in Western Australia

22.10 The Criminal Investigation Act 2006 (WA) establishes a regime for the investigation and prevention of offences and supplements a police officer's powers, duties and responsibilities under common law: s 7. The Act sets out police powers to enter and search places and vehicles, protect forensic areas, gain access to business records and other data, and search people. It permits intimate and non-intimate forensic procedures on people in specified circumstances. The Act deals with interviewing suspects, requiring all admissions by suspects to be recorded audiovisually. The Act also sets out powers of arrest and the rights of arrested suspects, and provides for their detention until brought before a court.

Commonwealth police powers

22.11 The Crimes Act 1914 (Cth) sets out federal police powers which are broadly similar to those of the Queensland and Western Australia police. However, the Commonwealth has greatly expanded the powers of police in dealing with suspected terrorist activity.

Exclusion of wrongfully obtained evidence

22.12 A complex body of rules governs the admissibility of evidence in a criminal trial. For the most part, these rules deal with issues relating to the worth of evidence, such as its relevance and its weight. Educationally, these matters are usually covered in courses on the law of evidence rather than the law of criminal procedure. They do not fall within the scope

of this book. There is, however, one part of the law of criminal evidence which does fall within its scope. In some instances, evidence may be excluded from a trial because it was wrongfully obtained. In this respect, the law of evidence and the law of criminal procedure overlap.

The traditional weakness of the law governing powers to investigate offences was a lack of enforcement mechanisms. A police officer who broke the law in investigating an offence could conceivably be prosecuted or disciplined for the breach. The prosecutorial and disciplinary processes, however, are subject in large measure to the control of the police themselves. There is a more effective way of ensuring that the rule of law applies to criminal investigation. That is to remove the incentive for illegal conduct by excluding wrongfully obtained evidence.

22.13 The common law has long mandated the exclusion of 'involuntary confessions', primarily because of doubts about their probative value: **26.16–26.21**. Queensland has statutory versions of the rule: see 26.18, discussing the Criminal Law Amendment Act 1894 (Qld) s 10 and the Police Powers and Responsibilities Act (Qld) s 416. At both common law and under statute, however, exclusion is prescribed only for confessions induced in certain narrowly prescribed ways.

Until recent years, the courts did not acknowledge any more general powers of trial judges to exclude evidence because of the manner in which it was obtained. The High Court, however, has now breathed life into some broad *discretionary* powers: see, for example, *Foster v R* (1993) 113 ALR 1 (**22.28C**); *Ridgeway v R* (1995) 184 CLR 19; 129 ALR 41 (**23.40C**); *R v Swaffield* (1998) 192 CLR 159; 151 ALR 98 at **26.82**.

22.14 Decisions of the High Court in the 1990s recognised the emergence of two broad 'common law' discretions to exclude evidence even if of acceptable probative value: one based on considerations of public policy, and the other, mainly used for confessional evidence, based on fairness to the accused. The rationale for the 'public policy' discretion is the protection of the public interest; the rationale of the 'unfairness' discretion is the protection of the rights and privileges of the accused. Exclusion of evidence on grounds of public policy is a different matter from recognising a claim that the accused deserves to have the evidence excluded. When evidence is excluded on grounds of public policy, the accused is merely an incidental beneficiary of the way in which the public interest is pursued. In contrast, what the accused actually deserves is at stake when exclusion is sought in order to vindicate that accused's rights.

A similar exclusionary scheme was incorporated in the uniform Evidence Act which has been adopted for New South Wales and certain Commonwealth territories: see Evidence Act 1995 (NSW); Evidence Act 1995 (Cth). Section 138 authorises the exclusion of improperly or unlawfully obtained evidence on grounds of 'desirability' (effectively mirroring the common law 'public policy' discretion). Section 90 separately authorises the exclusion of evidence of an admission where, because of the circumstances in which it was made, 'it would be unfair to a defendant to use the evidence'.

22.15 The 'public policy' and the 'unfairness' discretions were developed by courts as a matter of common law:

- Queensland and the Commonwealth both still rely primarily on the common law to deal with the discretionary exclusion of evidence in criminal cases. However, statutory regimes now govern the admission of evidence respecting unrecorded confessions and admissions: see **26.12–26.15**. Moreover, some statutory recognition has been given to the common law discretions:

- The Evidence Act 1977 (Qld) s 130 recognises the unfairness discretion by providing: 'Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence.'
- The Crimes Act 1914 (Cth) s 23S(d) preserves the discretion to exclude unfairly obtained evidence and s 23S(e) preserves the discretion to exclude illegally or improperly obtained evidence.

- In Western Australia, there still may be a role for court-developed rules; for example, the discussion in *Wright v Western Australia* [2010] WASCA 199; 203 A Crim R 339 (**26.81C**) in relation to whether a confession is voluntary. However, the Criminal Investigation Act 2006 (WA) enacts rules that apply when evidence has been improperly obtained through use of powers or authorisations under the Act. Section 154 makes such evidence prima facie inadmissible. However, by s 155 a court is given discretion to admit improperly obtained evidence if it is satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting it. The probative value of the evidence does not of itself justify its admission. The factors the court must take into account are:
  - any objection to the evidence by the accused;
  - the seriousness of the offence;
  - the seriousness of any contravention;
  - whether any contravention was intentional or reckless, or arose from an honest and reasonable mistake of fact;
  - the probative value of the evidence; and
  - any other matter the court thinks fit.

The Criminal Investigation Act (WA) does not make separate provision for considerations of public policy and fairness. Its terms are sufficiently broad to allow considerations of both kinds to be taken into account. That at least was the view of Blaxell J in *Wright*, while McLure P (Buss JA agreeing) left the question open.

22.16 The 'public policy' discretion can exclude evidence which was obtained by 'unlawful or improper means' on the ground that its admission would be contrary to public policy, even though its admission might not involve any unfairness to the particular accused. The purpose of the discretion has been said to be 'the protection of the public interest': *Swaffield* at **26.82C**. In *Ridgeway* (**23.40C**), it was said: 'The basis in principle of the discretion lies in the inherent or implied powers of our courts to protect the integrity of their processes.' The focus of the discretion is on the societal impact of the investigative practice. Concerns may be that the police conduct flouts the law and, therefore, undermines the rule of law, or that it endangers societal expectations of privacy, or that the misconduct is of a kind which is generally likely to risk wrongful convictions, regardless of whether there was a risk with respect to the particular accused. Although the focus is different from that of the 'unfairness' discretion, there is the potential for overlap. See *Foster* (**22.28C**), where the High Court excluded evidence of a confession on grounds of fairness to the accused but indicated that it would also have been prepared to make the same decision on grounds of public policy.

Usually, the 'public policy' discretion is called into play when there has been unlawful conduct on the part of the police in collecting evidence. In *Ridgeway*, the High Court

was presented with a somewhat different problem: that of entrapment, where unlawful police conduct induces or facilitates the commission of the offence. It was held that the same principle applies. *Ridgeway* also contained some discussion of situations in which the police conduct is improper but not unlawful. It was held that these too can be subject to the public policy discretion. Entrapment by harassment was mentioned. Another example might be discrimination in investigative practices.

22.17 In *Swaffield* (26.82C), it was said that the purpose of the 'unfairness' discretion is 'to protect the rights and privileges of the accused person'. The primary focus of the discretion is on evidence of poor probative value, particularly confessional evidence which is unreliable because of the manner in which the accused's statement was obtained. Some judges have attempted to confine the discretion to unreliable confessions in which there is a risk of a wrongful conviction. However, the High Court has taken the view that there are various ways in which the admission of evidence may be unfair to an accused: *Foster* (22.28C); *Swaffield* (26.82C). It would certainly be unfair to admit an unreliable confession. But it might also be unfair to use evidence that was obtained in violation of some procedural right of the accused, observance of which could have prevented the evidence being obtained. For example, the accused in *Foster* was illegally detained when a confession was made: that was one of the factors in the decision that it was unfair to admit the confession at trial. In *Swaffield*, it was said: 'Unreliability is an important aspect of the unfairness discretion but it is not exclusive.'

Protection for procedural rights was expressed in *Swaffield* as an aspect of the right to a fair trial. Thus, investigative unfairness has been viewed as tainting all subsequent proceedings and producing adjudicative unfairness if the wrongfully obtained evidence is admitted at trial.

22.18 A twist was introduced in *Swaffield* at 26.82C. It was suggested in the majority judgment by Toohey, Gaudron and Gummow JJ that, instead of having one discretion for issues of fairness and another for issues of public policy, the better division would be between a discretion to deal with problems of reliability and an 'overall discretion' to deal with other problems of both fairness and public policy.

Subsequent decisions of state courts of appeal have generally interpreted *Swaffield* as simply reorganising the discretions, without reducing the scope to exclude evidence on grounds of fairness. For example, in *R v Batchelor* [2003] QCA 246 at [12], McMurdo P stated that a decision on whether it would be unfair to admit evidence of a confession could involve consideration of 'whether the confession would have been made if the investigation had been properly conducted'. See also the statements about the discretion in *R v Lobban*, [2000] SASC 48 at [45], [51]–[58]; (2000) 77 SASR 24; *R v Juric* [2002] VSCA 77 at [50]; (2002) 4 VR 411; *R v Thomas* [2006] VSCA 165 at [103]; (2006) 24 VR 475; *Wright v Western Australia* at [116]; *R v Belford & Bound* [2011] QCA 43 at [62] (reasoning endorsed at [87], [131]).

Thus, it may now be more appropriate to speak of considerations of public policy and unfairness than of separate discretions. However, references to the 'unfairness' discretion and the 'public policy' discretion are still common. In *Tofilau v R* [2007] HCA 39; 231 CLR 396; 238 ALR 650 (26.71C) at [399], the organisation of the discretions was left as an open question in the joint reasons of Callinan, Heydon and Crennan JJ.

22.19 *Ridgeway* (23.40C) is the leading case on the criteria for assessing considerations of public policy. The High Court viewed decisions on whether to admit or exclude evidence as turning on 'the degree of criminality' in issue versus the gravity (more precisely 'the nature,

seriousness and effect') of the police misconduct. The worse the criminality, the more likely the evidence is to be admitted; while the worse the police misconduct, the more likely the evidence is to be excluded. The drafter of the Criminal Investigation Act 2006 (WA) s 155 seems to have followed *Ridgeway* because its terms are similar to those of the decision.

The concept of 'degree of criminality' was not analysed closely in *Ridgeway*. There appear to be at least two dimensions. One is obviously the legal seriousness of the offence in issue, as reflected in the penal liability which has been prescribed; another may be the personal culpability of the individual under investigation. Therefore, the High Court indicated that a consideration in entrapment cases should be whether or not the target was 'an otherwise law-abiding person'.

Culpability will also be a factor in assessing the gravity of the police misconduct. The High Court indicated in *Ridgeway* that the case for excluding evidence would be strengthened if the misconduct was 'calculated'. Similarly, in *Bunning v Cross* (1978) 141 CLR 54; 19 ALR 641, a contrast was drawn between misconduct resulting from an honest mistake and misconduct resulting from a deliberate disregard of the law. *Bunning v Cross* also suggested that misconduct might be worse if it would have been easy to comply with proper standards of investigation.

A significant development in *Ridgeway* was the suggestion that the police misconduct under scrutiny should include not only the conduct of the officer involved in the investigation, but also that of other officials. 'Entrenched' misconduct was viewed as particularly bad. Moreover, it was said that any illegality or impropriety would become more serious if it was encouraged or tolerated by a superior official.

22.20 The High Court has not laid down criteria for assessing considerations of unfairness. Presumably, the criteria will vary according to the reason why it would be unfair to use the evidence.

When the unfairness lies in the risk of a wrongful conviction, the exercise of discretion should turn only on the magnitude of the risk. In calculating the unfairness, it makes little if any difference how serious the alleged offence was and how serious the police misconduct was. In *Swaffield* (**26.82C**), it was suggested that an unreliable confession should never be admitted in evidence.

On the other hand, a wider range of factors should come into play where the unfairness lies in the violation of an accused's procedural rights. In this context, the seriousness of the violation may have to be balanced against the seriousness of the offence in issue. See, for example, the analysis of these competing considerations by the Queensland Court of Appeal in *Batchelor* [2003] QCA 246 at [32]–[36]. Moreover, in assessing the seriousness of the violation, consideration needs to be given not only to the impact on the accused but also to the culpability of the officer. Was the violation deliberate, reckless or negligent, or the result of an innocent mistake? See the reference in *Foster* (**22.28C**) to the infringement of the appellant's rights having been 'serious and reckless'.

22.21 When it is argued that evidence should be excluded because of the manner in which it was obtained, the case for exclusion must be established by the accused. An exception is found in the mandatory exclusion of 'involuntary confessions', where the prosecution must prove the voluntariness of a confession once the matter is in issue. For the discretionary exclusions, however, the burden of proof lies on the accused to make a convincing argument in favour of exclusion. The matter will be determined by the judge.

Questions of admissibility will usually be resolved before the trial by the judge. If not resolved earlier, there will be a voir dire, which is a 'trial within a trial' in which the question of admissibility is determined in the absence of the jury. The question of admissibility can be raised at any stage, even after the evidence has been heard, and can be raised by the judge as well as by counsel: *Walbank v R* [1996] 1 Qd R 78.

THE TRIAL PROCESS

22.22 In *McKinney v R* (1991) 171 CLR 468 at 478; 98 ALR 577, it was said: 'The central thesis of the administration of justice is the entitlement of an accused person to a fair trial according to law.' This precept is commonly expressed in terms of an accused having a 'right to a fair trial'. The expression could be misleading because no one can enforce a right to be tried if the state is unwilling to prosecute. It has, therefore, been suggested that the right would be 'more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial': *Dietrich v R* (1992) 177 CLR 292; 109 ALR 385 (28.58C), per Mason CJ and McHugh J. Nevertheless, it is standard usage to refer to the right to a fair trial.

22.23 Primarily, the right to a fair trial means that an accused should not be exposed to an unacceptable risk of a wrongful conviction. No trial process can be guaranteed free of potential error. In *Nudd v R* [2006] HCA 9; (2006) 225 ALR 161 (30.35C), Gleeson CJ said at [11]:

> Criminal trials are conducted as a contest, but the adversarial system does not require that the adversaries be of equal ability. The system does its best to provide a level playing field, but it cannot alter the fact that some players are faster, or stronger, or more experienced than others. Opposing counsel may be mismatched, but this does not make the process relevantly unfair.

Nevertheless, fairness to an accused demands that the potential for error be kept to a minimum.

Until 1897, accused persons were prevented from giving evidence in their own defence but the right to do so is now enshrined as one of the rights to a fair trial: Evidence Act 1977 (Qld) s 8 and Evidence Act 1906 (WA) s 8. In addition, the High Court has explored the dimensions of the right to a fair trial in a series of modern cases, addressing various problems on which the relevant statutes are silent. Particularly important has been the assertion that, under some circumstances, the right to a fair trial requires that the accused be legally represented: *Dietrich* at 28.58C. Other topics which have attracted attention include prior disclosure of the prosecution's evidence and other material which could be relevant to the defence, the effects of trial delay and the impact of prejudicial publicity on jurors: see 28.30–28.53.

22.24 The High Court has said that in exceptional cases, proceedings may be stopped by a judge before trial or verdict. The formal order is a 'stay of proceedings'.

- In Queensland, the power to stay proceedings follows as a matter of common law from the inherent jurisdiction of a court to control its processes: *Jago v District Court of New South Wales* (1989) 168 CLR 23; 87 ALR 577 at 22.29C.

- In Western Australia, the inherent jurisdiction of a court to control its processes to prevent an unfair trial has been replaced by statutory powers. A magistrate has power to stay a summary prosecution permanently if satisfied that the charge is an abuse of the process of the court: Criminal Procedure Act 2004 (WA) s 76. A judge has a wider power to stay an indictment permanently if it is in the interests of justice to do so: s 90. For what may be encompassed in the interests of justice, see *Salmat Document Management Solutions Pty Ltd v R* [2006] WASC 65; 199 FLR 46.

22.25 Stays of proceedings have been used mainly in two contexts. One is exposure of the accused to an unacceptable risk of a wrongful conviction, thereby violating the right to a fair trial. For example, in *Jago* (22.29C), the High Court acknowledged that unreasonable trial delay could conceivably make a fair trial impossible and justify a stay of proceedings. The other is the invocation of the trial process for an improper or oppressive purpose: that is, for some purpose other than a genuine attempt, based on reasonable grounds, to obtain a conviction. For example, the prosecution may be pursued for collateral advantage or it may be foredoomed to failure: *Williams v Spautz* (1992) 174 CLR 509; 107 ALR 635 (27.52C); *Walton v Gardiner* (1993) 177 CLR 378; 112 ALR 289 (27.53C); *Ridgeway* at 23.40C.

Stays have been granted to prevent 'abuse of process' (that is, abuse of the process of the court). Sometimes a distinction is drawn between granting a stay for this purpose and granting a stay to prevent trial unfairness; sometimes, however, the term 'abuse of process' is used in a looser sense that encompasses trial unfairness: see the discussion in *Jago* at 22.29C. In *Walton v Gardiner* (27.53C), the power to stay proceedings was cast in the broadest terms, extending:

> … to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness.

22.26 A stay of proceedings is a discretionary remedy. The exercise of the discretion will depend on balancing various factors including the public interest in bringing offenders to trial: see *Jago* at 22.29C. Less drastic measures will be preferred wherever possible. For example, while pre-trial publicity may endanger the fairness of a trial, it will usually be countered by the trial judge giving appropriate warnings to the jury rather than by resorting to a stay: see the discussion at 28.46–28.50. When a stay is granted, it may be permanent or temporary. A permanent stay will be exceptional. It will be appropriate only when nothing can be done to correct the unfairness. This might be the case where, for example, a key witness for the defence has died before the trial occurs: see, for example, *Gill v DPP* (1992) 64 A Crim R 82. More often, a temporary stay will be sufficient. For example, a temporary stay may be needed where an accused person lacks the protection of legal representation. There will be no reason to grant a permanent stay in such a case because the defect can be remedied.

Even where a stay is cast in permanent form, it may still be lifted if the reasons why it was imposed no longer apply. For example, in *Nicholas v R* [1998] HCA 9; (1998) 193 CLR 173; 151 ALR 312, the High Court was faced with a permanent stay of proceedings which had been imposed because the police had acted unlawfully in obtaining evidence of importation of narcotics. The High Court lifted the stay following a legislative amendment which decreed that evidence in such cases was not to be rejected only because it had been obtained unlawfully. Brennan CJ said, at [41]:

An order staying a criminal trial is not a judicial decree conferring an immunity from punishment for a criminal offence. It is not the equivalent of a verdict and judgment of acquittal. It confers no vested right. A stay does not determine the matter charged in the indictment. There is concededly power to lift a stay and, if the stay be lifted, the trial on the indictment can proceed.

22.27 A decision to stay an indictment can be appealed by the prosecution, because it brings the prosecution proceedings to an end even though there has not been a verdict: see **30.9, 30.14**.

22.28C **Foster v R**
(1993) 113 ALR 1
High Court of Australia

Mason CJ, Deane, Dawson, Toohey and **Gaudron JJ:** The appellant, Mr Stephen Foster, was charged in the District Court of New South Wales, Criminal Jurisdiction, with the offence of maliciously setting fire to a public building … [Crimes Act 1900 (NSW), s 199 (the section has since been replaced)]. The public building in question was the High School building in the town of Narooma on the South Coast of New South Wales. The prosecution case against the appellant rested on a seven-line typed confessional statement which the appellant had signed while he was held in custody at the Narooma Police Station. That confessional statement constituted the only evidence of the appellant's involvement in the fire. Indeed, the learned trial judge (Ford DCJ) directed the jury that, without it, the Crown had not succeeded even in proving, as against the appellant, that the fire at the High School had been caused by human intervention.

At the commencement of the trial, the appellant challenged the voluntariness of the confessional statement. It was also submitted on his behalf that evidence of it should be excluded on the discretionary ground that it would be 'unfair to the accused to use the material against him at his trial'. These objections were dealt with by the trial judge on preliminary voir dire hearings and overruled. Evidence of the confessional statement was subsequently led at the trial and the appellant was convicted by the jury. An appeal by the appellant against his conviction was dismissed by the New South Wales Court of Criminal Appeal (Hope AJA, Hunt and Loveday JJ). The appellant now appeals to this court … The only issue on the appeal is whether the Court of Criminal Appeal was mistaken in upholding the decision of the trial judge to allow evidence of the confessional statement to be placed before the jury. That issue falls to be resolved in the context provided by events leading up to the signing of the statement by the appellant.

The fire at the Narooma High School occurred in the early hours of the morning of 4 August 1987. At that time, the appellant, who is an Aborigine, was 21 years old. He lived with his mother and others in a house on land owned by an Aboriginal Co-operative at Wallaga Lake which is about a half-hour drive from Narooma. On 14 August 1987, at about 12.30 pm, a party of five detectives and three uniformed police arrived at Wallaga Lake in three vehicles. One of the vehicles was a police van or, as a police witness called it, a 'caged truck'. After a brief exchange of remarks, the appellant, who was in the company of some relatives and friends, was ordered by one of the police (Detective Sergeant Liversidge) to '[g]et into the back of the police truck' and was then transported to the Narooma Police Station. There, he was questioned by two (according to the police) or three (according to the appellant) members of the police force. Both before and at the commencement of the interrogation, the appellant

emphatically denied any involvement in the fire. Within less than an hour, he had signed the confessional statement in which he unequivocally admitted that he and some unnamed companions had broken into the school and 'set it alight'. Thereafter, at approximately 2.30 pm on the afternoon of 14 August, the appellant was charged with the offence of which he was ultimately convicted.

On the voir dire hearings, the appellant gave evidence that the confessional statement had been concocted by interviewing police and that he had signed it only because of police threats that he would be taken 'out the back of Narooma' and 'bash[ed]' and that the police would 'pick up' his 'young brother'. The police evidence was to the effect that the appellant had voluntarily made and signed the confessional statement after he had been shown confessional statements of two alleged companions who were his co-accused at the trial. It is common ground that, before the appellant was shown those confessional statements, Detective Sergeant Liversidge, who was the principal interviewing officer, had stated to him that 'both' of the other two persons alleged that the appellant was 'with them when you burnt the school down'. In fact, neither statement contained an express allegation to that effect. One of them contained no express reference to the appellant at all. The other impliedly included him among persons whom it alleged to have been involved in arson of the school by referring to a 'Steven' as being a participant in a preliminary conversation. The voluntariness of both those statements was also on issue at the trial.

The learned trial judge conducted two distinct voir dire hearings in relation to the question whether evidence of the making of the confessional statement signed by the appellant should be received in evidence. The first of those hearings was directed to the question whether, assuming that the confessional statement had been voluntarily made, it should be excluded on the ground of unfairness to the appellant. For the appellant, it was argued that the written material before his Honour, including the evidence given by police witnesses on the committal hearing in the Local Court, disclosed that the appellant had been arrested by the police solely for the purpose of questioning and that he was being unlawfully held in police custody at the time he signed the confessional statement. The trial judge found that the appellant had not been arrested 'merely for the purpose of questioning'. He ruled that the arrest and detention in custody of the appellant was lawful and that the statement should not be excluded on discretionary grounds. In so ruling, his Honour expressed the view that, on the basis that the appellant's arrest had been lawful, the interrogation of him by the police had not been unlawful for other reasons. The second voir dire hearing was directed to the question whether the confessional statement was voluntary. It was on this hearing that the appellant and members of the police force gave the oral evidence to which reference has been made. The trial judge found that the statement had been voluntarily made. His Honour's reasons disclose that he saw the question of voluntariness as a 'difficult' one. He did not expressly find that the alleged threats had not been made by the police. Instead, in a context where the appellant agreed that the confessional statements of the two co-accused had been shown to him in the course of the police questioning, his Honour found 'that on the balance of probabilities it is more likely than not that it was the production of the confessional statements … that brought the [appellant's] own confessional statement into existence'.

…

The principal judgment in the Court of Criminal Appeal was delivered by Loveday J with whose reasons Hope AJA and Hunt J expressed their agreement. Their Honours found that the trial judge's finding that the appellant's arrest had not been merely for the purpose of

questioning was 'incorrect'. Accordingly, they held that the appellant's arrest and subsequent interrogation in custody had been 'unlawful'. Nonetheless, the members of the Court of Criminal Appeal concluded that the trial judge's error had had no vitiating effect for the reason that he had expressly stated that, even if he was wrong in thinking the arrest was lawful, he would nonetheless have exercised his 'discretion to admit the evidence'. In these circumstances, the members of the Court of Criminal Appeal concluded that the discretion of the learned trial judge had not miscarried.

Careful examination of the learned trial judge's reasons for declining to exclude evidence of the confessional statement on discretionary grounds discloses, however, that the Court of Criminal Appeal was in error in thinking that his Honour had stated that, if his view that the appellant's arrest was lawful was wrong, he would nonetheless have declined to exclude evidence of the confessional statement. In fact, his Honour did not indicate what approach he would have adopted if he had concluded that the appellant's arrest had been unlawful …

…

It follows from what has been written above that both the trial judge's decision to admit evidence of the appellant's confessional statement and the decision of the Court of Criminal Appeal that the trial judge's discretion had not miscarried were vitiated by error. In circumstances where the Court of Criminal Appeal did not address the question whether that evidence should, in all the circumstances of the case, have been excluded, it is appropriate for this court to go on to consider that question.

It is now settled [see, in particular, *Cleland* (1982) 151 CLR at 9, 23–4, 34–5; *Pollard* at 183–4, 196, 200–1, 234–5, 397, 407, 410–11, 438] that, in a case where a voluntary confessional statement has been procured by unlawful police conduct, a trial judge should, if appropriate objection is taken on behalf of the accused, consider whether evidence of the statement should be excluded in the exercise of either of two independent discretions. The first of those discretions exists as part of a cohesive body of principles and rules on the special subject of evidence of confessional statements. It is the discretion to exclude evidence on the ground that its reception would be unfair to the accused, a discretion which is not confined to unlawfully obtained evidence [see, *Duke* (1989) 38 A Crim R 305, per Brennan J at 307–9; *Van Der Meer* (1988) 35 A Crim R 232 per Wilson, Dawson and Toohey JJ at 247–8. See also *Collins* per Muirhead J (at 277), per Brennan J (at 313)]. The second of those discretions is a particular instance of a discretion which exists in relation to unlawfully obtained evidence generally, whether confessional or 'real'. It is the discretion to exclude evidence of such a confessional statement on public policy grounds. The considerations relevant to the exercise of each discretion have been identified in a number of past cases in the court [see, as regards the unfairness discretion, *McDermott* (1948) 76 CLR 501 at 513–15; *Lee* (1950) 82 CLR 133 at 148–55; *Pollard* (at 234–5, 438) and, as regards the public policy discretion, *Ireland* (1970) 126 CLR 321 at 334–5; *Bunning v Cross* (1978) 141 CLR 54 at 74–80; *Pollard* at 183–4, 196–7, 200–5, 206–9, 397, 407, 410–14)]. To no small extent, they overlap. The focus of the two discretions is, however, different. In particular, when the question of unfairness to the accused is under consideration, the focus will tend to be on the effect of the unlawful conduct on the particular accused whereas, when the question of the requirements of public policy is under consideration, the focus will be on 'large matters of public policy' [*Bunning v Cross* per Stephen and Aickin JJ (at 77)] and the relevance and importance of fairness and unfairness to the particular accused will depend upon the circumstances of the particular case [ibid at (77–8); *Pollard*

(at 203; 413)]. In a case where both discretions are relied upon to support an application for the exclusion of a voluntary incriminating statement obtained by unlawful police conduct, it will commonly be convenient for the court to address first the question whether the evidence should be excluded on the ground that its reception and use in evidence would be unfair to the accused. It is so in the present case.

As has been seen, the appellant was in the company of a number of other persons in the vicinity of his own home when he was unlawfully arrested by the police by being ordered to get into the caged section of a police truck. He was then transported to the Narooma Police Station where he was unlawfully detained in police custody. He was allowed no opportunity to contact a lawyer. He was given no choice about whether he would participate in an interview with the police or about where any such interview would take place. He was deprived of the presence of any non-police witness and placed in 'the special position of vulnerability … to fabrication' of a confessional statement to which reference was made in the judgment of the majority of the court in *McKinney and Judge* [(1991) 171 CLR 468 at 478; 52 A Crim R 240 at 246]: 'his detention … deprived him of the possibility of any corroboration of a denial of the making of all or part of [the] alleged confessional statement'. In a context where video or audio facilities were either not available or not utilized, his detention also effectively precluded any non-police corroboration of his account of the nature and content of the police questioning which led to his eventual signing of the statement. In that regard and in a context where the evidence indicates that the appellant was semi-illiterate, it is relevant to recall the comments of the court (Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ) in *Lee* [(1950) 82 CLR 133 at 159]:

> The uneducated — perhaps semi-illiterate — man who has a record and is suspected of some offence may be practically helpless in the hands of an over-zealous police officer. The latter may be honest and sincere, but his position of superiority is so great and so over-powering that a 'statement' may be 'taken' which seems very damning but which is really very unreliable. The case against an accused person in such a case sometimes depends entirely on the 'statement' made to the police. In such a case it may well be that his statement, if admitted, would prejudice him very unfairly. Such persons stand often in grave need of that protection which only an extremely vigilant court can give them.

The above considerations alone constitute substantial grounds upon which evidence of the confessional statement might have been excluded pursuant to the discretion to exclude evidence whose reception would be unfair to an accused [see, eg, *Cleland* (at 15–16, 25–6, 35–6)]. There were, however, some more particular aspects of the present case which weighed heavily in favour of exclusion of the evidence. We turn to identify them.

First, there was the nature of the police infringement of the appellant's rights. It was both serious and reckless. The courts of this country have been at pains to stress [see, eg, *Williams* (1986) 161 CLR 278 at 292; 28 A Crim R 1 at 11] that the right to personal liberty under the law is, in the words of Fullagar J [*Trobridge v Hardy* (1955) 94 CLR 147 at 152], 'the most elementary and important of all common law rights'. It is 'beyond question that at common law' neither a member of the police force nor any other person 'has power to arrest a person merely for the purpose of questioning him' [*Williams* per Wilson and Dawson JJ (at 305; 21)]. Nor was there any statutory provision which even arguably conferred a power upon the police, in the circumstances of the present case, to arrest the appellant otherwise than for the purpose of taking him before a 'Justice to be dealt with according to law' [see Crimes Act 1900 (NSW), s 352(1), (2) and (3) (as at August 1987)]. It was, as the 'Police

Instructions' in force in New South Wales at the relevant time made clear, a basic obligation of a member of the Police Force to be and remain 'fully acquainted' with the limitations upon police powers of arrest [see the Police Instructions in force in 1987 (as provided to the Court by the Solicitor for Public Prosecutions), Instruction 31-1] and including the fact that, in the absence of a lawful arrest, '[p]olice have no authority to exercise any restraint whatever upon a person being questioned or to detain him in any way, whether upon [p]olice premises or elsewhere' [ibid, Instruction 31–7(1)]. In circumstances where, at the time when the appellant was arrested, the police had neither the intention to charge him with an offence nor the evidence to justify such a charge, the gravity of the infringement of the appellant's rights involved in his public arrest and subsequent detention in custody is apparent. It should be mentioned that it appears from the evidence that Detective Sergeant Liversidge, who was the officer who actually arrested the appellant, believed that it was lawful to arrest a person solely for questioning. In the context of the clear law and of the content of the 'Police Instructions' at the time, however, that explanation is simply unavailing by way of excuse.

Second, it was clear from the police evidence that the unlawful arrest and detention of the appellant had been for the purpose of questioning him in an environment from which he had no opportunity of withdrawing. Thus, in the transcript of evidence on the committal proceedings, Detective Sergeant Liversidge had made clear that, notwithstanding that there was insufficient evidence to charge the appellant, he was not prepared to release him on the basis of his repeated denials of his involvement in the fire at the Narooma High School …

Detective Sergeant Liversidge's intentions and attitude in that regard were confirmed at the actual trial …

When the appellant's mother arrived at the Narooma Police Station and sought to see him, the appellant was not told of her presence. She was informed that she must wait until the interview between the police and the appellant had been completed.

Third, there was a real question in the present case about whether any admissions by the appellant were voluntary in the sense of meaning 'in the exercise of a free choice to speak or be silent' [*Lee* per Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ (at 149). That observation was made in a context where the court acknowledged that some might consider the introduction of a discretion rule unnecessary. The court had before it the observation of Dixon J in *McDermott* (1948) 76 CLR at 512 that a 'sufficiently wide operation' may not have been given to 'the basal principle that to be admissible a confession must be voluntary, a principle the application of which is flexible and is not limited by any category of inducements that may prevail over a man's will'. Nevertheless the existence of a discretion rule in New South Wales was recognised in *McDermott* and the court in *Lee* was not prepared to deny its existence in Victoria. The rule is well established in this country]. Inevitably, the subjection of a person to involuntary and persistent interrogation by the police while he or she is unlawfully detained in police custody gives rise to a situation in which there are likely to be grounds for concern about whether any confessional statement has been voluntarily made since the unlawful detention in custody is likely to carry with it an implicit threat of continued unlawful detention unless and until the questions of interviewing police are answered to their satisfaction. In the present case, there was the added factor that the appellant specifically claimed that the confessional statement had been fabricated by the police and that his signing of it was the direct result of police threats of physical violence to himself and of action against his younger brother. As has been seen, the trial judge's reasons disclose that he saw the question of voluntariness as a 'difficult' one. In that context, the fact that the appellant's unlawful detention in police custody effectively deprived him of any chance of corroboration of his allegations against

the police assumes particular significance. Indeed, to admit evidence of the appellant's alleged confessional statement was to compound the wrong done to him by his unlawful arrest and detention by subjecting him to the risk of conviction upon police evidence of what had occurred while he was unlawfully held in a police environment and deprived of any possibility of independent confirmation of his evidence.

Ultimately, the question whether evidence of the appellant's confessional statement should, as a matter of discretion, have been excluded on the ground that its reception in evidence and use against him on his trial would be unfair to him must be answered by reference to 'the conduct of the police and all the circumstances of the case' [*Lee* (1950) 82 CLR at 154]. When one has regard to the nature and the effects of the police infringement of the appellant's rights and to the other circumstances and considerations to which reference has been made, it is plain that the case was one in which a proper exercise of the learned trial judge's discretion required the exclusion of evidence of the confessional statement. That being so, it is unnecessary to consider whether the evidence should also have been excluded on public policy grounds. It is, however, appropriate that we indicate that we consider that the circumstances of the present case are such that the evidence should also have been excluded on the ground that the seriousness of the unlawful conduct on the part of the police was such that considerations of public policy precluded its reception. In that regard, the case manifests 'the real evil' at which the discretion to exclude unlawfully obtained evidence on public policy grounds is directed, namely, 'deliberate or reckless disregard of the law by those whose duty it is to enforce it' [*Bunning v Cross* (1978) 141 CLR 54 at 78; *Pollard* (1992) 176 CLR 177 at 204; 64 A Crim R 393 at 413].

...

[Their Honours noted that they did not consider that the trial judge was in error in dealing with the discretion to exclude the confession on a voir dire, prior to determining whether the confession was in fact voluntary. Their Honours commented that ordinarily it would be appropriate and convenient to deal with these matters in a single voir dire but noted that circumstances may arise where a single voir dire would not be appropriate. Their Honours concluded:]

The appeal should be allowed. The order of the Court of Criminal Appeal should be set aside and, in lieu thereof, it should be ordered that the appeal to that court be allowed and that the appellant's conviction be quashed and a verdict of acquittal be entered. In circumstances where the appellant has already served the whole of his custodial sentence and where the prosecution case against him depended upon his confessional statement, there should be no order for a new trial.

[**McHugh** and **Brennan JJ** agreed generally with the reasoning of the majority and the orders proposed.]

22.29C Jago v District Court of New South Wales

(1989) 168 CLR 23; 87 ALR 577
High Court of Australia

The appellant was arrested and charged with a number of offences on 19 October 1981, in relation to Manning Insurance Services Pty Ltd, of which the appellant was, at relevant times, a director. The offences were alleged to have been committed between April 1976

and January 1979. The appellant was committed for trial on 16 July 1982. The indictment prepared against him contained 30 counts, each alleging that the appellant fraudulently took and applied a cheque to a use other than the use of the company. Under the procedure which then existed, a bill of indictment was found in May 1986. In June 1986 the matter was listed in the District Court and a hearing of the charges was fixed for the week commencing 9 February 1987. When the indictment was presented on 13 February 1987, the appellant sought a stay of proceedings. The application was refused and an appeal to the New South Wales Criminal Court of Appeal failed.

Mason CJ: … Two questions are raised by those facts. The first question is whether the common law of Australia recognizes a right to a speedy trial separate from and additional to the right to a fair trial. The second is whether in this case the appellant's right to a fair trial has been prejudiced by virtue of undue delay amounting to an abuse of process …

It is convenient to commence by considering the inherent power of courts to prevent abuses of their process. It is clear that Australian courts possess inherent jurisdiction to stay proceedings which are an abuse of process: *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 201; *Barton* (1980) 147 CLR 75 at 96, 107, 116 …

This court has not yet decided whether the power to prevent abuses of process extends to a power to prevent unfairness generally (see *Barton* at 96–7), although lower courts have not found difficulty with such an approach …

Accordingly, since *Barton* was decided, decisions in other courts have endorsed the proposition that, at least in cases of undue delay, the courts possess power to stay criminal proceedings in order to prevent 'injustice' to the accused. … But the broader proposition, so far not decisively supported by authority, is that the power exists generally, and not only where the complaint is one of undue delay. It is not necessary in this case to address that more general issue. But it is necessary to decide whether the limited power I have described is in truth merely an example of the power to prevent abuse of process, in any of the narrower senses in which that power has traditionally been understood: see *Varawa v Howard Smith & Co Ltd* (1911) 13 CLR 35, at 55. If it is, then the scope for its exercise is significantly reduced.

…

[After examining existing case law, his Honour continued:]

It is therefore not clearly settled in the United Kingdom whether a court's power to protect itself from an abuse of process in criminal proceedings extends to a power to prevent unfairness to the accused or whether it is limited to traditional notions of abuse of process, such as bad faith and oppression …

…

Central to the narrow approach is the notion that, to use the words of Viscount Dilhorne [in *DPP v Humphrys* [1977] AC 1] (at 26), the 'judge must keep out of the arena'. This view places weight upon the fact that the legislature has seen fit not to prescribe a general limitation period for the bringing of criminal prosecutions and emphasizes that the judge's role is not that of prosecutor; the decision whether to prosecute is made at an executive level. These arguments misconceive the nature of the broader discretion which they seek to resist. The question is not whether the prosecution should have been brought, but whether the court, whose function is to dispense justice with impartiality and fairness both to the parties and to the community which it serves, should permit its processes to be employed in a manner which gives rise to unfairness. Such a question arises when proceedings have been set in train by the bringing of charges. It is a question for the judicial arm of government to address and, as such, mere silence on the part of the legislature cannot be taken as a command to the

courts as to how it should be answered. Lord Devlin made the point in *Connelly* [[1961] AC 1254] at 1354; 268–9 … as follows:

> Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.

The argument for the restrictive approach goes further and claims that the discretion contended for will produce aberrant results and detract from uniformity in the administration of justice. But that is to equate the process of balancing the relevant factors in the exercise of a judicial discretion to the making of capricious and arbitrary decisions. It is artificial to claim that the exercise of judicial discretion in this area, unlike other areas in which judges are called upon to exercise discretions, will result in unprincipled decision-making and, in consequence, unsatisfactory results for the administration of justice.

Moreover, objections to the discretion to prevent unfairness give insufficient weight to the right of an accused person to receive a fair trial. That right is one of several entrenched in our legal system in the interests of seeking to ensure that innocent people are not convicted of criminal offences. As such, it is more commonly manifested in rules of law and of practice designed to regulate the course of the trial: see *Bunning v Cross* (1978) 141 CLR 54; *Sang* [1980] AC 402; 69 Cr App R 282. But there is no reason why the right should not extend to the whole course of the criminal process and it is inconceivable that a trial which could not fairly proceed should be compelled to take place on the grounds that such a course did not constitute an abuse of process.

…

… In essence then, the power to prevent an abuse of process in this context is derived from the public interest, first that trials and the processes preceding them are conducted fairly and, secondly, that, so far as possible, persons charged with criminal offences are both tried and tried without unreasonable delay. In this sense, fairness to the accused is not the sole criterion when a court decides whether a criminal trial should proceed.

…

… The continuation of processes which will culminate in an unfair trial can be seen as a 'misuse of the court process' which will constitute an abuse of process because the public interest in holding a trial does not warrant the holding of an unfair trial.

Ultimately, it does not matter whether the problem is resolved in this way, by invoking a wide interpretation of the concept of abuse of process, or by saying that courts possess an inherent power to prevent their processes being used in a manner which gives rise to injustice. In either event the power is discretionary, to be exercised in a principled way, and the same considerations will govern its exercise. And in each case the power will be used only in most exceptional circumstances to order that a criminal prosecution be stayed. … If the distinction matters, I would prefer to regard the power as an incident of the general power of a court of justice to ensure fairness.

Once it is recognized that the courts may order that criminal proceedings be stayed for the purpose of preventing injustice to the accused caused by undue delay, it necessarily follows that other orders may be made in cases of undue delay for that purpose. There is no reason to confine the discretionary power of the courts by arbitrarily stipulating that a stay is the only proper remedy for undue delay. A second and related point may also be made. In

appropriate cases, orders may be made to prevent injustice notwithstanding that there is no reason to suspect that the actual trial, when held, will not be fair. Thus orders may be directed to ensuring fairness in pre-trial procedures; in particular, a court may order that a trial be expedited where it sees the delay as warranting such action but not as being of such a kind as to justify staying the proceedings.

In the context of undue delay, the interests of the accused in obtaining fairness are similar to, if not the same as, those which the right to a speedy trial contained in the United States Constitution is designed to protect. Those interests were identified by McHugh JA in *Aboud v A-G (NSW)* (1987) 10 NSWLR 671, at 692; 31 A Crim R 127 at 147 as the following:

(i) the prevention of oppressive pre-trial incarceration;
(ii) the minimization of the anxiety and concern of the accused;
(iii) the limiting of prejudice to the presentation of the accused's defence; and
(iv) the protection of the reputation and social and economic interests of the accused from the damage which flows from a pending charge.

See also Amsterdam, 'Speedy Criminal Trial: Rights and Remedies', (1975) 27 *Stanford Law Review* 525, at 532–3. These interests are safeguarded in our system by a variety of means. Oppressive pre-trial incarceration may be prevented by the granting of bail. Anxiety and concern, to the extent that they reflect apprehensions of unfairness, may be alleviated by appropriate orders designed to ensure fairness in pre-trial procedures. The third interest mentioned is in reality one aspect of the comprehensive right to a fair trial. The fourth and final interest is not one which of itself should be recognized as a basis for judicial intervention except to the extent that it is encompassed by the second.

It is strictly unnecessary to consider what other remedies a person charged with a criminal offence may seek when confronted with unreasonable delay in pre-trial processes leading to the ultimate commencement of the trial. But some clarity may be achieved by doing so. In many cases, where the second interest referred to by McHugh JA in *Aboud* is sought to be protected, an order that the trial be expedited may be appropriate. In deciding whether to make such an order, a court will inevitably give consideration to a range of matters, apart from the mere existence of delay, including whether the conduct of the accused has contributed to the delay, whether the accused has pressed for expedition in a manner consistent with the anxiety and concern he is said to be suffering, whether court resources are available for an expedited trial and whether the displacement of other trials is warranted.

It would be unwise to venture upon an abstract consideration, divorced from the concrete facts in specific cases, of the circumstances in which it would be appropriate to order expedition rather than a stay or vice versa. But it is important to bear in mind that the court may mould its order to meet the exigencies of the particular case. The court may grant a limited or conditional stay and it might even order that a proceeding be stayed and not proceeded with without an order of the court: *Campbell* (1959) 43 Cr App R 133; *Roberts* [1979] Crim LR 44. Naturally an early charge may still be justified where there is reason to believe that the person charged may escape the jurisdiction or commit further crimes. And there is some support for the view that the rule against double jeopardy would not prevent the bringing of charges previously brought but dismissed, at least prior to trial, pursuant to an order expressed to be without prejudice to their being brought again: see *Broome v Chenoweth* (1946) 73 CLR 583 at 599; *Charlesworth* (1861) 1 B & S 460 at 507–8 [121 ER 786 at 804] …

In the safeguarding of the interests of the accused in the manner I have described, the touchstone in every case is fairness. As appears from Toohey J's reasons for judgment and the majority judgments in the Court of Appeal, the Australian common law does not recognize

the existence of a special right to a speedy trial, or to trial within a reasonable time, which relies for its operation not upon actual prejudice or unfairness but upon a concept of presumptive prejudice. Because there is no constitutional guarantee of a speedy trial, the remedies are discretionary and necessarily relate to the harm suffered or likely to be suffered if appropriate orders are not made.

The test of fairness which must be applied involves a balancing process, for the interests of the accused cannot be considered in isolation without regard to the community's right to expect that persons charged with criminal offences are brought to trial: see *Barton* at 102, 106; *Sang* at 437; 290–1; *Carver v A-G (NSW)* (1987) 29 A Crim R 24 at 31, 32. At the same time, it should not be overlooked that the community expects trials to be fair and to take place within a reasonable time after a person has been charged. The factors which need to be taken into account in deciding whether a permanent stay is needed in order to vindicate the accused's right to be protected against unfairness in the course of criminal proceedings cannot be precisely defined in a way which will cover every case. But they will generally include such matters as the length of the delay, the reasons for the delay, the accused's responsibility for asserting his rights and, of course, the prejudice suffered by the accused: *Barker v Wingo* 407 US 514 (1972); *Bell v DPP (Jamaica)* [1985] AC 937, as explained in *Watson*, and *Gorman v Fitzpatrick* (1987) 32 A Crim R 330. In any event, a permanent stay should be ordered only in an extreme case and the making of such an order on the basis of delay alone will accordingly be very rare: *Cooney* (1987) 31 A Crim R 256 at 263–4.

To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial 'of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences': *Barton* per Wilson J (at 111). Where delay is the sole ground of complaint, an accused seeking a permanent stay must be 'able to show that the lapse of time is such that any trial is necessarily unfair so that any conviction would bring the administration of justice into disrepute': *Clarkson* at 973. I agree with Toohey J that no such case has been made out in the present appeal. For that reason, and because there is no right to a speedy trial or trial within a reasonable time independent of the right to be protected from unfairness resulting from undue delay, I would dismiss the appeal.

[**Brennan, Gaudron, Toohey** and **Deane JJ** agreed generally with the reasoning of **Mason CJ**. **Toohey J** examined in some depth whether a right to a speedy trial could be found in the Magna Carta. **Brennan J** agreed with his conclusion that it could not.]

Entrapment and Controlled Operations

CHAPTER 23

REACTIVE AND PROACTIVE POLICING

23.1 Criminal investigation is usually reactive. First, an offence is committed, then the police seek evidence about it. Sometimes, however, policing takes more proactive forms in which the search is for offences that may occur rather than for evidence of those which have already occurred. For example, an area with a high record of property offences may be targeted for surveillance. Opportunities to commit offences may even be specially constructed in order to enable evidence to be collected. This often happens in relation to drug offences, where an undercover police officer may offer to purchase illegal drugs from a dealer.

Proactive policing is widely viewed as necessary for law enforcement. But it can take objectionable forms. For example, legitimately selective surveillance may become illegitimate discrimination if the objects of the surveillance are chosen for reasons that cannot be justified within the bounds of law enforcement policy. Moreover, the construction of opportunities to commit offences is particularly problematic if police participate in their commission. If they procure, counsel or positively aid an offence rather than just facilitate its occurrence, the conduct of police may then be unlawful unless there is a special exemption for the operation.

The law respecting exemptions for 'controlled operations' and 'controlled activities' is discussed in this chapter, after a review of the issue of entrapment.

ENTRAPMENT

23.2 The term 'entrapment' is used to describe cases where the police or their agents improperly induce or facilitate offences for the purpose of prosecuting them. Usually, although not necessarily, the police action is covert. The term 'entrapment' is sometimes applied to proper as well as improper conduct but is more often confined to improper conduct. It is in the latter sense that the term is used in this text.

Entrapment is never a substantive defence in Australia, either under the Criminal Codes or at common law. Any remedy is procedural; all evidence of an offence brought about by improper entrapment is liable to be excluded in the exercise of the 'public policy' discretion: see **22.16, 22.19**; see also *Ridgeway v R* (1995) 184 CLR 19; 129 ALR 41 at **23.40C**.

23.3 In most cases of entrapment, the police actions have induced the offence. For example, there may have been threats or persistent importuning, or positive inducements may have been offered in order to make someone commit an offence. In such cases, the operative may well have acted unlawfully, becoming a party to the offence.

Nevertheless, inducing the commission of an offence does not necessarily amount to entrapment. There are some acceptable ways in which offences may be induced in order to gain evidence for their prosecution. For example, a covert operative may offer to purchase a product or service from someone reasonably suspected of breaching the terms of a licence or may offer a bribe to an official reasonably suspected of corruption. Depending on the circumstances, such investigative practices may even involve what would technically be unlawful participation in the resulting offences. Yet few people would criticise such investigative practices if there were a reasonable suspicion of criminal activity and if there were no other viable way of obtaining evidence for a prosecution.

23.4 The mere facilitation of offences, in the sense of simply providing opportunities for their commission, will usually not amount to entrapment. However, the Supreme Court of Canada has extended the idea of entrapment to cover cases in which the police do no more than provide an opportunity to commit an offence but act without any basis for reasonable suspicion of criminal activity: *R v Mack* [1988] 2 SCR 903 at 964–5. The reasoning turned on the distinction between providing someone with an opportunity to commit an offence and tempting the person to commit it. The court's view was that, unless the person is reasonably suspected of being engaged in criminal activity, the provision of an opportunity to commit an offence amounts to an improper temptation to do so and that this should be regarded as a form of entrapment.

23.5 The leading Australian case on entrapment is *Ridgeway* at **23.40C**. The circumstances were unusual for a finding of entrapment because the appellant had been plotting to have illegal drugs imported into Australia before the police became involved in the plan. The appellant made the mistake of seeking assistance from a person who was an informer for the Malaysian police. The informer contacted the Malaysian police who, in turn, contacted the Australian police. The drugs were imported by the informer and another person under an arrangement between the two police forces and with the co-operation of the Australian Customs Service. After the drugs were delivered to the appellant, he was charged with possession of prohibited imports. The evidence obtained as a result of the operation was admitted at trial. The High Court, however, held that the evidence should have been excluded and quashed the conviction. The conduct of the Australian police in relation to the importation was unlawful: at the time, there was no legislative scheme for the authorisation of such 'controlled operations'.

Ridgeway is perhaps best understood as recognising a third form of entrapment, based on an unacceptable relationship between the offence prosecuted and the offence committed by the police. The police committed the primary offence of importing narcotics in order to prosecute the ancillary offence of possession.

23.6 Other countries have taken different approaches to the problem of improper entrapment.

In the United States of America, entrapment has long been recognised as a substantive excusing defence, for example akin to duress: see the discussion in *Ridgeway* at **23.40C**. On this approach, it has understandably been held that the defence can only be available to a person who was not predisposed to commit the offence.

The American approach has been rejected in Commonwealth jurisdictions, which have preferred to focus on entrapment as an issue of police misconduct rather than as a matter affecting the responsibility of the accused. Until recent years, the traditional approach in these jurisdictions was to insist that the entrapped accused should still be convicted, with any mitigation of the offender's culpability considered only in relation to sentence. Any issue of police misconduct was a matter for separate proceedings against the police. However, the modern view is that disapproval of the police misconduct should be signalled in the trial process in cases where this is warranted:

- The remedy in England and Canada is to stay the proceedings on the ground that a trial following entrapment amounts to an abuse of process.
- In contrast, the remedy adopted for Australia by the High Court in *Ridgeway* is to exclude all evidence of an offence brought about by entrapment on the ground that its admission would be contrary to public policy. This will often result in an acquittal.

23.7 Curiously, the rulings eventually made in *Ridgeway* included not only a ruling that the conviction should be quashed because the evidence of the offence should have been excluded, but also an ancillary order staying further proceedings. This was because, once all evidence of the offence was to be excluded, any prosecution under a retrial would have been doomed to failure. The High Court said that the pursuit of a prosecution which will inevitably fail is an abuse of process justifying a stay of proceedings. Nevertheless, the remedy of a stay in Australian cases of entrapment is granted because of the inevitability of a further prosecution failing and not because of the entrapment itself.

23.8 There is little if any practical difference between the remedies of excluding evidence and staying proceedings:

- Both remedies effectively put an end to the prosecution.
- Both are *discretionary* remedies which are granted in light of various considerations including the seriousness of the offence charged as well as the seriousness of the police misconduct.
- Neither remedy requires a lack of predisposition in the accused, although any previous record could be considered in assessing the seriousness of the offence charged and the police misconduct.

23.9 The discretion to exclude evidence obtained by entrapment is governed by the same general criteria as apply to other cases where evidence was illegally or improperly obtained: see **22.19**. Indeed, *Ridgeway* (**23.40C**) is now the leading case on these general criteria as well as on entrapment. In the view of the High Court, consideration must be given to both the 'degree of criminality' of the accused and the gravity of the police misconduct. Encouragement or tolerance of the misconduct by superior officers will strengthen any case for exclusion.

The High Court noted that, in assessing the 'degree of criminality' of an accused who has been entrapped, a factor to be considered is whether the accused was 'an otherwise law-abiding person who would not have offended were it not for the "inordinate inducements" … involved in the illegal conduct': *Ridgeway*, above, at CLR 39, per Mason CJ, Deane and Dawson JJ. Presumably, the entrapment of a generally law-abiding person could lead to the exclusion of the evidence even in a case where the police misconduct was relatively minor. On the other hand, evidence should not be admitted automatically because of the criminal predisposition of the accused. The appellant in *Ridgeway* itself was clearly predisposed to commit the offence

and yet the High Court concluded that exclusion of the evidence was appropriate because of the gravity of the police misconduct.

23.10 In assessing the gravity of the police misconduct involved in entrapment, the High Court in *Ridgeway* distinguished between two categories of cases:

1. those in which the police conduct simply induces the offence; and
2. those in which the police conduct amounts to the principal offence, with the offence charged against the accused being ancillary to it, or the police conduct is part of the offence charged.

The High Court suggested that the decision whether or not to exclude the evidence would typically vary between these two categories of cases. *Ridgeway* itself fell into the second category. The view of the High Court was that such cases are particularly reprehensible and that the evidence should generally be excluded unless the entrapment was disowned by those in higher authority and action was taken against the police concerned. In contrast, it was suggested that evidence of entrapment should generally be admitted in the first category of cases, where there has simply been an inducement to commit the offence. The evidence should be excluded only in exceptional cases where the illegality or impropriety was 'calculated' or 'entrenched'.

23.11 The application of the distinction between these two categories of cases may depend on a judgment about which of two offences is the principal one. An order of priority may be indicated by the relative magnitude of the penalties which attach to the offences. Therefore, in drugs cases, evidence may be more likely to be excluded in 'reverse sting' operations, where police undercover operatives sell drugs in order to secure evidence against the purchasers, than in simple 'sting' operations, where the operatives buy or offer to buy drugs; compare the penalties for trafficking or supplying with those for possession in the Drugs Misuse Act 1986 (Qld) and the Misuse of Drugs Act 1981 (WA).

In some instances, the penalties attached to the offences may be the same. That was the situation in *Ridgeway*. The Customs Act 1901 (Cth) s 235 (now repealed) prescribed the same scale of penalties for the offences committed by those who imported drugs, those who aided, counselled or procured importation, and those who possessed imported drugs. In *Ridgeway*, two reasons were given for the High Court's characterisation of the police offence as the principal one:

1. importation was the offence to which the legislative rule was primarily directed; and
2. importation was an essential element in the offence of possession of a prohibited import.

23.12 The result in *Ridgeway* can be contrasted with that in *Swift v R* (1999) 105 A Crim R 279. *Swift* was a case of official corruption, in which an undercover operative of the Queensland Criminal Justice Commission had offered to pay a detective for protection for certain drugs activities. The detective was convicted of corruptly agreeing to receive a benefit. On appeal, it was argued that the evidence of the agreement should have been excluded because the offer of the bribe was unlawful. The Court of Appeal questioned whether the offer was unlawful but held that, in any event, the evidence of the agreement was correctly admitted because the case fell into the High Court's first category of entrapment. Offering and agreeing to accept a bribe carry the same penalties under the Criminal Code (Qld) s 121. Presumably, the court took the view that agreeing to accept a bribe was the primary object of the provision.

23.13 Prior to *Ridgeway*, the Queensland Court of Appeal had reached contrasting decisions in two cases arising from the notorious 'Operation Trident'. That was an undercover operation involving the infiltration of an agent into a car-stealing ring in order to identify and prosecute those involved. The notoriety of Operation Trident stemmed in part from the losses suffered by members of the public in consequence of the criminal activity of the police agent and, also, from the involvement of police officers in the offences committed by the agent. The agent was acting under the protection of an indemnity issued by the Queensland Attorney-General, but the Court of Appeal subsequently held that this indemnity was invalid: see the discussion of indemnities in relation to prosecutorial powers at **27.32**.

In *D'Arrigo v R* [1994] 1 Qd R 603, the prosecution used evidence from the agent to obtain a conviction on a charge of unlawful possession of one of the stolen vehicles. On appeal, it was held that the evidence should have been excluded because of the extent of the illegality involved in its collection. The result of excluding this evidence was that there was no substantial case against the appellant, who was therefore acquitted. In *Stead v R* [1994] 1 Qd R 665, a member of the car-stealing ring had been convicted of a number of offences. Some of them occurred before the police agent infiltrated the ring; other offences occurred afterwards and the evidence of the agent had been crucial for some of these convictions. The Court of Appeal, differently constituted from *D'Arrigo*, held that the evidence had been properly admitted.

Stead might be distinguished from *D'Arrigo* because it was established that the appellant Stead had been involved in car-stealing before Operation Trident began. This factor would be relevant in assessing the 'degree of criminality' which, *Ridgeway* says, must be balanced against the police misconduct. It might be that *Stead* would be decided in the same way, even after *Ridgeway*. On the other hand, the appellant in *Ridgeway* was the one who had first proposed that the drugs should be imported. Moreover, there were suggestions of some disagreement over principles between the courts in *D'Arrigo* and *Stead*. The court in *Stead* commented that it was difficult to see any public benefit in excluding the evidence and it expressly left open the question of whether *D'Arrigo* was correctly decided.

23.14 If there was a disagreement over the principles governing the exclusion of entrapment evidence, it has been resolved in favour of *D'Arrigo* by *Ridgeway*, where it was cited with apparent approval. Moreover, the decision in *Ridgeway* clearly proceeded on the basis that there is a public benefit in excluding evidence obtained through illegal conduct: that is, the benefit of maintaining the integrity of the criminal justice system and upholding the rule of law. In some instances, that benefit may be outweighed by the public interest in securing the conviction and punishment of an offender. Nevertheless, the benefit to be obtained by excluding the evidence must be acknowledged and weighed in the process of balancing interests. It cannot be dismissed out of hand.

CONTROLLED OPERATIONS

23.15 Subsequent to *Ridgeway*, Queensland, Western Australia and the Commonwealth all enacted legislation to authorise what are called 'controlled operations': Police Powers and Responsibilities Act 2000 (Qld) Ch 5; Corruption and Crime Commission Act 2003 (WA) Pt 4 Div 5; Crimes Act 1914 (Cth) Pt IAB. These legislative schemes legalise what would otherwise be unlawful conduct in the course of undercover investigations. The personnel involved in a controlled operation are exempted from liability for their conduct. There are substantial similarities between all three schemes.

23.16 Evidence obtained as a result of a controlled operation will not be inadmissible on the ground that it was obtained unlawfully. This is stated expressly in the Police Powers and Responsibilities Act 2000 (Qld) ss 226, 230(6) and it is necessarily implied in the other schemes.

Conversely, when a regime of controlled operations is available, almost all unauthorised participation in offences for the purpose of obtaining evidence will be improper, invoking the discretion to exclude evidence obtained thereby. The enactment of a scheme for controlled operations is inconsistent with any widespread tolerance of criminal participation by the police.

There is an exception under the Police Powers and Responsibilities Act 2000 (Qld) s 230(3) to the effect that it is not intended 'to affect the investigation of minor matters or investigative activities that, by their nature, can not be planned'.

23.17 Authorised participation in an offence might conceivably be characterised as improper entrapment if the authorisation has been wrongfully granted in breach of the procedural requirements of the scheme. However, an authorisation will not be invalidated by defects which are formal rather than material: Police Powers and Responsibilities Act 2000 (Qld) s 257; Corruption and Crime Commission Act 2003 (WA) s 127; Crimes Act 1914 (Cth) s 15H.

23.18 A properly authorised operation might be conducted in an improper manner with the resulting evidence excluded on that ground. Certain conduct is prohibited when conducting a controlled operation including intentionally inducing an offence 'that the person would not otherwise have intended to commit' (Queensland and Commonwealth) or that 'there is no reason to suspect the person had previously engaged in' (Western Australia): Police Powers and Responsibilities Act 2000 (Qld) s 258(1)(b); Corruption and Crime Commission Act 2003 (WA) s 130; Crimes Act 1914 (Cth) s 15HA(2)(c). In addition, certain forms of conduct might be held improper even though they are not expressly prohibited. For example, it might be improper for an operative to develop and then to exploit a relationship of intimacy with a vulnerable suspect.

The Queensland scheme

23.19 The Police Powers and Responsibilities Act 2000 (Qld) establishes a scheme for 'controlled activities' and 'controlled operations'. *Controlled activities* involve one or more meetings with a single person: s 224(1)(b). There is a relatively simple set of conditions for these activities. *Controlled operations* are governed by a more elaborate scheme. They can involve ongoing operations involving interaction over a period of time and with a number of people.

The Crime and Misconduct Act 2001 (Qld) establishes a linked scheme for offences within the purview of the Crime and Misconduct Commission. References in this part will be confined to the Police Powers and Responsibilities Act 2000 (Qld).

23.20 The purpose of a *controlled activity* must be to obtain evidence of the commission of a 'controlled activity offence': s 224(1)(a). A 'controlled activity offence' is one which is punishable by seven or more years' imprisonment or which is specifically mentioned in Sch 2 or Sch 5: s 221(2). The latter category includes some offences relating to pornography, child exploitation, prostitution, weapons, property and drugs.

'Controlled activities' may be conducted by police officers with the authorisation of superiors of the rank of inspector or above: s 224(2).

The officer conducting the activity must consider it 'reasonably necessary' to obtain the evidence: s 224(1). In addition, authorising the activity must be considered 'appropriate in the particular circumstances', having regard to 'the nature or extent' of the relevant offence: s 224(4).

An authorisation must be written and must specify the activity authorised: s 224(3), (5).

23.21 The purpose of a *controlled operation* must be to gather evidence of a 'relevant offence': s 244(1)(a). A 'relevant offence' is one which is punishable by seven or more years' imprisonment (including serious property and drugs offences) or which is specifically mentioned in Sch 2 (including offences relating to pornography, child exploitation, prostitution and weapons): s 229.

23.22 Usually, controlled operations will be conducted by police officers (or Crime and Misconduct Commission officers) but, if that is impractical, approval can be given for other persons: s 244(1)(h). Any participant must be appropriately trained: s 244(1)(i).

23.23 Controlled operations are subject to a two-tiered control scheme involving the Chief Executive Officer of a law enforcement agency (that is, the police service or the Crime and Misconduct Commission) and a supervisory 'controlled operations committee'.

1. An application to conduct an operation must be approved by the Chief Executive Officer of the law enforcement agency proposing it: ss 239, 243–245. The powers of the CEO may be delegated: ss 273–275.
2. Unless the CEO decides that an application is without merit, or unless there are 'urgent circumstances', the application must be referred to a 'controlled operations committee' for a recommendation: s 240 (but see the exception for certain Crime and Misconduct Commission operations under s 241). The committee comprises personnel of the police service and the Crime and Misconduct Commission but a retired Supreme Court or District Court judge serves as an 'independent member': ss 232–233. The CEO must not grant authority for an operation unless it has been recommended by the committee: s 244(2).

Where 'urgent circumstances' are present, approval may be given without the application having been referred to the committee; the application must then be referred to the committee as soon as practicable but a negative recommendation from the committee does not override the approval: s 242.

23.24 An application for a controlled operation must meet certain formal requirements: s 239(4)–(5). These include requirements for the application to be written (unless there are urgent circumstances), for it to identify the personnel to be involved and the criminal activity in relation to which evidence is sought, and for it to describe the controlled conduct in which a participant will be required to engage. For a civilian participant, the controlled conduct must be described precisely; for a law enforcement participant, the description can be in general terms. An approval of an application must be in similar form: s 245.

23.25 In deciding whether to authorise an operation, the CEO must be satisfied on reasonable grounds of certain matters. The positive conditions include:

1. that a relevant offence has been, is being, or is likely to be committed (s 244(1)(a)) and that the operation is justified in light of the nature and extent of the suspected criminal activity (s 244(1)(b)); and

2. that any unlawful conduct involved in the operation will be limited to what is needed for an effective operation (s 244(1)(c)) and that the risk of leaving illicit goods in the control of persons other than law enforcement officers will be minimised: s 244(1)(d).

The negative conditions include:

1. that the operation will not be conducted in a way that makes it likely for a person to be induced to commit an offence that the person would not otherwise have intended to commit (s 244(1)(f)); and
2. that the operation will not seriously endanger the health or safety of any person, or cause death or serious injury to any person, or involve the commission of a sexual offence, or result in serious loss or damage to property: s 244(1)(g).

Presumably, the same considerations must be taken into account by the controlled operations committee.

23.26 In *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43; 236 CLR 236; 249 ALR 398 (**23.42C**), the High Court of Australia held that certain authorisations for controlled operations in New South Wales were invalid. The legislative scheme in New South Wales is similar to that in Queensland, although there are some differences in the wording. In particular, whereas s 244(1)(g) (Qld) requires that the operation will not seriously endanger the health or safety of any person, or cause death or serious injury to any person, or involve the commission of a sexual offence, or result in serious loss or damage to property, the New South Wales scheme prohibits authorising operations that involve any participant engaging in conduct that is likely to have any of these outcomes.

In *Gedeon*, the New South Wales Crime Commission had granted authorities for wholesale sales of large quantities of cocaine by undercover agents. Advice had been given that the cocaine would be on-sold to end users and was unlikely to be recovered. Some persons facing charges as a result of the operation sought declarations of the invalidity of the authorisations. The High Court ruled that the authorisations were invalid on the ground that they violated the prohibition on conduct likely to seriously endanger health or safety of persons. It was also said at [57]:

> A reasonable person in the position of the defendant would have foreseen that the conduct of the activities the subject of the Authorities would involve a risk of seriously endangering the health of some at least of the numerous class of end purchasers of the cocaine.

In response to an argument that endangerment may not have been established on the facts, the High Court emphasised the use of the term 'likely' in the New South Wales scheme. It was said at [55] that the authorisation scheme 'uses the term "likely" and does not speak in terms of the serious endangerment as a necessary consequence of engagement in the conduct authorised'. In contrast, the Queensland scheme requires that the operation will not endanger health or safety. Nevertheless, the term 'endangerment' itself incorporates some uncertainty of outcome. Both schemes are concerned to prevent risks to health or safety. It is therefore difficult to see why *Gedeon* would be decided differently under the Queensland scheme.

23.27 A participant in a controlled operation is generally protected from criminal responsibility when acting in accordance with its terms: s 258(1)(a). The conduct of the participant must, however, observe standards similar to some of those which apply to the granting of the authorisation. The conduct must not be intended to induce a person to

commit an offence that the person would not otherwise have intended to commit: s 258(1)(b). In addition, the conduct must not be likely to cause death or serious injury to any person or be likely to involve a sexual offence: s 258(1)(c).

23.28 The exemption from liability of a participant who is a law enforcement officer, although not that of any other participant can extend beyond the scope of what has been authorised. For an operative who is a law enforcement officer, the exemption can cover additional activities reasonably necessary for protecting the safety of any person or the identity of a participant, or for taking advantage of opportunities to gather evidence about additional offences: s 258(2). However, this exemption from liability does not extend to an officer who actually causes injury or death to a person, causes serious damage to or loss of property, or encourages or induces 'criminal activity of a kind the person could not reasonably be expected to have engaged in if not encouraged or induced by the covert operative to engage in it': s 258(3).

23.29 The purpose of a controlled operation should be to gather evidence of criminal activity that would have occurred in any event. Several provisions seek to exclude inordinate or misdirected pressure or temptation and to capture only those offences that persons are predisposed to commit:

- Section 244(1)(f) requires that an operation not be authorised if it is likely to induce the commission of an offence that a person would not otherwise have intended to commit.
- Section 258(1)(b) reinforces the message by prohibiting a participant from engaging in conduct intended to induce the commission of an offence that otherwise would not have been intended.
- Section 258(3)(d) prohibits an officer who goes beyond the scope of an authorisation from encouraging or inducing criminal activity that otherwise could not reasonably be expected to have occurred.

There is a curious difference in the wording of these provisions. By itself, a suspect's predisposition to commit an offence guarantees neither the validity of an approval under s 244(1)(f) nor the lawfulness of a participant's conduct under s 258(3)(d). The tests under these provisions involve characterising the operation or conduct in light of what might reasonably be expected to be its result. A suspect's predisposition, therefore, needs to be known at the time when the approval is given or the participant offers the encouragement or inducement. Subsequent discovery of evidence of predisposition to commit an offence will be immaterial. It cannot retrospectively validate an approval or make a participant's conduct lawful. In contrast, the test under s 258(1)(b) is framed with reference to what might otherwise have actually occurred. A suspect's predisposition to commit an offence would, therefore, appear to make the conduct lawful whether or not that disposition was known in advance.

The Western Australia scheme

23.30 In Western Australia, controlled operations are carried out under the authority of the Corruption and Crime Commission (the Commission), constituted by the Corruption and Crime Commission Act 2003 (WA). References in this part will be confined to that Act.

The Commission is able to authorise the use of investigative powers not ordinarily available to the police service to effectively investigate particular cases of 'organised crime', as defined in s 3 to mean:

> … Activities of 2 or more persons associated together solely or partly for purposes in the pursuit of which 2 or more Schedule 1 offences are committed, the commission of each of which involves substantial planning and organisation.

Schedule 1 includes serious offences against the person, property laundering and drug offences.

Authorisation for the use of exceptional investigative powers is given by the Commission on application of the Police Commissioner: s 46. Authorisation can be given for compulsory examinations and enhanced powers to stop, search and detain without warrant as well as powers to conduct controlled operations. Police officers may be authorised to assume other identities.

23.31 A controlled operation is one involving activities which would, but for a statutory immunity, involve the commission of a criminal offence: s 119. A person who engages in such activities in the course of and for the purposes of an authorised operation is exempt from criminal responsibility as long as the person acts in accordance with the authority: s 128.

Authority to conduct a controlled operation must identify the participants and specify the nature of the activities they may engage in: s 121.

Authority must be given only to police officers or officers of the Commission unless it is 'wholly impractical' for such officers to be used: ss 64(1), 122(4).

23.32 A participant must not intentionally induce another person to engage in misconduct that there is no reason to suspect that person has previously engaged in: s 122(1)(a). Moreover, the participant must not induce conduct likely to seriously endanger the health or safety of a person or result in serious loss or damage to property: s 122(1)(b). A participant who exceeds these restrictions loses protection from criminal responsibility: s 130.

23.33 For the impact of *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43; 236 CLR 236; 249 ALR 398 (**23.42C**) in Western Australia, see 23.26. The legislation in Western Australia is similar.

23.34 It is expressly stated that the powers to conduct controlled operations are not intended to limit a discretion that a court has to admit or exclude evidence in any proceedings or stay criminal proceedings in the interests of justice: s 120. Therefore, the courts' general discretion over the admissibility of evidence and public policy is preserved.

The Commonwealth scheme

23.35 The Commonwealth scheme for controlled operations is directed to the investigation of 'serious Commonwealth offences' (or serious state offences with a federal aspect): the Crimes Act 1914 (Cth) s 15GD. 'Serious Commonwealth offences' are listed in s 15GE, with a general requirement of liability to three or more years' imprisonment.

Unlike the schemes in Queensland and Western Australia, the Commonwealth has no independent check on police power. Authorisation for controlled operations may be

given by certain high-ranking members of the Australian Federal Police and certain other Commonwealth law enforcement agencies: s 15GF. Authorisation does not have to be given by a supervisory body with some independent membership.

An application for authorisation must be in writing unless there are urgent circumstances, in which case a written application must be submitted as soon as practicable: s 15GH(2), (6). Approval is to be given by way of a written certificate which includes the name of the person targeted and the nature of the operation: s 15GJ–GK.

23.36 The conditions for the issue of a certificate are very similar to those of the Queensland scheme: see 23.25. The positive conditions include:

1. that a 'serious Commonwealth offence' has been, is being, or is likely to be committed (s 15GI(2)(a)) and that the operation is justified in light of the nature and extent of the suspected criminal activity (s 15GI(2)(b));

and

2. that any unlawful conduct involved in the operation will be limited to what is needed for an effective operation (s 15GI(2)(c)) and that the operation will be conducted in a way that maximises the likelihood of illicit goods being under the control of a law enforcement officer at its termination: s 15GH(2)(d).

The negative conditions include:

1. that conducting the operation would not involve intentionally inducing a person to commit an offence if that person would not otherwise have intended to commit that offence or an offence of that kind (s 15GI(2)(f)); and
2. that the operation will not seriously endanger the health or safety of any person, or cause death or serious injury to any person, or involve the commission of a sexual offence, or result in serious loss or damage to property: s 15GI(2)(g).

23.37 The protection of the Commonwealth scheme does not cover conduct involving the commission of a sexual offence or an offence involving death or serious injury: ss 15HA(2)(d), 15HB(d). Moreover, it does not cover the intentional inducement of an offence if the person targeted would not otherwise have intended to commit that offence or an offence of that kind: ss 15HA(2)(c), 15HB(c). The restriction depends only on a target not having been predisposed to commit that kind of offence. In contrast to the Queensland scheme (see **23.29**), there is no reference to the likely or expected results of the inducement. Therefore, if evidence of predisposition is discovered subsequently, it may retrospectively make the operative's conduct lawful.

USE OF THE INTERNET BY CYBER PREDATORS

23.38 Legislatures have responded to the growing use of the internet and social networks by adults for child sexual exploitation by enacting provisions to punish such behaviour. A police officer may pose as a child and enter chat rooms, social network sites and other internet destinations to attract adults. The legislative mechanism is to make it immaterial that the person being groomed is a fictitious person represented to the adult as a real person: Codes s 218A (Qld)/s 204B (WA).

23.39 In *Johnson v The State of Western Australia* [2009] WASCA 224, Buss JA described the purpose of this legislation at [33]–[34]:

> The Attorney General, the Hon JA McGinty, said, in the course of his second reading speech in relation to the Bill which upon enactment became the *Criminal Code Amendment (Cyber Predators) Act 2006* (WA):
>
> New section 204B in the Criminal Code will provide a means to target those who seek to exploit children through contact on the Internet and other types of electronic communication. Predators will frequently go to online Internet chat sites, often posing as children, and attempt to engage a child victim in a conversation, and to groom the child for planned sexual exploitation. After gaining the trust of a child, the predator may attempt to arrange an actual meeting with the child for the purpose of engaging in sexual acts with the child. Alternatively, the predator may sexually exploit a child by having the child digitally photograph herself or himself and send these images via email or a mobile phone. The predator may convince the child to engage in indecent acts and describe these acts via text communication, or may move the communication off-line and conduct it via digital phone conversations and SMS — short message service — text. … The offence will also occur in cases in which the offender has supplied a child with indecent material; a common method used in grooming to lower a child's inhibitions to the abuse.
>
> …
>
> A crucial aspect of this legislation is that it provides police with the ability to stop a child from being abused before it happens. Police will have the capacity to go online and conduct operations against offenders by posing as children. Offenders need only believe that they are communicating with a child and, unless the offenders can show otherwise, they will be held to have a belief that they are communicating with a child of the particular age that is communicated to them. The offender commits the offence even when the child victim turns out to be a police officer.
>
> This legislation will provide a deterrent to those seeking to prey on children. If predators know that the children they intend to prey upon may be police officers, it is far more likely that children will be left alone.
>
> (See Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 October 2005, 6725, 6726, 6732.)
>
> Four points as to the purpose or object underlying s 204B may be discerned from this passage in the Attorney General's speech. First, Parliament was concerned with the apparent prevalence of predators seeking to use the internet and other types of electronic communication for the purpose of engaging a potential child victim in a conversation, gaining the child's trust, grooming the child for planned sexual exploitation, and attempting to arrange an actual meeting with the child for the purpose of engaging in sexual activity with the child. Secondly, Parliament was concerned with the apparent prevalence of predators using the internet and other types of electronic communication to persuade potential child victims to engage in indecent acts and to describe these acts by means of electronic communication with the predator. Thirdly, Parliament was concerned with the apparent prevalence of predators using the internet and other means of electronic communication to supply children with indecent material (a common method used in grooming to lower a child's inhibition to engaging in sexual activity) and to persuade children to send digital photographs of themselves to the predator by electronic means. Fourthly, s 204B was intended to prevent child abuse. The offences created by s 204B are, in essence, preventative offences. They merely require the existence of an *intent* to procure a child to engage in sexual activity or an *intent* to expose a child to indecent matter. Pursuant to s 204B, police officers may, in using the internet and other electronic communications, pose as children. Section 204B merely requires that an offender believe that he or she is communicating with a child.

The offences created by s 204B may be compared to and contrasted with s 320(3) of the Code which provides that a person who procures, incites, or encourages a child under the age of 13 years to engage in sexual behaviour is guilty of a crime and is liable to imprisonment for 20 years. A similar offence is created by s 321(3) in relation to a child over the age of 13 years and under the age of 16 years. See also s 320(5) and s 320(6) and s 321(5) and s 321(6). The provisions of s 320 and s 321 are concerned with, relevantly, actual procurement (or attempts to procure: see s 552 read with s 4 of the Code) of real children.

23.40 The offences under Code s 218A (Qld)/s 204B (WA) are inchoate offences and may be likened to attempts: see **Chapter 19**.

23.40C **Ridgeway v R**
(1995) 184 CLR 19; 129 ALR 41
High Court of Australia

Mason CJ, Deane and **Dawson JJ:** The appellant was convicted in the District Court of South Australia, pursuant to an information filed by the Commonwealth Director of Public Prosecutions, of an offence under s 233B(1)(c) of the Customs Act 1901 (Cth) (the Act) ... An appeal to the Full Court of the Supreme Court of South Australia against his conviction was dismissed, by majority (Matheson and Duggan JJ; Legoe J dissenting). He now appeals to this court.

The appellant's alleged offence, as identified by the information, was that he:

> ... without reasonable excuse had in (his) possession a prohibited import, namely 140.4 grams of heroin being not less than the trafficable quantity, to which section 233B of the Customs Act applies and which had been imported into Australia in contravention of the Customs Act 1901.

Heroin is included among the narcotic goods to which s 233B applies. The allegation of the quantity of heroin being not less than the trafficable quantity was included in the information for the purposes of penalty [see the Act, s 235]. That means that the objective elements of the offence of which the appellant was convicted were: (i) possession of heroin; (ii) absence of reasonable excuse; and, (iii) prior importation of the heroin into Australia in contravention of the Act. There is no doubt that the first two of those elements were satisfied in the present case. The appellant was in possession of the heroin when he was taken into custody. There is no suggestion that he had any reasonable excuse for that possession. Obviously, he had acquired and was in possession of the heroin for unlawful purposes.

Nor is it argued on the appellant's behalf that the third objective element of the offence was not established. To the contrary, the illegality of the importation of the heroin was and is a central plank of the appellant's argument both in the South Australian Full Court and in this court. The argument is that the proceedings against the appellant should have been stayed or the evidence of the appellant's guilt should have been excluded on discretionary grounds by reason of the fact that the heroin had been illegally imported into Australia under the auspices of, and with the active involvement of, the Australian Federal Police so that it could be supplied to the appellant.

Background facts

The appellant and a man named Lee were in prison together in South Australia during the years 1985 to 1987. Both were serving sentences for drug-related offences. On his release

from prison in August 1987, Lee was deported to Malaysia where he became a 'registered informer' for the Royal Malaysian Police Force. The appellant was released from prison on parole in February 1989.

In the latter half of 1989, the appellant, who was unaware of Lee's association with the Royal Malaysian Police Force, contacted Lee for the purpose of seeking to arrange, through him, the purchase of heroin for importation into and sale within Australia. During that period, the appellant, in breach of his parole conditions and using his brother's passport, made two trips to Singapore in the course of which he had personal contact with Lee. In his dealings with the appellant, Lee acted under the instructions of Assistant Superintendent Thian Soo Chong ('Chong') of the Anti Narcotics Branch of the Royal Malaysian Police Force who was, in turn, in contact with a Superintendent Butler ('Butler') who was the Liaison Officer for the Australian Federal Police in Kuala Lumpur. The information which had been received by Chong from Lee and passed on to Butler made clear that, if Lee could not arrange the supply of heroin, the appellant could 'go to another person in another place'.

In these circumstances, the Australian Federal Police, acting in conjunction with the Malaysian Police, set up 'Operation Decade' which involved what has been described as a 'controlled' importation and delivery of heroin. The starting point of the operation was the purchase by Lee, accompanied by Chong, of heroin in Malaysia. While the evidence is not clear, the money used for the purchase may, at least in part, have been obtained by Lee from the appellant during his second visit to Singapore. After the purchase, Chong took and retained physical possession of the heroin. In December 1989, pursuant to arrangements with the Singapore Police, Chong flew to Singapore with the heroin. He was accompanied by Lee. On their arrival in Singapore, the heroin was delivered into the custody of the Singapore Police. On the following day, the heroin was returned to Chong who, accompanied by Lee, flew with it to Australia. They arrived, with the heroin in Chong's physical possession, at Adelaide Airport on 29 December 1989.

Lee and Chong had each received a visa from the Australian High Commission in Malaysia. Those visas had been issued on the application of the Australian Federal Police on the basis that the two men were involved in a 'controlled delivery' of narcotics to Australia and that the Royal Malaysian Police Force was in agreement with, and cooperating in, the delivery. Upon their arrival, Chong and Lee were met at the airport by officers of the Australian Federal Police. Chong was able to clear Customs at the airport with the heroin by virtue of arrangements made between the Australian Federal Police and the Australian Customs Service …

From the time of the importation of the heroin, the appellant was under surveillance by the Australian Federal Police. Lee met the appellant on several occasions and provided him with very small samples of the heroin. On 31 December 1989, the appellant went to a hotel room for a meeting with Lee and Chong. A short time later the appellant and another person left the room carrying a camera bag containing 203 grams of heroin (140.4 grams pure heroin). The appellant and the other man were apprehended by officers of the Australian Federal Police. The sum of $9000 cash, being an amount paid by the appellant on account of the purchase price for the heroin, was in the possession of Chong and Lee in the hotel room. Lee was paid the equivalent of the $9000 cash as a reward for his part in the operation.

It has, at all times, been common ground that the importation of the heroin was contrary to s 233B(1)(b) of the Act. The person who unlawfully brought the heroin into Australia was Chong who, on the facts as disclosed at the trial, was guilty of an offence under s 233B(1)(b) in that he imported into Australia prohibited imports to which s 233B of the Act applied. In truth, however, the whole of the unlawful importation was arranged by and under the

auspices of the Australian Federal Police and the police involvement reached upwards to a high level of command. Realistically speaking, the illegal importation of the heroin was 'controlled' and effected (through the services of Chong) by the Australian Federal Police. Clearly enough, the objective acts of the members of the Australian Federal Police directly involved in the importation of the heroin by Chong came within s 233B(1)(d) of the Act which provides that any person who 'aids, abets, counsels, or procures, or is in any way knowingly concerned in, the importation, or bringing, into Australia of any prohibited imports to which this section applies' is guilty of an offence. In that regard, the Commonwealth Director of Public Prosecutions expressly conceded that the Australian authorities 'had either counselled or at least were prepared to aid and abet' the illegal importation. The effect of s 235 of the Act was that, in circumstances where a trafficable quantity of heroin was involved, the maximum penalty for each of the offences presumably committed by Chong and members of the Australian Federal Police was imprisonment for 25 years and a fine of $100,000.

A defence of entrapment?

The question whether the common law of this country recognizes a substantive defence of 'entrapment' to a charge of a criminal offence has not been directly addressed in any case in this court. It has, however, been considered on a number of occasions by state Supreme Courts which have consistently and emphatically answered it in the negative … Similarly, the courts of England … Canada and New Zealand … have denied the existence of such a substantive common law defence. The decisions to that effect are not surprising since it is a central thesis of our criminal law that a person who voluntarily and with the necessary intent commits all the objective elements of a criminal offence is guilty of that offence regardless of whether he or she was induced to act by another, whether private citizen or law enforcement officer. And that is so even if the inducement involved criminal conduct on the part of a law enforcement officer. Where that is so, the result is not that the induced person is not guilty of the crime. It is that the law enforcement officer is also guilty of an offence.

The principal support for the recognition of a substantive defence of entrapment lies in the majority judgments in three cases in the Supreme Court of the United States: *Sorrells v United States* [287 US 435 (1932)]; *Sherman v United States* [356 US 369 (1958)]; and *United States v Russell* [411 US 423 (1973)]. Those cases established entrapment as a substantive, but 'relatively limited' [ibid at 435], defence in a criminal trial in the federal courts of that country. The basis of the defence, as recognized in those majority judgments, is a presumption of legislative intent, namely, that 'Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations' [*Sherman v United States* 356 US at 372 (1958). And see also *Sorrells v United States* 287 US 435 at 448 (1932)]. The elements of the defence are essentially subjective, namely, that there was an absence of previous intent or purpose on the part of the accused to commit an offence of the kind charged and that the accused actually did what is alleged to be the offence 'only because he was induced or persuaded by some officer or agent of the government' [see the District Judge's direction in *United States v Russell* which is set out at 411 US at 427, n 4 (1973)] …

Analysis of the majority judgments in the United States Supreme Court discloses that they provide no satisfactory conceptual basis for the acceptance of entrapment as a substantive defence to a criminal charge under our law. In particular, those judgments do not identify any common law principle which is capable of sustaining the proposition that an otherwise guilty person is not guilty if, lacking previous intent or purpose, that person was induced or persuaded to do what he or she did by some government officer. As has been seen, their basis

is a presumption of legislative intent, namely, that it was not the intention of Congress that 'otherwise innocent' persons should be entrapped into the commission of criminal offences. That basis is not, however, adequate to sustain the creation of a substantive defence of entrapment in this country. Even if it be assumed that it would not have been the legislative intent that persons should be induced by government officials to commit crimes which they otherwise would not have committed, it is a very long step to the conclusion that, if a person does in fact commit a crime as a result of such inducement, he or she is nonetheless not guilty of it for the reason that there should be read into the express terms of every provision creating a statutory offence an unexpressed qualification establishing an applicable defence which is unknown to, and quite contrary to, our common law. Whatever may be the position in the United States, the principles of statutory construction provide no warrant for the taking of such a step by our courts.

Moreover, the existence of a substantive defence of government persuasion or inducement would, upon analysis, be at odds with the emphatic denial in judgments in this Court, in *A v Hayden (No 2)* [156 CLR 532 (1984)], of the existence of any substantive defence in the stronger circumstances of government directions or orders. In *Hayden*, a number of part-time members of the Australian Secret Intelligence Service were alleged to have committed breaches of the criminal law in the course of participating, 'at the direction of the Government', in a security training exercise. In the course of his judgment, Gibbs CJ pointed out [ibid at 540], … that it is 'fundamental to our legal system … that it is no excuse for an offender to say that he acted under the orders of a superior officer'. The other members of the court all expressly stated [(1984) 156 CLR at 550 per Mason J, 562 per Murphy J, 580–1 per Brennan J and 593, per Deane J], or clearly assumed [ibid at 574, per Wilson and Dawson JJ], that the fact that the part-time officers were acting at the direction of the Commonwealth and under orders of government officers provided no defence to the allegation of criminal offences for the reason that, to quote Murphy J, 'it is no defence to the commission of a criminal act or omission that it was done in obedience to the orders of … the government'. Government 'orders', if obeyed, go much further than mere inducement. If obedience to actual orders is not a substantive defence to a criminal charge, it is difficult to see any logical basis for a conclusion that persuasion by mere inducement constitutes such a defence.

Discretionary exclusion of evidence

The conclusion that the law of this country knows no substantive defence of entrapment does not dispose of the present case. While senior counsel for the appellant did suggest that there may be 'room in Australian law for a limited defence of entrapment based on subjective principles', the primary argument advanced on the appellant's behalf was that, in all the circumstances of the case, the effect of the police involvement in the illegal importation of the heroin was that the proceedings against the appellant should have been stayed or the evidence of his guilt should have been excluded on discretionary grounds. In support of that submission, the appellant placed particular reliance, by way of analogy, upon the cases in this court dealing with the discretion of a trial judge to exclude, on public policy grounds, evidence which has been procured by unlawful police conduct. He also relied upon the judgments in a number of cases in State Supreme Courts and in the courts of other common law countries.

At least since *Bunning v Cross* [(1978) 141 CLR 54], it has been 'the settled law in this country' [ibid at 69, per Stephen and Aickin JJ (with the concurrence of Barwick CJ)] that a trial judge has a discretion to exclude prosecution evidence on public policy grounds in circumstances where it has been obtained by unlawful conduct on the part of the police …

Clearly enough, in a criminal trial there is a distinction between a discretion to exclude particular evidence and a discretion to exclude any evidence at all which tends to establish the accused's guilt of the alleged crime or of an element of it. Nonetheless, the existence of the discretion to exclude evidence procured by unlawful conduct on the part of law enforcement officers provides strong support, by way of analogy, for the recognition of a discretion to exclude evidence of the accused's guilt either of an alleged crime or of an element of it in circumstances where the actual commission of the crime was procured by such unlawful conduct. Indeed, the distinction between the two discretions can, in some circumstances, be of theoretical rather than practical importance. Thus, in a case where a course of unlawful conduct on the part of the police has procured both the commission of the offence and evidence of it, there will be little practical significance in the distinction between an exclusion of that particular evidence on the ground that it was procured by the illegal conduct and the exclusion of all evidence on the ground that the commission of the offence was itself procured by that conduct if the only evidence against the accused is that which was unlawfully procured.

More importantly, the considerations of 'high public policy' which justify the existence of the discretion to exclude particular evidence in the case where it has been unlawfully obtained are likewise applicable to support the recognition of a more general discretion to exclude any evidence of guilt in the case where the actual commission of the offence was procured by unlawful conduct on the part of law enforcement officers for the purpose of obtaining a conviction. In both categories of case, circumstances can arise in which the need to discourage unlawful conduct on the part of law enforcement officers and to preserve the integrity of the administration of criminal justice outweighs the public interest in the conviction of those guilty of crime. In both categories, the objective of the unlawful conduct is the obtaining of curial advantage: the use of the unlawfully procured evidence in one category; the obtaining of a conviction for the unlawfully procured offence in the other. In both, the reception of the evidence by the courts is a critical step in the obtaining of that objective. If, in relation to either category, no judicial discretion existed to prevent the curial advantage being derived from the unlawful conduct, statements of judicial disapproval would be likely to be hollow and unavailing and the administration of justice would be likely to be 'demeaned by the uncontrolled use of the fruits of illegality in the judicial process' [*Pollard* (1992) 176 CLR at 203; at 412–13]. Indeed, there is much to be said for the view that the considerations favouring the exclusion of unlawfully procured evidence of a crime which had already been committed are likely to be less compelling than those favouring the exclusion of evidence of a crime which would never have been committed but for such unlawful conduct on the part of law enforcement officers designed to bring about its commission.

Moreover, the two principal considerations weighing against the recognition of a judicial discretion to reject evidence of an offence procured by illegal conduct on the part of law enforcement officers were also the principal considerations which weighed against the recognition of the discretion to reject unlawfully procured evidence. The first of those considerations is that to which reference has already been made, namely, the legitimate public interest in the conviction of those guilty of crime. In *Ireland* and *Bunning v Cross*, that consideration was rightly seen as not justifying a denial of the existence of a discretion to exclude unlawfully procured evidence but as constituting the primary factor to be put in the balance against the considerations favouring a rejection of the evidence in determining how the discretion should be exercised in all the circumstances of a particular case. It should be similarly seen in relation to a discretion to exclude evidence of an offence procured by

unlawful conduct. The second of those considerations lies in the separation, under our system of the administration of criminal justice, of executive and judicial functions. The function of determining whether, in the circumstances of a particular case, a criminal prosecution should be initiated and maintained is essentially that of the Executive. The function of hearing and determining the prosecution, when initiated and while maintained, is that of the courts. Nonetheless, it has long been established that, once a court is seized of criminal proceedings, it has control of them and may, in a variety of circumstances, reject relevant and otherwise admissible evidence on discretionary grounds … or temporarily or permanently stay the overall proceedings to prevent abuse of its process … One such discretion is the discretion to exclude unlawfully procured evidence on public policy grounds. That discretion is properly to be seen as an incident of the judicial powers vested in the courts in relation to criminal matters. Neither its existence nor its exercise involves any intrusion into the exclusive sphere of the Executive. Nor, in our view, does the existence or exercise of a judicial discretion to exclude, on public policy grounds, all evidence of an offence or an element of an offence procured by unlawful conduct on the part of law enforcement officers.

…

The judgments in State Supreme Courts supporting the recognition of such a judicial discretion disclose a divergence of views about a number of important questions. In particular, there is a divergence of views both in relation to the question of the considerations by reference to which the discretion falls to be exercised and in relation to the question whether the discretion extends beyond a mere exclusion of evidence and encompasses a grant of a permanent stay of proceedings. Those questions are addressed subsequently in this judgment. At this stage, it suffices to say that, for the reasons given above, it should be accepted that a trial judge possesses a discretion to exclude, on public policy grounds, evidence of an offence or of an element of an offence in circumstances where its commission has been brought about by unlawful conduct on the part of law enforcement officers.

Conduct which is not unlawful but is improper

Strictly speaking, it is unnecessary for the purposes of the present case to determine whether the discretion to exclude evidence extends to circumstances where a criminal offence has been induced by improper, though not unlawful, conduct on the part of the authorities. It does, however, seem desirable that we indicate that we are of the view that it does.

In a context where ancillary offences — such as counselling, being knowingly concerned in, inducing, aiding, abetting and procuring — exist, in one form or another, in all Australian jurisdictions and where no laws exist authorizing law enforcement officers to encourage or participate in the commission of criminal offences in order to enable the apprehension and procure the conviction of those whom they believe to be involved in criminal activity, it is likely that conduct which intentionally procures the commission of a criminal offence by another will itself be criminal. Nonetheless, circumstances can conceivably exist in which a law enforcement officer intentionally brings about the opportunity for the commission of a criminal offence by conduct which is not criminal but which is quite inconsistent with the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement. Extreme cases of creating circumstances of temptation under which a vulnerable but otherwise law-abiding citizen commits an offence of a kind which (so far as the police are concerned) he or she otherwise might not have committed provide possible examples. As the Supreme Court of Canada pointed out in *Mack* [(1988) 44 CCC (3d) at 541], 'there are inherent limits on the power of the state to manipulate people and events

for the purpose of attaining the specific objective of obtaining convictions'. The rationale of the discretion requires that it extend to cases where those 'inherent limits' are exceeded.

Moreover, the *Bunning v Cross* discretion to exclude illegally procured evidence provides, by analogy, support for the conclusion that the discretion to exclude evidence of an offence or an element of an offence procured by unlawful conduct on the part of law enforcement authorities extends to evidence of an offence or an element of an offence procured by conduct which, while not unlawful, is improper. … In subsequent cases, the words 'improper' and 'impropriety' have been generally preferred to the words 'unfair' and 'unfairness' and it has been accepted as established that the *Bunning v Cross* discretion extends to cases of either unlawful or improper conduct on the part of the authorities [see, eg, *Cleland v R* (1982) 151 CLR at 16–17, 19–20, 31–2; *Pollard* (1992) 176 CLR at 196; 64 A Crim R 393 at 406–7].

The effective investigation by the police of some types of criminal activity may necessarily involve subterfuge, deceit and the intentional creation of opportunities for the commission by a suspect of a criminal offence. When those tactics do not involve illegal conduct, their use will ordinarily be legitimate notwithstanding that they are conducive to the commission of a criminal offence by a person believed to be engaged in criminal activity. It is neither practicable nor desirable to seek to define with precision the borderline between what is acceptable and what is improper in relation to such conduct. The most that can be said is that the stage of impropriety will be reached in the case of conduct which is not illegal only in cases involving a degree of harassment or manipulation which is clearly inconsistent with minimum standards of acceptable police conduct in all the circumstances, including, amongst other things, the nature and extent of any known or suspected existing or threatened criminal activity, the basis and justification of any suspicion, the difficulty of effective investigation or prevention and any imminent danger to the community. A finding that law enforcement officers have engaged in such clearly improper conduct will not, of course, suffice of itself to give rise to the discretion to exclude evidence of the alleged offences or of an element of it. As with the case of illegal conduct, the discretion will only arise if the conduct has procured the commission of the offence with which the accused is charged.

Exercise of the discretion

In what has been written above, the existence of the *Bunning v Cross* discretion to exclude illegally procured evidence has been relied upon as supporting, by way of analogy, the recognition of a discretion to exclude evidence of an illegally procured offence or an element thereof. It is arguable that the preferable view is that the two discretions are not distinct and independent but represent complementary aspects of a single discretion which encompasses them both. Regardless of whether that be so, there is, at the least, a broad correspondence between the considerations, both positive and negative, to which regard should be had by a trial judge in determining whether the challenged evidence should be excluded in a case where either discretion exists and is invoked. … The relative weight to be given to them will vary according to the circumstances of the particular case. Thus, the weight to be given to the public interest in the conviction and punishment of those guilty of crime will vary according to the degree of criminality involved. The weight to be given to the principal considerations of public policy favouring the exclusion of the evidence — the public interest in maintaining the integrity of the courts and in ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement — will vary according to other factors of which the most important will ordinarily be the nature, the seriousness and

the effect of the illegal or improper conduct engaged in by the law enforcement officers and whether such conduct is encouraged or tolerated by those in higher authority in the police force or, in the case of illegal conduct, by those responsible for the institution of criminal proceedings. When assessing the effect of the illegal or improper conduct, the relevance and importance of any unfairness either to a particular accused or to suspected or accused persons generally will likewise depend upon the particular circumstances [see, eg, *Bunning v Cross* (1978) 141 CLR at 77–8; *Pollard* (1992) 176 CLR at 202–3; 64 A Crim R 393 at 411–12]. Ordinarily, however, any unfairness to the particular accused will be of no more than peripheral importance.

In one important respect, the factors militating against the exclusion of all evidence of an illegally procured offence are likely to be more weighty than the factors militating against exclusion of illegally procured evidence. The discretion to exclude all evidence will ordinarily fall to be exercised on the assumption that the offence has been committed and that the effect of the exclusion of the evidence is that the prosecution will be shut out completely from proving guilt and that a guilty person will walk free. In contrast, the discretion to exclude illegally procured evidence will ordinarily be exercised on the basis that guilt or innocence remains an open question to be determined by reference to any other admissible evidence which the parties may see fit to place before the court. On the other hand, in the worst cases of entrapment by illegal police conduct, the weight to be given to the public interest in the conviction and punishment of those guilty of crime may be lessened by the diminution in the heinousness of the accused's conduct resulting from (for example) the fact that he or she was an otherwise law-abiding person who would not have offended were it not for the 'inordinate inducements' [a phrase used by Frankfurter J in *Sherman v United States* 356 US at 383 (1958)] involved in the illegal conduct.

References in this judgment to an offence being 'procured' by illegal conduct on the part of law enforcement officers are intended to refer to two distinct, but possibly overlapping, categories of case. The first category consists of cases in which the police conduct has induced an accused person to commit the offence which he or she has committed. In that category of case, the public interest in the conviction and punishment of those guilty of crime is likely to prevail over other considerations except in what we would hope to be the rare and exceptional case where the illegality or impropriety of the police conduct is grave and either so calculated or so entrenched that it is clear that considerations of public policy relating to the administration of criminal justice require exclusion of the evidence. The other category of case is where illegal police conduct is itself the principal offence to which the charged offence is ancillary or creates or itself constitutes an essential ingredient of the charged offence. An example of that category is a case where a person is charged with receipt or possession of stolen property in circumstances where not only the supply, but the actual theft, of the stolen property had been organized by the police for the purpose of obtaining the conviction of the person to whom it is supplied [see, eg, *D'Arrigo* [1994] 1 Qd R 603; (1991) 58 A Crim R 71]. In that category of case, the police illegality and the threat to the rule of law which it involves assume a particularly malignant aspect. Even in such a case, if the police conduct is disowned by those in higher authority and criminal proceedings have been instituted against the police as well as the accused, it is unlikely that considerations of public policy relating to the integrity of the administration of criminal justice would require the exclusion of evidence either of the accused's offence or of the particular element of it created by the police illegality. If, however, the illegal police conduct would appear to be condoned by those in higher authority and it does not appear that criminal proceedings have

been brought against the police, those considerations of public policy will be so strong that an extremely formidable case for exclusion will be raised. Indeed, if the courts were prepared to allow curial advantage to be derived from the police illegality in such circumstances, there could be no satisfactory answer to Macrossan CJ's rhetorical question [ibid at 605; at 73] 'at what point would it ever be appropriate to demur and offer objection?'

Stay of proceedings

In Canada, the Supreme Court has held that the appropriate immediate remedy in an entrapment case is a stay of prosecution. The basis of that approach is that 'the rationale for recognition of the entrapment doctrine lies in the inherent jurisdiction of the court to prevent an abuse of its own processes' [*Mack* (1988) 44 CCC (3d) at 542] and that, in a case where relief should be granted on entrapment grounds, a stay is necessary to avoid 'the improper invocation by the state of the judicial process and its powers' [ibid, quoting Estey J in *Amato* (1982) 69 CCC (2d) at 73]. That approach finds support in some judgments in State Supreme Courts in this country … With due respect, we are unable to accept it.

Once it is concluded that our law knows no substantive defence of entrapment, it seems to us to follow that the otherwise regular institution of proceedings against a person who is guilty of a criminal offence for the genuine purpose of obtaining conviction and punishment is not an abuse of process by reason merely of the circumstance that the commission of the offence was procured by illegal conduct on the part of the police or any other person. To the contrary, to institute and maintain proceedings in a competent criminal court for that purpose is to use the process of that court for the very purpose for which it was established. If the commission of the crime was procured by illegal conduct on the part of another person, one would prima facie expect that criminal proceedings would also be instituted against that person. If that other person is a police or other government officer, a failure to institute such criminal proceedings might be a relevant consideration favouring the exercise of the discretion to exclude evidence of the illegally procured crime or of an element thereof. Such a failure would not, however, of itself convert the use of a criminal court's process for the trial and conviction of the person who committed the charged offence into an abuse of that process.

Nonetheless, the appropriate ultimate relief in a case where the commission of the charged offence has been procured by illegal police conduct may well be a permanent stay of further proceedings. Ordinarily, the question whether evidence of an offence or of an element of an offence should be excluded pursuant to the discretion to exclude evidence on entrapment grounds should be raised and determined in the course of a preliminary hearing. If, on such a hearing, a ruling is made that evidence of the charged offence or of an element of it should be so excluded, it will be apparent that it would be an abuse of process for the Crown to proceed with the trial. The reason why that is so is not that the commission of the charged offence was procured by illegal conduct on the part of the police. It is that the proceedings will necessarily fail with the consequence that a continuance of them would be oppressive and vexatious. It is true that there is an appearance of artificiality in the distinction between an exclusion of all evidence and a stay of proceedings [cf *Vuckov and Romeo* (1986) 40 SASR at 518; 22 A Crim R at 27, per Cox J]. There is, however, a significant distinction in principle between staying criminal proceedings on the ground that the proceedings in themselves constitute an abuse of process and staying further steps in the proceedings on the ground that, due to the effect of evidentiary rulings made in them, they must fail.

The present case

In the Full Court in the present case, it was agreed by the parties that that court should consider afresh the application made to the trial judge for a permanent stay of proceedings or the exclusion of evidence of the alleged offence 'and exercise its own discretion'. Notwithstanding some procedural difficulties, the members of the Full Court adopted that approach and concluded, by majority, that evidence of the alleged offences, including evidence of the illegal importation, was properly received and that a stay of proceedings should not have been granted. As we followed the argument, it is common ground between the parties that, if that conclusion of the Full Court was vitiated by error, this court should itself determine whether the evidence should have been excluded or a stay of proceedings should have been ordered.

Examination of the judgments of Matheson J and Duggan J who constituted the majority in the Full Court discloses that their Honours placed disproportionate weight on the question of unfairness to the particular accused. … the question of unfairness to a particular accused is ordinarily of but peripheral importance in deciding whether evidence of an illegally procured offence should be excluded on public policy grounds. In the present case, where the illegal importation of heroin and the subsequent supply of it to the appellant had been instigated by the appellant, there was no real question of any unfairness to him being involved in the receipt of evidence of his guilt. The critical question was whether, in all the circumstances of the case, the considerations of public policy favouring exclusion of the evidence of the appellant's offence, namely, the public interest in maintaining the integrity of the courts and of ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement, outweighed the obvious public interest in the conviction and punishment of the appellant of and for the crime against s 233B(1)(c) of the Act of which he was guilty. With due respect, it appears to us that neither of their Honours directly or adequately addressed that question.

Viewed in its context in a customs statute, the legislative purpose to be discerned in s 233B of the Act, and in the punishment of the offences which it creates, is the prevention of the illegal importation or exportation of the prohibited imports or exports to which the section applies, namely, prohibited imports or exports which are 'narcotic goods' [s 233B(2)]. Indeed, it is at least questionable whether the enactment of s 233B(1)(c) creating the offence of which the appellant was convicted would have been within the legislative power of the Commonwealth Parliament if that had not been the underlying legislative purpose and illegal importation had not constituted an element of the offence. Once that is appreciated, it becomes apparent that the present case falls within the second, more serious, category mentioned above. The illegal importation of the heroin which members of the Australian Police Force organized and in which they were involved was the very conduct against which the legislative provision creating the offence of which the appellant was convicted was primarily directed. The illegality of that importation was not only calculated. It was necessary to procure the commission of the appellant's offence. If the heroin had been obtained from supplies lawfully within Australia for medical or research purposes or if its importation under police control had been lawful, an essential element of the appellant's offence — ie 'imported into Australia in contravention of this Act' — would not have existed. The illegal police conduct itself provided and constituted that element.

As has been seen, the criminality of the police conduct was grave in that the maximum penalty for being involved in the illegal importation of a trafficable quantity of heroin was imprisonment for 25 years and a fine of $100,000. There is nothing before the court to suggest that the conduct of the police officers involved has been received with other

than acquiescence or approval at higher levels of the Australian Federal Police. There is no suggestion that any of those police officers has been charged with a criminal offence or otherwise reprimanded. Even in the course of argument of the case in this court, the Director of Public Prosecutions appeared somewhat reluctant to concede that the illegal conduct of those involved was unjustifiable. The receipt of evidence tending to show that the heroin was illegally imported meant that the prosecution was allowed by the court to derive the curial advantage which constituted the objective of the criminal conduct of the police.

In these circumstances, the above-mentioned factors — ie grave and calculated police criminality; the creation of an actual element of the charged offence; selective prosecution; absence of any real indication of official disapproval or retribution; the achievement of the objective of the criminal conduct if evidence be admitted — combine to make the case an extreme one in which the considerations favouring rejection of evidence on public policy grounds are extremely strong. Against those considerations, one must weigh the legitimate public interest in the conviction and punishment of the appellant for the criminal offence of which he is guilty. The weight of that consideration in the present case is reduced by the fact that the appellant's possession of the heroin at the time he was apprehended constituted any one of a variety of offences against the law of South Australia of which illegal importation was not an element and which range from knowing possession of a prohibited substance or drug of dependence (maximum penalty: $2000 and two years' imprisonment) [see Controlled Substances Act 1984 (SA) (as at December 1989), s 31(1)(a) and 2(b)] to possession of more than the prescribed quantity of a prohibited substance or drug of dependence for the purpose of sale or supply (maximum penalty: $500,000 and life imprisonment) [ibid, s 32(1)(e) and (5)(b)(i). And note that, under s 32(3), possession of more than a prescribed amount of heroin leads to a prima facie deeming of possession for the purpose of sale or supply. Further, the evidence discloses that the appellant viewed on-sale of the heroin as a viable method of providing Lee with the balance of the originally negotiated purchase price]. That being so, the effect of a stay of the prosecution of the appellant for offences against the Commonwealth Act would be that the appellant remained liable to be prosecuted under state law. In all the circumstances, the considerations of public policy favouring an exclusion of evidence of the illegal importation of the heroin clearly outweigh the considerations of public policy favouring the conviction of the appellant of an offence under s 233B(1) of the Act.

It follows that the learned trial judge should have ruled that all evidence tending to show that the heroin supplied to the appellant had been, or was reasonably suspected of having been, illegally imported should be rejected on public policy grounds. The evidence so excluded should have included any evidence from which any inference of illegal importation might be drawn (eg that heroin is not produced in Australia). The result of that ruling would have been that a necessary element of both the offence of which the appellant was convicted and the alternative offence [the offence under s 233B(1)(ca) of being in possession of heroin 'reasonably suspected of having been imported into Australia in contravention of this Act'] with which he was charged could not have been proved. Accordingly, further proceedings should have been stayed for the reason that they would inevitably fail.

There are two further matters which should be mentioned. The first is that, in the context of the fact that deceit and infiltration are of particular importance to the effective investigation and punishment of trafficking in illegal drugs such as heroin, it is arguable that a strict requirement of observance of the criminal law by those entrusted with its enforcement undesirably hinders law enforcement. Such an argument must, however, be addressed to the

legislature and not to the courts. If it be desired that those responsible for the investigation of crime should be freed from the restraints of some provisions of the criminal law, a legislative regime should be introduced exempting them from those requirements. In the absence of such a legislative regime, the courts have no choice but to set their face firmly against grave criminality on the part of anyone, regardless of whether he or she be government officer or ordinary citizen. To do otherwise would be to undermine the rule of law itself.

The second further matter is that, as has been indicated, a quashing of the appellant's conviction and the imposition of a stay of proceedings in respect of the offence against the Act will not preclude the appropriate authorities from instituting proceedings against the appellant for an offence or offences against the law of South Australia. In the event that such proceedings are instituted, it may be that the appellant will seek to have the whole of the evidence of any alleged offence excluded on public policy grounds by reason of the illegal police conduct. This court has not heard argument on the question whether a proper exercise of the discretion would require the exclusion of the evidence in those circumstances. It should, however, be clear from what has been written above that the fact that illegal importation would not be an element of the charged offence would greatly reduce the weight of the considerations favouring an exclusion of evidence.

The appeal should be allowed. As we have said, the judgment which ought to have been given in the first instance was that further proceedings against the appellant be stayed. No such order was made and the prosecution proceeded to conviction. It is therefore necessary to quash that conviction in order to give such judgment as ought to have been given in the first instance [see Judiciary Act 1903 (Cth), s 37]. The decision of the Full Court dismissing the appeal to it should be set aside and in lieu thereof it should be ordered that the appeal to that court be allowed, that the appellant's conviction be quashed and that there should be a permanent stay of further proceedings in relation to the two alleged offences under s 233B(1) of the Act. It will be a matter for the appropriate authorities to determine whether proceedings should be brought against the appellant for an offence or offences against the law of South Australia.

[**Brennan, Toohey** and **Gaudron JJ** gave separate judgments substantially agreeing with the reasoning of the joint judgment. **McHugh J** dissented.]

Note

23.41 See now Pt 1AB of the Crimes Act 1914 (Cth), which authorises certain entrapment-type operations to be carried out for the purpose of obtaining evidence of serious offences, including those relating to the importation of drugs. This scheme is discussed in **23.35–23.37**.

23.42C Gedeon v Commissioner of the New South Wales Crime Commission

High Court of Australia
[2008] HCA 43; 236 CLR 120; 249 ALR 398

Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ:

Introduction

1 These applications for special leave were heard together by a Court of six Justices under a referral made on 18 April 2008 when the applications first came before Gleeson CJ and Gummow J. The applicants seek to establish the invalidity of certain authorities for 'controlled operations' which were issued under the *Law Enforcement (Controlled Operations) Act 1997* (NSW) ('the LECO Act'). That statute, together with legislation in other jurisdictions,[1] was a response to the decision of this Court in *Ridgeway v The Queen*.[2]

…

11 Section 16 of the LECO Act is a provision of central importance for this litigation.[10] It states:

> Despite any other Act or law, an activity that is engaged in by a participant in an authorised operation in the course of, and for the purposes of, the operation is not unlawful, and does not constitute an offence or corrupt conduct, so long as it is authorised by, and is engaged in in accordance with, the authority for the operation.

12 Section 138 of the Evidence Act confers upon trial judges a discretion to exclude evidence obtained improperly or illegally. If s 16 of the LECO Act applies to a particular activity sought to be led in evidence, then the scope for the operation of s 138 is thereby diminished, but if there has been no authorised operation to which s 16 can apply, the scope for the operation of s 138 is increased.

13 It is with that prospect in mind that the applicants contend that s 16 can have no application to three authorities granted by the Commissioner on 8 and 22 February and 17 March 2005 ('the Authorities'). This is said to be because the Authorities are invalid, having been issued by the Commissioner in excess of the power conferred by the LECO Act.

The facts

14 For the purposes only of the present proceedings which seek to establish the invalidity of the Authorities, certain facts are agreed. On 8 October 2004 approximately 10 kilograms of cocaine were unlawfully imported into Australia. Thereafter the Commissioner authorised six controlled operations which utilised the services of an informer (codenamed 'Tom'). He already had sold three kilograms of the imported cocaine. The first and sixth authorities (No 05/00556 granted 8 February 2005, and No 05/01792 granted 17 March 2005) were used to support sales by 'Tom' to the applicant Mr Gedeon of, respectively, two kilograms and 750 grams of the imported cocaine. The second authority (No 05/01038 granted 22 February 2005) was used to support a sale by 'Tom' to the applicant Mr Dowe of one kilogram of cocaine. None of the cocaine disposed of in these three operations was recovered by any law enforcement officer. Messrs Gedeon and Dowe are the applicants for special leave in these proceedings.

15 The controlled operations had been planned in circumstances where the Commissioner and other New South Wales senior law enforcement officers had been briefed that it was unlikely that the cocaine would be recovered because the cocaine would be sold on to end users. The briefing had been given on 2 February 2005 at a meeting at which no member of the Australian Federal Police ('the AFP') was present. The AFP had participated at earlier stages, but this participation did not continue. No authorities were issued under Pt IAB of the Crimes Act.

16 Before turning to consider the specific issues that are raised, something more should be said of the procedural history.

The procedural history

17 The applicants seek in this Court declarations that the Authorities are invalid. They also sought in the Supreme Court of New South Wales an order in the nature of certiorari, but do not appear to press for that relief in this Court. They failed to obtain any relief in the Supreme Court both before the primary judge in the Common Law Division (Hall J),[11] and in the Court of Appeal (Spigelman CJ and Handley AJA; Basten JA dissenting).[12] Handley AJA agreed with the reasons of Spigelman CJ.

18 The proceedings in the Supreme Court were commenced by the applicants on 11 April 2006. Previously, on 9 May 2005, the applicants had been charged with taking part in the supply of a prohibited drug, contrary to the *Drug Misuse and Trafficking Act 1985* (NSW).

19 On 28 March 2006, at the committal proceedings in the Central Local Court, senior counsel for the Commissioner moved to have set aside a subpoena addressed to his client. He submitted that the Authorities had to be accepted for what they purported to be and that any question directed to the Commissioner which sought to 'go behind' them could not be relevant. Counsel said that it might be possible to obtain declaratory relief in the Supreme Court, but that this was a matter for the applicants. There followed the institution of the Supreme Court proceedings.

20 On 13 April 2006 the applicants were committed for trial. The trial of Mr Gedeon has yet to take place. Mr Dowe was convicted on 15 November 2007 after a trial in the New South Wales District Court before Hulme DCJ and a jury and on 7 March 2008 he was sentenced to a term of imprisonment of 12 years with a non-parole period of eight years. His appeal to the New South Wales Court of Criminal Appeal is pending. It should be noted that the conviction of Mr Dowe occurred after the delivery of the decision of the Court of Appeal upholding the validity of the Authorities.

21 As Basten JA indicated in his dissenting reasons in the Court of Appeal, the applicants have an interest in challenging the validity of the Authorities. In the case of Mr Gedeon this is the exclusion of evidence at his trial, pursuant to s 138 of the Evidence Act and, in the case of Mr Dowe, it is to found a complaint in his appeal against conviction that s 138 should have been applied in his favour at his trial.

…

33 The critical provision, the construction of which is disputed, appears in s 7 of the LECO Act. This deals with certain matters which are not to be authorised. In particular sub-s (1) states:

> An authority to conduct a controlled operation must not be granted in relation to a proposed operation that involves any participant in the operation:

(a) inducing or encouraging another person to engage in criminal activity or corrupt conduct of a kind that the other person could not reasonably be expected to engage in unless so induced or encouraged, or
(b) *engaging in conduct that is likely to seriously endanger the health or safety of that or any other participant, or any other person, or to result in serious loss or damage to property*, or
(c) engaging in conduct that involves the commission of a sexual offence against any person. (emphasis added)

34 The effect of s 13A of the LECO Act is that the Authorities are 'not invalidated by any procedural defect, other than a defect that affects the substance of [the Authorities] in a material particular'. It will be apparent that if the Authorities were granted contrary to s 7(1), they suffer from more than a procedural defect, and that a matter of substance is involved. The contrary was not suggested and the respondents did not rely upon s 13A to save the Authorities if they were invalid.

[Having dealt with several issues raised by the appellants, their Honours continued:]

…

48 The remaining issue concerns the expression in par (b) of s 7(1), 'to seriously endanger the health or safety of … any other person'. The majority in the Court of Appeal held:[33]

> The words 'any other person' should be read ejusdem generis with the reference to 'participants' in the controlled operation so as to be confined to persons proximate to, that is, in the physical vicinity of, the operation upon whom the authorised conduct directly impinges.

49 In this Court, counsel for the Commission did not support that construction. Rather, counsel submitted that the expression 'any other person' is limited to those involved in the operation in question. This submission was developed by counsel as follows:

> Now, the operational plan here did not go beyond the supply by [an officer of the Commission] to Tom and by Tom to Gedeon and thereafter the matter was beyond the control of this operation. It was a matter which may have caused harm at some point down the track, depending upon the quantities in which and the circumstances in which cocaine was ingested by end users, which end users would of course have been involving themselves in what might be described as 'interposed criminal conduct'.

50 By way of contrast, in his dissenting reasons Basten JA contended that the Authorities could not properly have been granted because of the prohibition imposed by par (b) of s 7(1).[34]

51 The question of construction of par (b) of s 7(1) is not resolved by the application of any particular maxim or canon of statutory construction selected from among those which may jostle for acceptance. The preferable starting point appears from what was said by Dixon J in *Cody v J H Nelson Pty Ltd*:[35]

> In the modern search for a real intention covering each particular situation litigated, however much help and guidance may be obtained from the principles and rules of construction, their controlling force in determining the conclusion is likely to be confined

> to cases where the real meaning is undiscoverable or where the court of construction, sceptical of the foresight of the draftsman or of his appreciation of the situation presented, is better content to supply the meaning by a legal presumption than subjectively.

52 The first point to be made here is that the provision in par (b) of s 7(1) uses the expression 'seriously endanger' health or safety and does not speak of damage to health or the sustaining of injury. The emphasis is upon exposure to danger or peril rather than upon the materialisation of that risk.

53 The primary judge accepted evidence that a consequence foreseen by a senior officer of the Commission of the conduct of the controlled operations using the services of 'Tom' was that, depending upon the extent of dilution, between 70,000 and 100,000 discrete dosage units of the cocaine would reach the streets.[36] With the agreement of Basten JA,[37] Spigelman CJ said:[38]

> If the subsequent distribution to end users of the cocaine fell within the scope of the prohibited 'conduct' in which a participant would engage pursuant to an authority, within the meaning of s 7(1)(b), it was not, and could not be, contended that the health of those users was not 'seriously endangered'.

54 In this Court, counsel for the Commission was asked:

> Is the position of the [Commission] in this Court that it wishes to contend that delivery of six kilograms of cocaine to a variety of end users is not likely to seriously endanger the health or safety of any end user? Is that the position of the [Commission]?

Counsel responded:

> We submit that it will not necessarily do so. There is a factual decision to be made in that respect and it is better made back in the Supreme Court.

55 The difficulty with that submission is that par (b) of s 7(1) uses the term 'likely' and does not speak in terms of the serious endangerment as a necessary consequence of engagement in the conduct authorised.

56 That the term 'likely' was employed advisedly in s 7(1) appears from the passage in the second reading speech in the Legislative Assembly which has been set out earlier in these reasons. The Minister spoke of 'a high risk of liability for damages' as a reason for the express prohibition to be imposed by par (b) of s 7(1). That approach was consistent with the well-known statement of general principle which had been made in 1980 in *Wyong Shire Council v Shirt* by Mason J.[39] His Honour's statement begins:[40]

> In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk.

57 A reasonable person in the position of the defendant would have foreseen that the conduct of the activities the subject of the Authorities would involve a risk of seriously endangering the health of some at least of the numerous class of end purchasers of the

cocaine. The contrary is impossible to reconcile with the legislative judgment, reflected both in federal and State law, prohibiting respectively the importation, supply and possession of such drugs. That prospect was sufficient to attract, as the legislative response to such a situation of risk, the prohibition in par (b) of s 7(1) of the LECO Act.

58 The submission by the Commission that the phrase 'any other person' is limited to participants in the operation reads down the ordinary meaning of that phrase and does so with the consequence of leaving the State exposed to the possibility of civil liability to a range of third parties, a hazard the legislature wished to avoid.

59 Hypothetical examples of what might be thought to be extreme situations cannot determine the particular issue of the validity of the Authorities in the present litigation. It may, however, be said that in some of those situations issues of sufficiency of the causal link to the conduct authorised might be important. The point sought to be made here appears from what was said by Basten JA as follows:[41]

> It is often helpful to test a proposed construction of a statute by reference to its possible operation in other circumstances. Nevertheless, there are risks in taking that exercise too far. The need to consider possible harm which might occur due to criminals seeking to 'escape from the crime scene' would also need careful analysis. It is at least possible that those circumstances would flow from the attempt to arrest the criminals, rather than from some conduct involved in the controlled operation. By analogy with conferral of immunity in other circumstances, it might be wrong to treat the controlled operation as continuing to the stage of an attempted arrest which would otherwise be authorised by law: cf *Board of Fire Commissioners (NSW) v Ardouin*.[42]
>
> Similarly, retaliatory acts by a person targeted in the operation, which may endanger the safety of participants or third parties might properly be said to flow, not from the authorised conduct, but from a belief of the person targeted that he or she had been betrayed to the authorities. Whether such a conclusion is open would need to be considered in specific circumstances as they arose, as would findings as to whether the risk were likely or unlikely to eventuate.

We agree with these observations. The applicants are entitled to succeed on their interrelated first and second submissions.

Orders

60 Special leave to appeal should be granted and the appeals taken as heard instanter. Each appeal should be allowed with costs against the Commission; orders 3 and 4 of the Court of Appeal of the Supreme Court of New South Wales should be set aside and in their place (a) the appeal to that Court should be allowed with costs against the Commission and (b) a declaration should be made that the relevant Authorities are invalid and (c) the summons in the Common Law Division of the Supreme Court of New South Wales otherwise should be dismissed but with an order for costs against the Commission.

Footnotes

1. *Crimes (Controlled Operations) Act 2008* (ACT); *Police Powers and Responsibilities Act 2000* (Qld), Ch 11; *Criminal Law (Undercover Operations) Act 1995* (SA); *Crimes (Controlled Operations) Act 2004* (Vic) (not yet proclaimed); *Corruption and Crime Commission Act 2003* (WA), Pt 6, Div 4. See also *Crimes Act 1914* (Cth), Pt IAB, discussed at [5]–[7] below.

2. (1995) 184 CLR 19; [1995] HCA 66.

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10. Part IAB of the Crimes Act contains (ss 15I, 15IA, 15IB) exculpatory provisions in respect of authorised controlled operations which are more detailed than s 16 of the LECO Act.
11. The two relevant judgments of Hall J were delivered on 12 December 2006 and 6 March 2007 and are reported respectively as *Dowe v Commissioner of the New South Wales Crime Commission* (2006) 206 FLR 1, and *Dowe v Commissioner of New South Wales Crime Commission* [2007] NSWSC 166; (2007) 169 A Crim R 43.
12. *Dowe v Commissioner of New South Wales Crime Commission* [2007] SASC 296; (2007) 177 A Crim R 44.

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33. *Dowe v Commissioner of New South Wales Crime Commission* [2007] SASC 296; (2007) 177 A Crim R 44 at 61, 68.
34. *Dowe v Commissioner of New South Wales Crime Commission* [2007] SASC 296; (2007) 177 A Crim R 44 at 67.
35. [1947] HCA 17; (1947) 74 CLR 629 at 647; [1947] HCA 17. See also the discussion by Mahoney JA in *Mattinson v Multiplo Incubators Pty Ltd* [1977] 1 NSWLR 368 at 376–7.
36. *Dowe v Commissioner of New South Wales Crime Commission* [2007] NSWSC 166; (2007) 169 A Crim R 43 at 50.
37. *Dowe v Commissioner of New South Wales Crime Commission* [2007] SASC 296; (2007) 177 A Crim R 44 at 66.
38. *Dowe v Commissioner of New South Wales Crime Commission* [2007] SASC 296; (2007) 177 A Crim R 44 at 60.
39. [1980] HCA 12; (1980) 146 CLR 40 at 47–8; [1980] HCA 12.
40. [1980] HCA 12; (1980) 146 CLR 40 at 47.
41. *Dowe v Commissioner of New South Wales Crime Commission* [2007] SASC 296; (2007) 177 A Crim R 44 at 67.
42. (1961) 109 CLR 105; [1961] HCA 71.

Search, Seizure, Surveillance and Identification

CHAPTER 24

GENERAL LIBERTIES AND SPECIAL POWERS

24.1 The focus of this chapter is on the initial stages of the search for evidence relating to an offence, before a suspect has been taken into custody. The chapter excludes questioning of suspects because this often occurs in custodial situations where special rules apply. Questioning is covered in **Chapter 26**.

24.2 Searching for evidence has the potential to infringe reasonable expectations of privacy: see *George v Rockett* (1990) 170 CLR 104; 93 ALR 483 (**24.61C**); *State of New South Wales v Corbett* [2007] HCA 32; 230 CLR 606; 237 ALR 39 at 24.62C. In the context of criminal investigation, reference is sometimes made to a 'right to privacy'. This is understood in broad terms as being a right to be 'let alone', that is, to be free from interference and scrutiny in the conduct of everyday life. The right is potentially infringed when police demand that identification be produced, insist on examining personal property, or take away items they believe may be helpful in their investigations. However, some infringement of the right to privacy is necessary if criminal investigation is to be effective. One of the central tasks of the law of criminal procedure is to strike a balance between societal interests in law enforcement and in protecting reasonable expectations of privacy. This balance is struck through specification of the special powers that may be exercised for the purposes of criminal investigation.

The relevant legislation is the Police Powers and Responsibilities Act 2000 (Qld) (PPR Act (Qld)); Criminal Investigation Act 2006 (WA) (CI Act (WA)); the Crimes Act 1914 (Cth) (Crimes Act (Cth)).

24.3 The police need to have special investigative powers conferred by law only when they go beyond what is permitted under the general liberties of the ordinary citizen. Much police work in investigating offences does not depend upon any special powers because it falls within the exercise of these general liberties. Without resort to special powers, the police can look, listen and ask questions in the same way that anyone else can look, listen and ask questions. The exercise of these general liberties by the police is entrenched by statute: PPR Act (Qld) s 8(1); CI Act (WA) s 8.

24.4 The exercise of general liberties by the police is subject to the liberties of the person under investigation. For example, a police officer can look through a window, but the householder is

free to draw the curtains. Similarly, a police officer can ask a question of a pedestrian, but the pedestrian is free to ignore the question and walk on. These general liberties of the ordinary person are protected by the criminal law and by the law of torts. If the officer physically restrains the pedestrian from walking on, an assault, criminal or tortious, may be committed. The role of the law of special investigative powers is to override the barrier of protection and to authorise the police (and other persons acting for the purposes of law enforcement) to take action that would not be permitted under general liberties. Invasions of property may be authorised as may be the use of physical force against a person.

24.5 If police obtain consent for their actions, there is no need to rely on special powers. Consent can legitimise what would otherwise be an assault upon a person or a misappropriation of property.

Nevertheless, in the context of police action, care needs to be taken to distinguish consent from compliance. Words may be formally phrased as a request, but their utterance by a police officer may lead to them being interpreted as a demand for compliance with authority.

24.6 In the decision of the Supreme Court of Canada in *Dedman v The Queen* [1985] 2 SCR 2; (1985) 20 CCC (3d) 97, it was suggested that compliance with a police demand or direction cannot constitute consent unless it is made clear that the person is free to refuse to comply. Le Dain J said, at 20 CCC (3d) 116–17:

> A person should not be prevented from invoking a lack of statutory or common law authority for a police demand or direction by reason of compliance with it in the absence of a clear indication from the police officer that the person is free to refuse to comply. Because of the intimidating nature of police action and uncertainty as to the extent of police powers, compliance in such circumstances cannot be regarded as voluntary in any meaningful sense.

This principle has been recognised in several contexts in Australia. Roberts-Smith J of the Western Australia Court of Criminal Appeal said in *Norton v R (No 2)* [2001] WASCA 207; (2001) 24 WAR 488 (**25.69C**) at [101]: 'To avoid a conclusion that a person is under arrest or in custody the police officers must make it clear that they are free to go.' Similarly, in Queensland, consent to a forensic procedure is only recognised if the person is provided with certain information, including advice that consent may be refused: PPR Act (Qld) s 454.

Several provisions of the now superseded Queensland Police Responsibilities Code 1998 authorised the exercise of consensual searches only after notification was given that consent need not be given. These provisions were not incorporated in the revised scheme of police powers which came into effect in 2000. Nevertheless, the general principle that notification is required may still operate as part of common law doctrine on the meaning of consent.

24.7 Even if appropriate advice has been provided, it may be unsafe to infer consent in the absence of a reply indicating that consent has been given. In Western Australia, a lack of reply signifies lack of consent to a search: CI Act (WA) s 23.

24.8 Evidence is obtained unlawfully if it is not obtained by means permitted under general liberties or special powers. As such, it is liable to be excluded by a trial judge.

- For Queensland and Commonwealth offences, admissibility is determined in the exercise of the discretion at common law to take account of considerations of public policy and fairness to the accused: see **22.14–22.20**.

- For Western Australia offences, admissibility is determined under the terms of CI Act (WA) s 155: see 22.15.

In all the jurisdictions, unlawfully obtained evidence may still be admitted having regard to considerations such as the seriousness of the offence and the seriousness of the official misconduct or errors.

24.9 If an investigative procedure is unlawful, there is no duty to co-operate or to submit to it. The use of force to resist it may also be permitted: see Chapter 14 on the use of force in defence of a person or property. Even if excessive force is used and an assault is committed, it will not amount to an offence of assaulting an officer in the execution of her or his duty: Criminal Code (Qld) (Code (Qld)) s 340(b); Criminal Code (WA) (Code (WA)) s 318)(d); PPR Act (Qld) s 790.

THE STRUCTURE OF INVESTIGATIVE POWERS

24.10 The common law granted few special investigative powers to the police. At common law, search warrants were not available in relation to most offences. Powers exercisable without warrant were also severely restricted. Almost the only significant common law power exercisable without warrant has been the power to take possession of articles believed to provide evidence of the commission of offences: *Ghani v Jones* [1970] 1 QB 693; [1969] 3 All ER 1700. The power can be exercised only if the article is found in a lawful way. If the article is found through an unlawful search, then its seizure is also unlawful.

Most powers now exercised by the police are statute-based. They are derived from different Acts. The discussion in this chapter will focus mainly on the powers contained in the PPR Act (Qld), the CI Act (WA) and the Crimes Act (Cth). The powers and the circumstances of their use are broadly similar in all three jurisdictions.

24.11 A key element in the law of investigative powers is the distinction between powers that can be exercised without a warrant and powers that can only be exercised with a warrant. In both cases, the law can prescribe grounds on which the power may be exercised. The distinction between them turns on who makes the primary decision about whether the grounds for the exercise of the power exist. Where a warrant is not required, the decision is usually made by the person who exercises the power (although it may be subject to subsequent review by superiors or by the courts). For powers that require a warrant, an independent determination of whether grounds exist for the issue of a warrant is made before the power is exercised. The warrant itself is an authorisation to exercise the power. A warrant is issued by a justice of the peace or judicial officer, following a complaint which establishes the justification for the warrant to be issued. The role of the process is to ensure that an independent agency, acting in a quasi-judicial manner, has determined that the relevant invasion of privacy is justifiable.

24.12 Distinctions are to be drawn between the various standards which govern either the exercise of powers without warrant or the issuance of warrants:

1. *Reasonable suspicion*. The exercise of most investigative powers requires *reasonable suspicion* (or alternatively *reasonable grounds for suspecting*) that evidence will be obtained. A suspicion is 'more than a mere idle wondering — it is a positive feeling of actual apprehension or mistrust': *George v Rockett* (24.61C), quoting Kitto J in *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303.

2. *Reasonable belief*. Some investigative powers can only be exercised on the basis of *reasonable belief* (or alternatively *reasonable grounds for believing*) that evidence will be obtained. Suspicion and belief are distinct. In *George v Rockett* (24.51C), it was said: 'Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition.' It was also said that something may be reasonably believed to be true even though it cannot be proved to be so. Even so, reasonable belief sets a higher standard than reasonable suspicion.
3. *No standard*. A few provisions which establish investigative powers do not prescribe any standard for their exercise. For example, under schemes for the control of drink-driving, a police officer may require any driver of a motor vehicle to stop and submit to a roadside breath test. There is no requirement for a reasonable belief or even a suspicion that an offence has been committed. This form of power does not confer an absolute or untrammelled discretion. Discretion apparently unlimited in its terms must still be exercised in accordance with 'the scope and object of the statute': *Barton v R* (1980) 147 CLR 75 at 94; 32 ALR 449. The officer must, therefore, be acting in good faith with respect to the enforcement of the statute and the discretion cannot be used to pursue extraneous objectives. Nevertheless, as long as the officer is acting in accordance with the objectives of the statute, no particular criteria control the exercise of the discretion and the power can be exercised randomly.

24.13 'Reasonable suspicion' is the key standard. It is this loose expression that governs the use of most special investigative powers.

- 'Reasonable suspicion' incorporates an objective standard. It is not sufficient that the officer honestly suspects; the honest suspicion must also be reasonable. A suspicion may be reasonable even though it is eventually found to have been based on a mistake. In *Ruddock v Taylor* [2005] HCA 48; 222 CLR 612; 221 ALR 32, a case under the Migration Act 1958 (Cth), it was said, at [40]: '… what constitutes reasonable grounds for suspecting a person … must be judged against what was known or reasonably capable of being known at the relevant time'. The PPR Act (Qld) Sch 6 expressly defines 'reasonably suspects' as meaning 'suspects on grounds that are reasonable in the circumstances'.
- The CI Act (WA) s 4 provides: 'a person reasonably suspects something at the relevant time if he or she personally has grounds at the time for suspecting the thing and those grounds (even if subsequently found to be false or non-existent), when judged objectively, are reasonable'.

Whether or not a suspicion is reasonable will depend largely on the circumstances of the particular case, such as the behaviour of a suspect and his or her proximity to the commission of a known offence.

24.14 Although the officer exercising a power must personally have grounds for reasonable suspicion, the officer can rely on appropriate information provided by another person: *O'Hara v Chief Constable of the RUC* [1997] AC 296; 1 All ER 129 at 25.70C.

Moreover, in Western Australia (but not Queensland), a police officer may delegate the performance of a power to another officer: CI Act (WA) s 12. See *Cotchilli v The State of Western Australia* [2008] WASC 103, [22–26] at 25.71.

24.15 A critical general issue is how far the personal characteristics of the suspect may be taken into account in formulating a suspicion which is reasonable. How far, if at all, is it relevant

that a person is identified as a suspect because of certain characteristics such as gender, age or appearance, that are associated with high offence rates?

It would be blatantly unreasonable to identify anyone as a suspect merely on the basis of their characteristics. In Queensland, searching simply on the basis of characteristics and without reference to circumstances may even be excluded by the statutory definition of 'reasonably suspects': see 24.13.

The more difficult cases are those where there is some circumstantial basis for suspecting a person but that person's characteristics bolster the officer's suspicion. Suppose, for example, police officers go to a neighbourhood following a report that someone was seen breaking into property; they then want to search a person found in that neighbourhood because of that person's characteristics rather than because of any additional circumstantial grounds for suspicion. Whether or not such a search would be reasonable might depend in part on how close the person was to the scene of the reported break-in. It might also depend on whether the person's characteristics could be taken into account. The danger, of course, is that the police action will amount to discrimination as well as to an unwarranted violation of privacy.

POWERS EXERCISABLE WITHOUT WARRANT

24.16 At common law, an officer had no power to stop a person, to demand identification, or to require submission to a search. A leading case at common law is *Rice v Connolly* [1966] 2 QB 414; 2 All ER 649 at 652, where it was said that a citizen may have a moral or social duty to assist the police but there is no legal duty to do so. That general principle has been substantially eroded by statute.

24.17 In Queensland and Western Australia, the common law has now been superseded and an extensive range of powers to act without warrant is conferred upon the police.

'Reasonable suspicion' is the general standard specified for exercising powers without warrant. On the meaning of reasonable suspicion, see 24.12–24.13.

24.18 Powers given to police to act without warrant are similar in each state though not identical. They include:

1. power to require identification (PPR Act (Qld) ss 40–41; Criminal Investigation (Identifying People) Act 2002 (WA) s 16);
2. power to establish road blocks (PPR Act (Qld) s 26–28; CI Act (WA) s 18);
3. power to stop and search persons and vehicles (PPR Act (Qld) ss 29–32; CI Act (WA) ss 38–39, 65, 67–69);
4. power to enter and search public places: PPR Act (Qld) s 33; CI Act (WA) s 33;
5. power to seize evidence which has been lawfully found (PPR Act (Qld) ss 29(2), 31(5), 196; CI Act (WA) ss 39(2), 68(1)(b));
6. power to establish a crime scene (Qld) or protected forensic area (WA), restrict access and seize items within it: PPR Act (Qld) Ch 7, Pt 3; CI Act (WA) Pt 5, Div 4.

Demand for identification

24.19 A police officer may require identification from various persons, including a person who is found committing an offence, or who is reasonably suspected either of having

committed an offence or of being able to help in the investigation of an offence (in Queensland, an indictable offence): PPR Act (Qld) ss 40–41; Criminal Investigation (Identifying People) Act 2002 (WA) s 16. Consequently, identification can be demanded from potential witnesses as well as suspected offenders. The primary demand is for a statement of the person's name and address. There can also be a demand for evidence of the correctness of that statement if it would be reasonable to suspect the person to be in possession of such evidence: PPR Act (Qld) s 40(2); Criminal Law (Identifying People) Act (WA) s 16(3). Most adults might be expected to be in possession of a driving licence or some other form of identification.

24.20 Failure to comply with a demand without reasonable excuse is an offence: PPR Act (Qld) s 791(2); Criminal Law (Identifying People) Act 2002 (WA) s 16(6).

In Queensland, it appears to be a reasonable excuse that the officer was mistaken about the person's involvement in an offence or ability to assist an investigation. The PPR Act (Qld) states that non-compliance is not an offence if the person is not proved to have committed the offence under investigation or to have been able to help in the investigation: s 40(3). Therefore, a person who is rightly confident of being unable to help can refuse to provide identification with impunity. This is a major accommodation to the protection of privacy interests.

24.21 Failure to assist the police must be distinguished from actively misleading them. Telling lies to the police (as opposed to refusing or failing to answer their questions) can amount to obstructing them in the execution of their duties. Obstruction is an offence under the PPR Act (Qld) s 790 and, also, with more substantial penalties, under the Codes s 340(b) (Qld)/s 172 (WA). Moreover, where the offence of obstruction is in issue, it is no defence that the police suspicions were unfounded.

Searches

24.22 Public places include places to which the public has access as of right or by permission of the occupier, whether or not payment is charged: PPR Act (Qld) Sch 6; CI Act (WA) s 3.

- In Queensland, public places can be entered and searched for evidence of offences: PPR Act (Qld) s 33.
- In Western Australia, public places can be entered and searched for things reasonably suspected of being relevant to an offence or for persons against whom it is reasonably suspected an offence may have been or may be being committed: CI Act (WA) s 33.

24.23 Searches of private places generally require warrants. However, searches without warrant can be conducted under some special circumstances:

- In Queensland, there is power to search private places without warrant where delay in seeking a warrant might risk the concealment or destruction of evidence, although subsequent application must be made for a 'post-search approval order': PPR Act (Qld) ss 159–163. There is also power to enter and search for a person in order to make an arrest: PPR Act (Qld) s 21.
- In Western Australia there is power to enter without warrant and seize property to prevent violence, attend to a dead or seriously injured person or to investigate a serious event: CI Act (WA) ss 35–37.

24.24 The police can stop and search people and vehicles without warrant under the law of both Queensland and Western Australia: PPR Act (Qld) ss 29–32; CI Act (WA) ss 38–39, 65, 67–69. Under Commonwealth law, there is a power to stop and search conveyances: Crimes Act (Cth) s 3T. There is no general power under Commonwealth law to stop and search persons but there is a specific power relating to searches for terrorism-related items: Crimes Act (Cth) s 3UD.

Although these powers are wide, they are subject to certain limits in order to protect privacy interests. There is generally a requirement for reasonable suspicion about what will be found. However, this only applies where a person is not in lawful custody. The requirement disappears once a person has been arrested or is otherwise in lawful custody; search powers then expand. See the discussion in **25.45** of the PPR Act (Qld) s 443 and the CI Act (WA) s 135.

24.25 Maintenance of dignity is an important element of privacy. The manner of searching persons has therefore been closely regulated: PPR Act (Qld) ss 624, 629–630; CI Act (WA) ss 70–72. Queensland and Western Australia allow both clothed and strip searches subject to conditions designed to minimise embarrassment and protect privacy, so far as is consistent with a body search.

Intimate searches of bodily cavities and other intrusive forensic examinations are governed by special regimes: PPR Act (Qld) ss 445–466; CI Act (WA) Pt 9. These are discussed in **Chapter 25** in relation to searching as an incident of arrest.

24.26 Following a lawful search, an officer can seize anything that might provide evidence of the commission of an offence: PPR Act (Qld) ss 29(2), 31(5); CI Act (WA) ss 39(2), 68(1)(b). The evidence can relate to any offence, not only an offence which would justify the original search. The explanation is that privacy interests require restrictions on the grounds for searching but not for seizing items lawfully found.

Searches in Queensland

24.27 In Queensland, an officer exercising powers to search persons or vehicles without warrant must reasonably suspect that the search will reveal any of a list of items which includes:

- an unlawful weapon or knife;
- an unlawful dangerous drug;
- property which is stolen, unlawfully obtained or tainted;
- evidence of the commission of an offence punishable by 7 years imprisonment or more;
- instruments for committing property offences or administering dangerous drugs;
- items which the person intends to use to cause harm to himself, herself or someone else: PPR Act (Qld) ss 30, 32.

A motor vehicle may also be stopped and searched if there is a reasonable suspicion that it is being unlawfully used: s 31(2)(a).

24.28 There are general requirements that minimal embarrassment be caused, that reasonable care be taken to protect dignity, that public searches ordinarily be confined to outer clothing and that more thorough searches ordinarily be conducted out of public

view: PPR Act (Qld) s 624(1). A search must ordinarily be conducted by an officer of the same sex as the person searched: s 624(2).

Strip searches are specifically authorised: s 629(1). The officer must, however, explain what will happen and why it is necessary, and also ask for co-operation: s 630(1)(a). In addition, the suspect must be given the opportunity to keep some clothes on during each stage of the search (s 630(1)(b)); reasonable privacy must be afforded (s 630(2)); the search must be conducted as quickly as reasonably practicable (s 630(3)); there must ordinarily be no physical contact with genital or anal areas although these can be visually examined (s 630(4)); video records are discouraged and restrictions are imposed on access to any recordings which are made: s 632.

24.29 The power to seize evidence as a result of a search (PPR Act (Qld) ss 29(2), 31(5)) overlaps with a more general power to seize evidence which an officer finds lawfully: PPR Act (Qld) s 196. Under s 196, an officer who lawfully finds evidence of any offence may seize it without warrant. The evidence might be found in a public place, or in a private place to which the officer had been invited, or in a place which the officer is lawfully searching. There are supplementary powers to remain on and to re-enter a place where this is reasonably necessary for removing the thing: s 196(4).

Searches in Western Australia

24.30 In Western Australia, persons can be stopped and searched on the basis of reasonable suspicion that they possess things relevant to offences: CI Act (WA) ss 65, 68(1).

A police officer who stops and searches a vehicle must reasonably suspect that it is carrying a thing or is itself relevant to an offence or is carrying a person against whom an offence may have been committed or that an offence has been, is or may be committed in the vehicle: s 39. There is also power to act to prevent vehicles being used in the commission of offences and for certain other preventive purposes: s 38.

The term 'thing relevant to an offence' includes things used in or obtained by offences and things that afford evidence: s 5.

24.31 With respect to the manner of searching, Western Australia distinguishes between 'basic searches' and 'strip searches': CI Act (WA) ss 63–64.

For all searches, the searcher must if reasonably practicable identify himself or herself, provide the reason for the search, request consent and, if it is not forthcoming, provide advice on the consequences of the refusal: s 70(2). The search must be done as quickly as is reasonably practicable, in the least intrusive manner and with an explanation for the need to remove any clothing: s 70(3).

Strip searches are permitted only where there is a reasonable suspicion of their necessity: s 72(2). They must be done in circumstances affording reasonable privacy, with the removal of as few articles as is reasonably necessary and with as few persons present as is reasonably necessary: s 72(3).

Unless the searcher is a doctor or nurse, the searcher and the person searched must be of the same gender. For basic searches, this requirement applies if practicable: s 71(2). For strip searches it is mandatory: s 72(3)(a). Persons present during strip searches must also be of the same gender if practicable: s 72(3)(b).

SEARCH WARRANTS

24.32 'Search warrants' are judicial or quasi-judicial authorisations to look for and take possession of things in ways that would otherwise be unlawful. Although the common term is *search* warrant, the warrant also covers seizure of items found.

24.33 The law of search warrants is now wholly based in statute, although case law may be used in interpreting the legislation. Most warrants are issued under these items of legislation:

- Queensland — the PPR Act (Qld) Ch 7, Pt 1;
- Western Australia — the CI Act (WA) Pt 5, Div 3; Misuse of Drugs Act (WA) s 24;
- Commonwealth offences — the Crimes Act (Cth) ss 3E–3S. A Commonwealth warrant is valid even though it authorises the search of state premises: *Jacobsen v Rogers* (1995) 182 CLR 572; 127 ALR 159.

24.34 In *George v Rockett* (24.61C), the High Court insisted on 'strict compliance' with any statutory conditions for the issuance of a search warrant. In *Corbett* (24.62C), however, the High Court took the view that, in interpreting the significance of statutory conditions, the guiding principle is the purpose of ensuring the proper identification of the object of the search. If a warrant imposes appropriate limits on the scope of a search, it will not be automatically invalidated by non-compliance with some statutory condition.

24.35 The validity of warrants can be challenged in proceedings for judicial review of administrative action or a civil action for trespass.

When evidence has been obtained by means of an invalid warrant or in breach of the terms of a valid warrant, it is potentially liable to be excluded at trial: see **24.8**.

24.36 Warrants can be issued to search a place to obtain evidence of the commission of an offence and for things to be used for committing offences, under:

- Queensland — the PPR Act (Qld) ss 150–151, and see the definition of 'evidence of the commission of an offence' in Sch 6.
- Western Australia — the CI Act (WA) ss 41(3)(g), 42(1), and see the definition of 'thing relevant to an offence' in s 5. The Western Australian power extends to searches for evidence relevant to an offence that may be committed in the future: s 41(3)(b).

24.37 The Queensland and Western Australian legislation authorises warrants for searches of places, including vehicles, but not searches of persons: PPR Act (Qld) ss 150(1), 151; CI Act (WA) s 42. However, there is power to conduct incidental searches of persons found in places for which a warrant is issued. Special authorisations are required for certain forensic examinations of persons: see **25.54–25.67**. These authorisations are like warrants, although they are governed by separate statutory provisions.

- In Queensland, incidental searches of persons can be specifically authorised in warrants: PPR Act (Qld) s 157(2)(a).
- In Western Australia, there is a general power to search persons in a place for a thing specified in the warrant: CI Act (WA) s 43(8)(b)(ii).

For Commonwealth offences, in contrast, the general scheme for search warrants may be used to obtain warrants to search persons as well as premises: Crimes Act (Cth) s 3E(1)–(2). There is no requirement under the Commonwealth scheme for the person to be in any place identified in a warrant.

24.38 The process of issuing a search warrant is in 2 stages.. first, a police officer (or a public officer in Western Australia) makes an application for a warrant and, second, a justice of the peace or a judicial officer decides whether to issue the warrant.

- For Queensland, the PPR Act (Qld) s 150(5) and Police Responsibilities Code 2000 (Qld) s 3 prescribe what must be stated in the application; PPR Act (Qld) ss 156–157 prescribe what must be stated in the warrant.
- For Western Australia, CI Act (WA) s 41 prescribes what must be stated in the application; s 42 prescribes what must be stated in the warrant.

24.39 An application must state the grounds on which the warrant is sought: *George v Rockett* (24.61C); PPR Act (Qld) s 150(5); Police Responsibilities Code 2000 (Qld) s 3(f); CI Act (WA) s 41. It must identify the place to be searched, the item(s) to be sought and the reason for the search (for example, the offence in respect of which evidence is sought). Otherwise, the warrant cannot effectively perform its function of controlling the search and ensuring that the invasion of privacy is justifiable.

The issuer of a warrant must then be personally satisfied that the grounds to issue the warrant are present: *George v Rockett* (**24.61C**); PPR Act (Qld) s 151; CI Act (WA) s 42. The issuer can question the applicant in order to confirm any points but if an application fails to address some essential matter, the responses to questions cannot cure the defect: *George v Rockett*.

The warrant issued must be consistent with the application. The warrant cannot extend any further than what the application justifies. Moreover, the warrant must on its face indicate that the justice is satisfied that the grounds for issuing it are established by the application: *George v Rockett*.

24.40 The application must be on oath: PPR Act (Qld) s 150(5)(a); CI Act (WA) s 13(6) (unless the application is made by remote communication and it is impractical to administer an oath); Crimes Act (Cth) s 3E(1).

It will usually be in writing. In *George v Rockett* (**24.61C**), the High Court indicated that this was desirable. The CI Act (WA) requires the application to be in writing unless it is from a remote location and writing is impractical: s 13(5).

24.41 The officer making the application is usually expected to be present in person and available for questioning by the justice. Sometimes this may be impracticable; for example, where delay in searching would risk the loss or destruction of evidence. Application may be made by telephone, fax, email or radio in case of remoteness or urgency: PPR Act (Qld) s 800(2); CI Act (WA) s 13(4)(c); Crimes Act (Cth) s 3R.

- Standard procedure in Queensland still requires personal attendance. In *Wright v Queensland Police Service* [2002] QSC 46; 2 Qd R 667 at [9], it was said: '… it seems clear enough that what is contemplated in the ordinary course is personal attendance on the issuing justice or magistrate'. The telewarrant in that case was held invalid because exigent circumstances had not been established.

- In Western Australia, a telewarrant must not be granted unless it is needed urgently and personal contact is not feasible: CI Act (WA) s 13(4)(d).

24.42 Search warrants are ordinarily issued by justices: PPR Act (Qld) s 150(2); CI Act (WA) ss 41(2), 42(1). There are, however, exceptions:

- In Queensland, if the search might cause structural damage to a building, the original application must be made to a Supreme Court judge: PPR Act (Qld) s 150(4). Applications for covert search warrants, which can be issued for the investigation of organised crime or terrorism, must also be made to a Supreme Court judge: PPR Act (Qld) s 212(1). For some warrants relating to the proceeds of crime, application must be made to a magistrate: PPR Act (Qld) s 150(3).
- In Western Australia, certain warrants sought by the Corruption and Crime Commission must be issued by a Supreme Court judge: Crime and Corruption Commission Act 2003 (WA) s 101(2).

24.43 It is possible to apply to more than one justice in the event of an initial refusal but this practice is subject to regulation.

- In Queensland, a second application can only be made where the first was made to a justice other than a magistrate. The second application must be made to a magistrate or judge and the magistrate or judge must be informed of the initial refusal: PPR Act (Qld) s 152.
- In Western Australia, the applicant for a warrant must disclose any applications made in the preceding 3 days and whether a warrant was issued or not: CI Act (WA) s 41(3)(h).

24.44 The role of a person issuing a warrant is to make an independent assessment of whether the statutory grounds for the search are present.

The key standard to justify issuing a warrant is reasonable suspicion:

- In Queensland, a warrant to search for evidence requires reasonable grounds for suspecting that the evidence is either in the place or likely to be there within the next 72 hours. The standard of reasonable suspicion applies not only to the location of the item but also to its character as evidence of the commission of an offence: PPR Act (Qld) s 151.
- In Western Australia, an application for a search warrant must state the offence that is suspected, the grounds on which the applicant suspects that the offence may have been, or will be, committed, and the grounds on which the applicant suspects that things relevant to the offence are in the place to be searched or that a person against whom an offence has been or might be committed is in the place: CI Act (WA) s 41(3). A search warrant may be issued if the justice is satisfied that in respect of each of a number of matters that the applicant suspects, there are reasonable grounds for the applicant to have that suspicion: CI Act (WA) s 42(1).
- Reasonable suspicion is the standard adopted under the Crimes Act (Cth) s 3E.

24.45 The warrant issued must be consistent with the application. The warrant cannot extend any further than what the application justifies. Moreover, the warrant must on its face indicate that the justice is satisfied that the grounds for issuing it are established by the application: *George v Rockett* at 24.61C.

24.46 Warrants are ordinarily very specific in describing the person or persons who can conduct the search, the place or places to be searched and the items for which the search is to be made. A search warrant is not an entitlement to conduct a wider 'fishing expedition':

- In Queensland, a warrant must specify the place to be searched (PPR Act (Qld) s 157(1)(a)) and that a police officer may exercise search warrant powers: s 156(1)(a) (although the warrant could be directed to all officers of the police force). It must also specify brief particulars of the offence to which the warrant relates, the evidence that may be seized, the hours of entry if a night search is to be conducted, and the day and time when the warrant ends: s 156(1)(b)–(e). A warrant expires after 7 days if issued to search for evidence suspected to be in a place: s 155(1).

In *Wright* [2002] QSC 46; 2 Qd R 667 at [31]–[3], it was held that merely inserting the name of the relevant offence and its section number was insufficient to meet the requirement of 'brief particulars'. It was suggested that particulars should provide information about where and when, and by whom, an offence is alleged to have been committed.

- In Western Australia, a warrant must state the applicant's name and details, the offence that is suspected, the place to be searched, and the object or person of the search: s 42(2)(a)–(e). It must also state the period, not exceeding 30 days, during which it may be executed: s 42(2)(f). Any police officer may execute a warrant applied for by a police officer: CI Act (WA) s 43(5).

However, if a warrant does impose appropriate limits on the search, it will not necessarily be invalidated by a minor defect in what is stated: *Corbett* at **24.62C**.

24.47 Warrants can be held invalid on the ground that they are too general. However, there will often be some uncertainty about what kind of evidence may be available and where it can be found. An obsession with specificity could impose unreasonable fetters on the investigative process. How specific a warrant must be is therefore a difficult question. Much can depend on the circumstances of the particular search which is to be made. In *R v Tillett* [1969] 14 FLR 101, the court was particularly concerned about the generality of a warrant to search a bank, presumably because of the risk to the financial privacy of persons unconnected with the warrant. Countervailing concerns that investigative processes should not be unduly inhibited are demonstrated by *Beneficial Finance Corp Ltd v Commissioner of Australian Federal Police* (1991) 31 FCR 523; 103 ALR 167. In that case, the court rejected the idea of an 'exact object' test. Neither the item to be sought nor the offence for which it may provide evidence needs to be described exactly. Moreover, in *Corbett* (**24.62C**), it was held that a defect in the description of the offence would not have invalidated the warrant. In terms of general principle, perhaps little more can be said than that the warrant must be sufficiently specific to provide adequate controls on the search in light of all the circumstances.

24.48 Power to seize things lawfully discovered in executing a warrant extends beyond things specified in the warrant to additional evidence of the offence or evidence of other offences: PPR Act (Qld) ss 157(1)(h), 190; CI Act (WA) ss 43(8)(b)(iii), 41(9).

A search warrant does not extend to seizing documents that may be subject to legal professional privilege: *Baker v Campbell* (1983) 153 CLR 52; 49 ALR 385. Indeed, a claim for legal professional privilege may even prevent the seizure of documents which may establish the accused's innocence or materially assist his defence: *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121; 129 ALR 593.

Queensland: additional provisions

24.49 Queensland permits an officer to search places without warrant to prevent evidence being concealed or destroyed and then make a subsequent application for a 'post-search approval order': PPR Act (Qld) ss 159–163.

24.50 The general powers of an officer exercising a search warrant are set out in the PPR Act (Qld) s 157. These powers need not be expressly stated in the warrant. They include power to enter and stay for as long as is reasonably necessary, power to conduct the search and power to do specific things such as open things, remove floors and dig up land. There is no power to do structural damage unless authorised by a Supreme Court judge: s 157(3). Section 157(2) authorises the inclusion of certain additional powers in a warrant, including power to search a person found at the relevant place, power to search vehicles and power to remove vehicles to places with appropriate facilities for searching.

An officer executing a warrant must give the occupier a copy of it (or leave a copy in a conspicuous place if the occupier is not present) and also provide a statement of rights and obligations: PPR Act (Qld) s 158; Police Responsibilities Code (Qld) s 4.

24.51 Queensland permits covert search warrants to be issued to search for evidence of some serious offences against the person ('designated offences') including murder, and of organised crime or terrorism: PPR Act (Qld) s 212. 'Organised crime' is defined broadly in Sch 6 as 'an ongoing criminal enterprise to commit serious indictable offences in a systematic way involving a number of people and substantial planning and organisation'.

An application for a covert search warrant must be made to a Supreme Court judge by an officer of at least the rank of inspector: s 212. The matters to be considered by the judge include the nature and seriousness of the suspected offence and the use which could be made of conventional methods of investigation: s 214. The judge must also be satisfied that there are reasonable grounds for *believing*, not just suspecting, that evidence of organised crime is in or on the place: s 215(1).

Western Australia: additional provisions

24.52 Reasonable use may be made of equipment or facilities when executing a warrant: CI Act (WA) s 44(2)(d).

Occupiers of property to be searched have certain rights including a right to give consent to the search, a right to be present unless the effectiveness of the search will be endangered and a right to a copy of the search warrant: CI Act (WA) s 31. If reasonably practical, an audiovisual recording must be made of the execution of the search warrant: CI Act (WA) s 45(2).

24.53 Western Australia has introduced two orders that are similar to search warrants and must be applied for in the same way and with the same reasonable grounds of suspicion.

An order to produce business records is issued by a JP and requires a person in a business, including a business of a government or local body or any occupation, trade or calling, to produce records. The order may require the records to be produced in paper, electronic or other versions. The person must have a reasonable time to comply: CI Act (WA) Pt 6.

A data access order may only be made by a magistrate, not a JP, and only in respect of a serious offence punishable by imprisonment for 5 years or more. An order allows access to any record, computer program or part program in a digital electronic or magnetic form: CI Act (WA) Pt 7.

SURVEILLANCE DEVICES

24.54 Police and special investigative authorities such as the Australian Crime Commission and its state equivalents (the Queensland Crime and Misconduct Commission and the Western Australia Corruption and Crime Commission) have wide powers to track persons and vehicles, plant and remove listening and optical devices, and listen in to telephone conversations. The use of these methods for the prevention and detection of crime raises significant questions as to the balance of the public interest. On the one hand, modern criminal organisations involved in the trafficking of narcotics employ sophisticated means to avoid detection and capture. It is necessary for states to protect themselves by giving investigative bodies wide powers to maintain surveillance on suspects. On the other hand, the unrestricted use of surveillance powers can lead to significant erosion of the privacy of individuals. The issue becomes acute when considering possible terrorist offences and balancing the need to protect life and the state with the general liberty of the subject.

24.55 In general, more intrusive forms of surveillance such as listening and optical devices require the agency to apply for a warrant from a Supreme Court judge: PPR Act (Qld) s 328(2)(a); Surveillance Devices Act 1998 (WA) s 12(a). This control is relaxed for situations of emergency. In emergencies, a senior police officer (and in Western Australia, an officer of the Corruption and Crime Commission) may authorise a surveillance device. However, there must be a prompt report to a judge: PPR Act (Qld) ss 132–133; Surveillance Devices Act (WA) Div 2.

Less intrusive devices such as vehicle tracking devices may be issued on the authority of a magistrate: PPR Act (Qld) s 138(2)(b); Surveillance Devices Act (WA) s 12(b).

Queensland and Western Australia both require the high standard of a reasonable belief that the person has committed or is committing an indictable offence: PPR Act (Qld) s 328(1); Surveillance Devices Act (WA) s 13(1).

24.56 The Commonwealth has power to intercept telecommunications including telephone and internet traffic under the Telecommunications (Interception and Access) Act 1979 (Cth); Australian Federal Police Act 1979 (Cth) s 12G. The lower standard of reasonable suspicion applies: Telecommunications (Interception and Access) Act (Cth) ss 45–46; Australian Federal Police Act (Cth) s 12G(2).

State police and authorities must apply to a federal judge for a warrant to intercept telecommunications such as telephone and internet traffic.

24.57 There are restrictions on the use of evidence obtained through surveillance devices:

- In Queensland, evidence obtained through a listening device is inadmissible in any proceedings unless certain exceptions apply: Invasion of Privacy Act 1971 (Qld) ss 43, 46. The exceptions include cases where the person using the device was a party to the conversation and where a police officer was authorised to use the device.
- In Western Australia, the Surveillance Devices Act (WA) restricts the use that can be made of a product obtained from a device that has recorded private conversations or activities to purposes that may be generally described as law enforcement purposes. A party to a private conversation or someone acting on their behalf or acting to protect a vulnerable person such as a child may record the conversation. However, publication of the recording requires an order from the Supreme Court.

IDENTIFICATION PROCEDURES

24.58 Queensland and the Commonwealth have enacted similar schemes to regulate how identification parades and other visual means of identifying suspects should be conducted: PPR Act (Qld) s 617; Police Responsibilities Code (Qld) ss 45–53; Crimes Act (Cth) ss 3ZM–3ZP. The aim of these schemes is to prevent faulty identifications leading to miscarriages of justice.

24.59 In Queensland, only one witness at a time may be involved in an identification procedure: Police Responsibilities Code ss 45(1), 50(1), 53(1). A police officer must ask identification questions in a way that does not suggest an answer to the witness: Police Responsibilities Code ss 50(3), 53(3). A photo board must contain at least 12 photos: PPR Act (Qld) s 617(1)(b). An identification parade must have 12 persons of similar physical appearance and clothing: Police Responsibilities Code s 51. The suspect may choose his or her position in a parade and change it for each witness: Police Responsibilities Code s 48(4)(d). The conditions of a parade (for example, distance and lighting) must replicate conditions described by the witness as far as is reasonably practicable: Police Responsibilities Code s 49. If reasonably practical, the parade must be electronically recorded: Police Responsibilities Code s 47.

24.60 Western Australia does not have a statutory scheme. Identification parades are rarely held. A digiboard containing at least 12 photos of persons similar in facial appearance to the suspect is prepared and shown to a witness For a description of a digiboard and discussion of identification generally, see *Winmar v The State of Western Australia* [2007] WASCA 244; 35 WAR 159 where the court concluded at [120]:

(a) A trial judge is not required to direct a jury that digiboard identification is unreliable and dangerous per se, or that it is inferior to other types of identification.
(b) A trial judge should usually direct a jury that identification from a digiboard may be affected by the fact that the images on the digiboard are static and two-dimensional.
(c) In some cases, it may be necessary for a trial judge to direct a jury that identification may be affected by the fact that images on a digiboard do not include identifying (or exclusionary) factors such as height, build and posture.
(d) In some cases, it may be necessary for a trial judge to direct a jury that they should take into account the risk that a relative identification has occurred, rather than actual identification.
(e) A trial judge is not, as a general rule, required to direct a jury that discrepancies between a description given by a witness and the appearance of the person identified by the witness may suggest that the identification is unreliable.
(f) A trial judge is not required as a general rule to direct a jury that 'stress' is a factor that may make a witness' identification suspect.
(g) Where there is any delay between observation and identification, a trial judge should direct a jury that delay is a factor to be considered in assessing the accuracy of identification.

24.60 It is preferable that the police officer who shows the witness a digiboard is not otherwise involved in the investigation. It is routine for the identification process to be recorded and the film later played to the jury so the members can assess for themselves the confidence of the identification and other factors that bear on its accuracy.

24.61C George v Rockett

(1990) 170 CLR 104; 93 ALR 483
High Court of Australia

The Court [comprising **Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron** and **McHugh JJ**]: On 22 August 1989 the first respondent, Detective Sergeant Rockett, attended at the office of the second respondent, a stipendiary magistrate, and applied for the issue of a search warrant under the provisions of s 679(b) of the Criminal Code (Qld). Section 679 reads as follows:

> If it appears to a justice, on complaint made on oath, that there are reasonable grounds for suspecting that there is in any house, vessel, vehicle, aircraft, or place —
>
> (a) Anything with respect to which any offence which is such that the offender may be arrested with or without warrant has been, or is suspected, on reasonable grounds, to have been, committed; or
> (b) Anything whether animate or inanimate and whether living or dead as to which there are reasonable grounds for believing that it will of itself or by or on scientific examination, afford evidence as to the commission of any offence; or
> (c) Anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any such offence;
>
> he may issue his warrant directing a police officer or police officers named therein or all police officers to enter, by force if necessary, and to search such house, vessel, vehicle, aircraft, or place, and to seize any such thing if found, and to take it before a justice to be dealt with according to law.
>
> Any such warrant is to be executed by day unless the justice, by the warrant, specially authorises it to be executed by night, in which case it may be so executed.
>
> Where it appears on the complaint that an offence involving the safety of an aircraft has been is being or may be committed on board or in relation to the aircraft the justice may direct in his warrant that any person on board the aircraft or any person who is about to board the aircraft may be searched.

Detective Sergeant Rockett placed before the magistrate a statutory declaration relating to the existence of some documents allegedly in the handwriting of Sir Terence Lewis, a former Commissioner of Police, against whom two charges of perjury were pending. In addition to the statutory declaration, a form of complaint to ground the issue of a search warrant and a pro forma of a search warrant were produced to the magistrate. The magistrate asked Rockett some questions about the matter and these questions were answered. Then Rockett swore the complaint before the magistrate. The sworn complaint read as follows:

> COMPLAINT TO GROUND SEARCH WARRANT
> The Complaint of Michael Daniel ROCKETT of The Office of the Special Prosecutor, 15–23 Adelaide Street, Brisbane in the State of Queensland made this 17th day of August, 1989 before the undersigned, a Justice of the Peace for the said state, who says:
>
> (1) that there are reasonable grounds for suspecting that there is in the rooms of Q D George, Hillhouse and Company, Solicitors, situated at 9th floor, Bank of New Zealand building, 410 Queen Street, Brisbane in the said state certain property, to wit a bundle of A4 pages in the handwriting of Sir Terence LEWIS containing his

comments on the evidence taken before the Commission of Inquiry conducted by Mr G E Fitzgerald, QC and part of the transcript of the evidence taken before the aforesaid Commission of Inquiry and annotated in the handwriting of the said Sir Terence LEWIS all of which were in the possession of one Dr Joseph M SIRACUSA until the 11th day of August, 1989 when they were forwarded by the said Dr Joseph M SIRACUSA to Messrs Q D George, Hillhouse & Company, Solicitors.

(b) as to which there are reasonable grounds for believing that it will of itself or by or on scientific examination, afford evidence as to the commission of offences, namely

1. that on the 17th day of October, 1988 at Brisbane in the State of Queensland, the said Terence Murray LEWIS in a judicial proceeding, namely an inquiry by a Commission within the meaning of the Commissions of Inquiry Act 1950–1988, whilst giving evidence before the said Commission, knowingly falsely swore to the effect that he then had no idea what certain notations in his own handwriting in his 1980 and 1981 notebooks referred to, and that the said false evidence was material to a question then depending in the said proceedings.
2. that on the 11th day of October, 1988 at Brisbane in the State of Queensland, the said Terence Murray LEWIS, in a judicial proceeding, namely an inquiry by a Commission within the meaning of the Commissions of Inquiry Act 1950–1988, whilst giving evidence before the said Commission, knowingly falsely swore to the effect that he had never met in a private room at the Crest Hotel with Jack ROOKLYN, and that the said false evidence was material to a question then depending in the said proceedings.

(2) and that the grounds of his suspicion and belief are as follows: There is evidence that the bundle of A4 pages was in the handwriting of the said Sir Terence LEWIS and consisted of approximately thirty to forty pages of comments on the evidence by the said Sir Terence LEWIS under specific headings and was in the possession of the said Dr Joseph M SIRACUSA on Friday, the 11th day of August, 1989 and was forwarded by the said Dr Joseph M SIRACUSA to the said Q D George, Hillhouse and Company, Solicitors, on that day. There is further evidence that the annotated transcript also consisted of approximately thirty to forty pages and was also in the possession of the said Dr Joseph M SIRACUSA on the 11th August, 1989 and that this was also forwarded by the said Dr Joseph M SIRACUSA on that same day to the said Q D George, Hillhouse & Company, Solicitors.

THEREUPON the said Michael Daniel ROCKETT prays that I, the said Justice, will proceed in the premises according to law.

Signature of Complainant

Sworn before me this 21st day of August, 1989 at Brisbane in the said State.

Signature of Stipendiary Magistrate.

The magistrate issued a search warrant which, having recited substantially the whole of the complaint except for para (2), stated that it appeared to the magistrate that there were 'reasonable grounds for so suspecting and so believing'.

The search warrant was executed and certain documents were seized at the office of Lewis's solicitor who is the appellant in the present proceedings. The documents were sealed

in an envelope without inspection by Rockett. Rockett and the solicitor attended before the magistrate and delivered the envelope to the magistrate for safekeeping. The solicitor, being a person against whom the warrant was issued, obtained an order to review under s 209 of the Justices Act 1886–1989 (Qld) calling upon Rockett to show cause why the warrant should not be reviewed. The order to review was returned before the Full Court which ordered that the order to review be discharged.

This appeal from the order of the Full Court turns on the construction of s 679 of the Code. Section 10 of the Crimes Act 1914 (Cth) and s 711 of the Criminal Code (WA) are in substantially the same terms …

A search warrant thus authorizes an invasion of premises without the consent of persons in lawful possession or occupation thereof. The validity of such a warrant is necessarily dependent upon the fulfilment of the conditions governing its issue. In prescribing conditions governing the issue of search warrants, the legislature has sought to balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasions of his privacy and property. Search warrants facilitate the gathering of evidence against, and the apprehension and conviction of, those who have broken the criminal law. In enacting s 679, the legislature has given primacy to the public interest in the effective administration of criminal justice over the private right of the individual to enjoy his privacy and property. The common law has long been jealous of the prima facie immunity from seizure of papers and possessions: see Holdsworth, *A History of English Law*, 4th ed, 1938, vol 10, pp 668–72. Except in the case of a warrant issued for the purpose of searching a place for stolen goods, the common law refused to countenance the issue of search warrants at all and refused to permit a constable or government official to enter private property without the permission of the occupier: *Leach v Money* (1765) 19 state Tr 1001; *Entick v Carrington* (1765) 19 State Tr 1029. Historically, the justification for these limitations on the power of entry and search was based on the rights of private property: *Entick* at 1066. In modern times, the justification has shifted increasingly to the protection of privacy: see Feldman, *The Law Relating to Entry, Search and Seizure*, 1986, pp 1–2.

State and Commonwealth statutes have made many exceptions to the common law position, and s 679 is a far-reaching one. Nevertheless, in construing and applying such statutes, it needs to be kept in mind that they authorize the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect. Against that background, the enactment of conditions which must be fulfilled before a search warrant can be lawfully issued and executed is to be seen as a reflection of the legislature's concern to give a measure of protection to these interests. To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation. It will be convenient to consider the relevant conditions prescribed by s 679 under three headings: the justice's function, the material to ground the issue of a warrant and the facts to be established.

The justice's function

The opening words of s 679 — 'If it appears to a justice' — impose on a justice to whom an application for a search warrant is made the duty of satisfying himself that the conditions for the issue of the warrant are fulfilled …

When the justice is so satisfied and a warrant is issued, the warrant should express the justice's satisfaction that there are reasonable grounds for the suspicion and belief: *Morse v Harlock* [1977] WAR 65, at 76–7. In *Parker v Churchill* (1985) 9 FCR 316; Burchett J said (at 322):

> The duty, which the justice of the peace must perform in respect of an information, is not some quaint ritual of the law, requiring a perfunctory scanning of the right formal phrases, perceived but not considered, and followed by simply an inevitable signature. What is required by the law is that the justice of the peace should stand between the police and the citizen, to give real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen and the inviolate security of his personal and business affairs.

These observations accord with the language of the statute. Although it is implicit in s 679 that the applicant for the search warrant should entertain the suspicion and belief to which that section refers, it must 'appear' to the issuing justice that there are reasonable grounds for entertaining the relevant suspicion and belief: see the phrase 'that there are reasonable grounds for suspecting' and, in paras (b) and (c), the phrase 'there are reasonable grounds for believing' …

When a statute prescribes that there must be 'reasonable grounds' for a state of mind — including suspicion and belief — it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person. That was the point of Lord Atkin's famous, and now orthodox, dissent in *Liversidge v Anderson* [1942] AC 206 … That requirement opens many administrative decisions to judicial review and precludes the arbitrary exercise of many statutory powers: see, for example, *A-G v Reynolds* [1980] AC 637. Therefore it must appear to the issuing justice, not merely to the person seeking the search warrant, that reasonable grounds for the relevant suspicion and belief exist …

It follows that the issuing justice needs to be satisfied that there are sufficient grounds reasonably to induce that state of mind.

The material to ground the issue of a warrant

The matters which must be made to appear to a justice must appear, as s 679 prescribes, 'on complaint made on oath'. This requirement reflects the ancient view of the common law that a magistrate who issues a warrant otherwise than on an information on oath is liable to an action for false imprisonment or trespass: see, for example, *Caudle v Seymour* [1841] 1 QB 889, at 893, 894 …

A more stringent requirement was stated in *Bridgeman v Macalister* (1898) 8 QLJ 151, where a search warrant was issued in purported pursuance of the Police Act (Qld), which contained provisions similar in relevant respects to those in s 679(1). Griffith CJ, speaking for the Full Court of the Supreme Court, held that 'the information must state the ground, the reasonable ground, for suspicion' and, finding that the information 'merely contains a statement that the deponent suspects they are concealed, for which suspicion he gives no relevant foundation', he declared that there was no ground for the exercise of the magistrate's power to issue the warrant …

The requirement that a sworn complaint must ground the issue of a search warrant carries the implication that the grounds for the issue of the warrant cannot be made to appear to the issuing justice from statements made by an applicant otherwise than by complaint on oath …

That is not to say that a justice before whom a complaint is sworn should abstain from questioning the complainant if the justice wishes to obtain some confirmation of what appears in the complaint. The requirement is that the sworn complaint should contain sufficient facts to found the reasonable suspicion and the reasonable belief respectively mentioned in s 679. If that requirement is not satisfied, the information otherwise conveyed to the issuing justice is immaterial but, if that requirement is satisfied, the justice may seek confirmation by inquiry of the complainant.

In this case, the only material laid before the magistrate which answered the description of a sworn complaint was the document headed 'COMPLAINT TO GROUND SEARCH WARRANT'. The other material placed before the magistrate was neither in affidavit form nor verified by oath or affirmation. The statutory declaration was not sworn: cf the Oaths Act 1867–1988 (Qld), ss 6, 8. If the sworn complaint did not contain sufficient information to satisfy the magistrate that there were reasonable grounds for suspicion and belief, the magistrate exceeded his power in issuing the warrant. In the circumstances of this case, therefore, it is unnecessary to decide whether the complaint on oath required by the section must be in writing, although, as Fox J observed in *Tillett; Ex parte Newton*, at 109, and as Lockhart J observed in *Crowley v Murphy* (1981) 52 FLR 123, at 142–3, there is much to be said for the view that a written complaint is desirable. If the validity of a warrant is challenged and the court is ascertaining whether the complaint shows reasonable grounds for suspicion and belief, a written complaint is less open to controversy than an oral complaint. *Bridgeman v Macalister*; *Montague v Ah Shen* [1907] VLR 458 and *Palethorpe v Nebbia* [1937] QWN 33 are consistent with the view that a written complaint is needed, but the question does not have to be decided in this case and it is better to leave it for decision on another day.

The sufficiency of the sworn complaint by itself to satisfy the magistrate that there were reasonable grounds for suspicion and belief was not challenged in the Full Court. However, the question was raised in this court in the course of argument. In the Full Court, the case proceeded on the footing that the magistrate was entitled to have regard to all the material that was put before him or, at all events, to the complaint and to the statutory declaration. But, if the warrant is invalid by reason of the insufficiency of the sworn complaint, no evidence or argument which might have been proffered to the Full Court can save it. It will therefore be necessary to consider whether, on the material contained in the sworn complaint, the magistrate could have been satisfied that there were reasonable grounds for Rockett's suspicion and belief. If, on the material contained in the sworn complaint, the magistrate could not have been so satisfied, it is immaterial that he might have been satisfied on the material contained in the statutory declaration or in the answers which Rockett gave to his questioning.

The facts to be established

In considering the sufficiency of a sworn complaint to show reasonable grounds for the suspicion and belief to which s 679 refers, it is necessary to bear in mind that suspicion and belief are different states of mind (*Homes v Thorpe* [1925] SASR 286, at 291; *Seven Seas Publishing Pty Ltd v Sullivan* [1968] NZLR 663, at 666) and the section prescribes distinct subject matters of suspicion on the one hand and belief on the other. The justice must be satisfied that there are reasonable grounds for suspecting that 'there is in any house, vessel, vehicle, aircraft, or place — Anything' and that there are reasonable grounds for believing that the thing 'will … afford evidence as to the commission of any offence'.

Suspicion, as Lord Devlin said in *Hussien v Chong Fook Kam* [1970] AC 942, at 948, 'in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove."' The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, a question was raised as to whether a payee had reason to suspect that the payer, a debtor, 'was unable to pay (its) debts as they became due' as that phrase was used in s 95(4) of the Bankruptcy Act 1924 (Cth). Kitto J said (at 303):

> A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as *Chambers's Dictionary* expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in subs (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes — a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors.

The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

It is necessary to identify the subject matter of suspicion and the subject matter of belief. At first reading, it may appear that the subject matter of suspicion is merely the location of the thing to which para (b) relates, while para (b) prescribes the subject matter of belief to be the nature of the thing ('will … afford evidence'). So to read the section is to omit the *existence* of the thing from the subject matter of either suspicion or belief. It is arguable that the requirement of reasonable grounds for believing that a thing 'will afford evidence' imports a belief that a thing exists which has that capacity. Construed in isolation, that phrase does not suggest that the requirement is satisfied by reasonable grounds for believing that a thing will have that capacity if it exists. These considerations favour construing s 679 so that the existence of the thing is the subject not of suspicion but of belief. The protection of property and privacy would be advanced by a construction of s 679 that makes the existence of the thing the subject of belief rather than the subject of suspicion. On the other hand, the subject of suspicion as stated in the text is 'that there is in any house, vessel, vehicle, aircraft or place — Anything' answering the description contained in one or other of the lettered paragraphs. If one substitutes 'exists' for 'is' in this clause — a substitution which seems legitimate — it is clear that the existence of the thing is the subject of suspicion. Moreover, it is unlikely that the legislature would have intended to require as a condition of a search warrant for a thing described in para (c) — that is, a thing which might be intended to be used for the purpose of committing an arrestable offence — reasonable grounds for more than mere suspicion of the existence of such a thing. Thus it seems that the better construction of s 679 is that the existence of the thing is the subject of suspicion.

So to hold does not deprive the requirement of 'reasonable grounds for believing' in para (b) of significance. That significance depends on the manner in which a complaint which grounds a search warrant and the warrant itself identify the object of the search. A thing must be identified either as a specific object or as an object which answers a particular description. It is by reference to the means of identification of the object of the search that the sufficiency of both reasonable grounds for suspecting and reasonable grounds for believing must be judged. Where a specific object is identified, the question whether there are reasonable grounds for believing that, if it exists and is found, it will afford evidence as to the commission of an offence is a discrete question to be answered according to the facts set out in the complaint.

Where the object is identified by description, the broader and less specific the description, the more difficult it is likely to be to satisfy the requirement of reasonable grounds for believing that a thing answering the description will afford evidence of the commission of an offence. Conversely, the narrower and more specific the description, the more difficult it may be to satisfy the requirement of reasonable grounds for suspecting that the designated object is in the particular location. The point is probably best made by illustration.

Suppose that a person has been killed by a revolver bullet and that A, who is believed on reasonable grounds to be the killer, was seen burying an object wrapped in cloth in the backyard of his house. If application were made to a justice for a warrant to search for 'an object wrapped in cloth' in A's backyard, the fact that A had been seen burying something wrapped in cloth would obviously provide compelling grounds for suspecting that an object of that description was in that place. On the other hand, there may, depending on the circumstances, be difficulty in sustaining a conclusion that there were reasonable grounds for believing that any object which answered that general description (ie 'an object wrapped in cloth') 'will', if found, afford evidence as to the commission of an offence. Conversely, if the object of the proposed search was described as a revolver, the grounds for suspecting that it was hidden in A's backyard would be much less compelling. There would, however, be little difficulty in satisfying the requirement of reasonable grounds for believing that the object so described would, if it was found in that place, afford evidence as to the commission of the particular offence.

It may be suggested that this emphasis upon description of the object of the search proposed to be conducted pursuant to a search warrant constitutes little more than a play on words. But that is not the case. The warrant, if issued, authorizes entry to search for the described object and authorizes the seizure of any object which comes within the particular description. In other words, the description of the object of the search is a reference point for delimiting the scope of the warrant. The wider and less specific the description of the object, the wider will be the powers of seizure which the warrant confers. On the other hand, as has been seen, the wider and less specific the description of the designated object, the more difficult will be the task of persuading the justice that there are reasonable grounds for belief that the object so described will, if found, afford evidence of the commission of the particular offence. Thus, the requirement of 'reasonable grounds for believing' in para (b) performs the important function of preventing the authority to search and seize which a warrant confers from being worded in unjustifiably wide terms. Again, the point is best made by illustration.

Suppose the sworn complaint placed before a justice establishes reasonable grounds for suspecting that the books and records of a listed public company in respect of a particular financial year contain an entry which will afford evidence that an executive of the company has appropriated a sum of money to the credit of his personal account with a particular bank and the complaint shows that there is evidence that the executive had no authority so to apply the money. In such a case, the complaint would establish reasonable grounds for suspecting that the particular entry existed and reasonable grounds for believing that, if it did exist, it would (ie 'will') afford evidence of the commission of an offence. The complaint before the justice would, in those circumstances, be adequate to justify the issue of a warrant to search for and seize any written entry to the designated effect in the company's books and records for the relevant year. It would, of course, be necessary that the suspected entry be identified with sufficient precision. On the other hand, the material before the justice could not justify the issue of a warrant authorizing search for or seizure of all the books and records of the company for the particular year. First, if the object of the authorized search and seizure

were described in terms of 'all those books and records', the material before the justice would not establish that the object so described would afford evidence of the commission of an offence. That material would only have established reasonable grounds for suspecting that the object (ie the books and records for the relevant year) contained an entry that would afford such evidence. Secondly, even if the material before the magistrate had gone so far as to establish reasonable grounds for believing that such an entry existed somewhere in those books and records, the description of the object of the authorized search and seizure would be unjustifiably wide. It would extend to authorizing search for, and seizure of, records which were unrelated to the particular entry and which were not suggested to afford evidence of the relevant kind.

In the present case, Rockett identified the things for which he was seeking a search warrant as a bundle of A4 pages in Lewis's writing and part of the transcript of the Commission hearings bearing Lewis's handwritten annotations. It was not disputed that the sworn complaint contained sufficient material to satisfy the magistrate that there were reasonable grounds for suspecting that such documents were in the solicitor's office. The critical question is whether there was sufficient material in the sworn complaint to satisfy the magistrate that there were reasonable grounds for believing that those documents 'will … afford evidence as to the commission of' the two offences set out in the sworn complaint with which Lewis had been charged.

… The power to issue a search warrant is in aid of criminal investigation as well as in aid of proof at the trial, though it is necessary that the investigation should have reached the stage where reasonable grounds for the statutory suspicion and belief can be sworn to. An object will answer the description in para (b) if there are reasonable grounds for believing that it will assist directly or indirectly in disclosing that an offence has been committed or in establishing or revealing the details of the offence, the circumstances in which it was committed, the identity of the person or persons who committed it or any other information material to the investigation of those matters.

If, in the present case, the first of the two objects of the search warrant had been identified in the complaint as a bundle of A4 pages in the handwriting of Sir Terence Lewis containing either a statement or statements about the meaning of the notations in Sir Terence Lewis's 1980–1981 notebooks or a statement or statements to the effect that Sir Terence Lewis had met the person called Jack Rooklyn at the Crest Hotel, a question would have arisen as to whether a warrant to search for the whole bundle of A4 pages, as distinct from a page or pages containing the relevant statement or statements, was wider than could be justified. The answer to that question would, no doubt, depend upon whether the complaint justified a conclusion that the bundle of pages should, in the circumstances, be seen as a single thing or upon whether pages in the bundle other than those containing relevant statements should be seen as part of the evidentiary context within which the relevant statements should be read.

In fact, neither of the objects of search (that is, the bundle of A4 pages and the part of the transcript of evidence) was identified in the complaint or the purported search warrant by a description which required that it contain some statement or statements relevant to the commission of one or other of the alleged offences. The sworn complaint was inadequate to found a conclusion that the identified bundle of documents would, if found, actually contain such a statement or statements. Consequently, the complaint was inadequate to found the magistrate's conclusion that there were reasonable grounds for 'believing' that the designated objects of the search would, if found, afford evidence as to the commission of an offence.

It follows that the terms of the search warrant were not supported by the sworn material placed before the magistrate.

…

… The sworn complaint in this case contains no facts which might have satisfied the magistrate that there were reasonable grounds for believing that the documents for which the search warrant was sought would afford evidence as to the commission of the offences set out in the complaint. It contains nothing save the assertion by Rockett that there are reasonable grounds for his own belief.

In the absence of information in the sworn complaint which might have satisfied the magistrate as to the existence of reasonable grounds for Rockett's belief, the magistrate had no power to issue the warrant. The warrant was invalid. It follows that the appeal must be allowed, the order of the Full Court set aside and in lieu thereof the order to review should be made absolute. Having regard to the way in which the matter was argued in the Full Court, it does not seem appropriate to make any order as to costs in that court. However, the appellant should be at liberty to apply for an order for the costs of the order to review and of the hearing in the Full Court within fourteen days. The application and the respondent's answer should be in writing.

We were invited to adjourn the formal pronouncing of this order if we were of the view that the warrant was invalid. That course would allow the swearing of a fresh complaint which might ground the issue of a valid warrant and thereby preclude the possibility of the return of the documents to the appellant and their loss to the prosecution. But this is not a sufficient reason for withholding the relief to which the appellant is otherwise entitled.

24.62C State of New South Wales v Corbett

[2007] HCA 32; 236 CLR 120; 249 ALR 398
High Court of Australia

Callinan and Crennan JJ:

44 This is an appeal from a decision of the Court of Appeal of New South Wales[32] remitting a matter to the District Court of New South Wales, following a finding that a search warrant obtained pursuant to the provisions of the Search Warrants Act 1985 (NSW)[33] ('the Act') was invalid.

45 On 4 June 1998, pursuant to that search warrant, officers of the New South Wales Police Service (for whom the appellant has accepted legal responsibility) entered and searched the respondents' property at Goulburn for firearms. The respondents later commenced proceedings against the appellant seeking damages for trespass, on the basis that the search warrant was invalid and did not authorise the entry of the police officers onto their property.

46 This appeal turns on the language of s 5(1)(b) of the Act. That section requires an applicant for a search warrant to have reasonable grounds to believe that in or on nominated premises there will be 'a thing connected with a particular firearms offence'.

The legislation

47 The search warrant was issued pursuant to the power contained in Pt 2 of the Act, using the procedures set out in Pt 3. The application for the search warrant was made using Form 1 in the Search Warrants Regulation 1994 (NSW) ('the Regulations').

48 The respondents alleged two failures to comply with the provisions of the Act. First, it was contended that the application for the search warrant failed to state a particular offence to which the firearms the subject of the search were connected. That issue arose because the application contained a reference to a particular firearms offence by reference to a section in legislation which had been repealed and replaced by new firearms legislation. Secondly, it was contended that the officer who applied for the search warrant did not have a reasonable belief that the first respondent ('Mr Corbett') had any firearms in his possession at the relevant time.

49 The Act provided a complete statutory code in respect of search warrants in New South Wales.[34] Common law search warrants were abolished by s 24. It is convenient to set out the provisions of the Act, as they applied, which are material to these issues.

50 Sections 4, 5 and 6 in Pt 2 of the Act relevantly provided:

> 4 Definitions – things connected with offence etc
> (1) For the purposes of this Part, a thing is connected with a particular offence if it is:
> … (a) a thing that was used, or is intended to be used, for the purpose of committing the offence. …
> 5 Application for warrant in respect of certain offences, stolen property etc
> (1) A member of the police force may apply to an authorised justice for a search warrant if the member of the police force has reasonable grounds for believing that there is or, within 72 hours, will be in or on any premises:
> … (b) a thing connected with a particular firearms offence, …
> (2) In subsection (1):
> ***firearms offence*** means an offence under the Firearms Act 1989, the Prohibited Weapons Act 1989 or regulations under either of those Acts, being an offence committed in respect of a firearm or a prohibited weapon within the meaning of those Acts. …
> 6 Issue of warrant
> An authorised justice to whom an application is made under section 5(1) may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising any member of the police force:
> (a) to enter the premises, and
> (b) to search the premises for things of the kind referred to in section 5(1).

51 Section 5(2) defines 'firearms offence' by reference to the Firearms Act 1989 (NSW) ('the 1989 Firearms Act') which at the relevant time had been repealed and replaced by the Firearms Act 1996 (NSW) ('the 1996 Firearms Act'). The Act was later updated to refer to the correct firearms legislation through the Statute Law (Miscellaneous Provisions) Act (No 2) 1998 (NSW).[35]

…

56 The Act contained a saving provision in respect of defects in warrants as follows:

> 23 Defects in warrant
> A search warrant is not invalidated by any defect, other than a defect which affects the substance of the warrant in a material particular.

The litigation

57 The primary judge,[37] Charteris DCJ, determined that the defects alleged in respect of the search warrant and its issue did not render it invalid, and therefore the search warrant provided a defence to the respondents' action for trespass.

58 In allowing the respondents' appeal, the Court of Appeal found that the search warrant was invalid because the application for the search warrant identified the offence as 'Possession of Firearm, Firearms Act No 25/1989 Sect 5(a)'. However, the Court of Appeal rejected the respondents' submission that the Acting Inspector of Police seeking the search warrant did not have reasonable grounds for a belief relating to the possession of firearms by Mr Corbett.[38]

59 The appellant now appeals to this Court on the issue of the validity of the search warrant. The respondents have filed a notice of contention alleging error in the Court of Appeal's finding that the Acting Inspector seeking the search warrant had reasonable grounds for believing that there would be firearms located on the respondents' property.

…

67 The application for the search warrant, which had been generated as a pro forma form on a computer, had the following information (italicised here) entered into its various fields by Acting Inspector Jago:

> I say on oath that:
> (1) I have reasonable grounds for believing that there is, or within 72 hours there will be, on or in these premises, the following things:
> *Unspecified firearms*
> (2) I have reasonable grounds for believing that:
> (a) the things are connected with the following indictable offence/firearms offence/narcotics offence within the meaning of the [Act] (s 5(2))
> Possession of Firearm Firearms Act No 25/1989 Sect 5(a),
> …
> (4) The grounds which I rely on are:
> *Police are in possession of documents written by the offender, where threats are made against other persons, including serving police officers. He was in possession of a number of firearms during the recent 'amnesty', however a search of records failed to locate them as having been surrendered.*
> *Two recent attempts at self harm have been made by the offender, which included the ingestion of medication and then leaving the residence and wandering into bushland. The most recent attempt being last weekend, which caused him to be admitted to hospital at Port Kembla for treatment. He has made threats against Senior Officers within the Police Service and as a result concerns are held for the personal safety of the offender and other persons.*

68 The authorised justice placed an asterisk against the reference to the records of the firearms suggesting they had not 'been surrendered'. The handwritten additions read:

> Pump action 12 gauge shotgun
> Has Current Firearms License. Action is being taken to suspend License.
> Person of Interest is a Police Officer.

69 The actual search warrant could not be found, but the 'form and content'[42] were not in dispute.

70 Whilst the entry in par 2(a) of the search warrant application 'Firearms Act No 25/1989 Sect 5(a)' followed s 5(2) of the Act as it appeared to then stand, the entry was not, in fact, a reference to the legislation in force at the relevant time. As explained above, the 1989 Firearms Act had been repealed and replaced by the 1996 Firearms Act, although consequential amendments to s 5(2) of the Act were yet to be made.

71 On 4 June 1998, while Mr Corbett was still in hospital, the suspension of his shooter licence was served on him by two local police officers. Once Inspector Hines had received confirmation of that service, he instructed Acting Inspector Jago to execute the search warrant. The search took approximately one hour and 15 minutes. No firearms were found. A report was then filed by Acting Inspector Jago with the authorised justice.

…

84 In essence, the respondents submitted that the erroneous reference in the application for the search warrant to s 5(a) of the 1989 Firearms Act (instead of s 7(1) of the 1996 Firearms Act) constituted a failure to comply with ss 5(1)(b) and 11(1) of the Act because Acting Inspector Jago could not have a reasonable belief in an identified offence which did not exist. It was said that this amounted to a failure to describe an offence, which meant that the application contained a defect of substance.

…

87 In support of their main argument, the respondents relied on the established principle that strict compliance with statutory conditions governing the issue of search warrants is required as explained in the judgment of this Court in *George v Rockett*[59] ('*Rockett*'), which concerned s 679 of the Criminal Code (Q):[60]

> [I]n construing and applying such statutes, it needs to be kept in mind that they authorize the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect. Against that background, the enactment of conditions which must be fulfilled before a search warrant can be lawfully issued and executed is to be seen as a reflection of the legislature's concern to give a measure of protection to these interests. To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation.

88 It is necessary to construe the requirement or condition in s 5(1)(b) of the Act in order to test whether the condition has been complied with strictly. In the reasons which follow, the requirement in s 5(1)(b) will be construed and applied by reference to its purpose of ensuring the proper identification of the object of the search. The need to have 'reasonable grounds for believing' in the existence of the object of the search, described by reference to a particular offence, is directed to making sure that the search warrant is properly confined.

Section 5(1)(b) of the Act

89 The balancing of a person's private interest in the inviolability of his house, his 'castle and fortress',[61] against the public interest in the 'gathering of evidence against, and the apprehension and conviction of, those who have broken the criminal law',[62] lies behind the statutory requirement in s 5(1)(b) that an applicant for a search warrant needs to have

reasonable grounds for a belief in respect of 'a thing connected with a particular firearms offence'.

…

97 A search warrant under the Act is a statutory authorisation to enter, search for and seize, a particular 'thing'. That purpose is easily distinguishable from the purpose of a charge, indictment, conviction, judgment or order. The requirement for strict particularity in the description of an offence in an indictment or charge is explained by Dixon J in *Johnson v Miller*:[83]

> [A] defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge.

98 The requirement for strict particularity in addition to a statement of the nature of the offence is imposed so as to define the issues with which the defendant must contend at trial; it also has the procedural consequence of avoiding duplicity in a charge or conviction thereon.[84] Similar considerations apply in respect of indictments which could not be amended at common law[85] although surplusage which did not mislead an accused did not necessarily invalidate an indictment or lead to duplicity.[86]

99 In *Beneficial Finance Corporation v Commissioner of Australian Federal Police* ('*Beneficial Finance*'), Burchett J said of the degree of particularity required of a reference to an offence in a search warrant:[88]

> The authorities make it clear that the statement of the offence in a search warrant need not be made with the precision of an indictment. That would be impossible, and indeed to attempt it would be irrational, bearing in mind the stage of the investigation at which a search warrant may issue. The purpose of the statement of the offence in the warrant is not to define the issues for trial; but to set bounds to the area of search which the execution of the warrant will involve, as part of an investigation into a suspected crime. The appropriate contrast is not with the sort of error which might vitiate an indictment, but with the failure to focus the statutory suspicion and belief upon any particular crime, with the result that a condition of the issue of the warrant is not fulfilled, and it purports to be a general warrant of the kind the law decisively rejected in the 18th century.

100 A similar approach to the construction of the requirements in s 5(1)(b) should be followed here.

101 In *R v Tillett; Ex parte Newton*,[89] Fox J construed s 10(a) of the Crimes Act 1914 (Cth) as it then applied. It authorised search for, and seizure of, 'anything' related to 'any offence'.[90] In concluding that this meant that a warrant should refer to a particular offence and authorise seizure by reference to that particular offence, Fox J said:[91]

> [F]orms of search warrant, whether or not prescribed by statute, but subject always to a contrary statutory intention, have always, since the famous debates and decisions of the eighteenth century in relation to general warrants … disclosed the nature of the particular offence relied upon. (references omitted)

102 That approach has been relied upon and followed in numerous subsequent decisions of Full Courts of the Federal Court of Australia.[92]

103 One such decision, *Parker v Churchill*,[93] concerned warrants containing a description of an offence which included an incorrect reference to a section in a statute. It was contended at first instance that the warrants in question did not disclose an offence known to the law.[94] On appeal to the Full Court of the Federal Court, Jackson J (with whom Bowen CJ and Lockhart J agreed on this point) said that unless a 'reference to an incorrect section [of legislation] has the result that the warrant does not specify *any* offence, or makes the warrant ambiguous so that it is not possible to tell what offence is referred to',[95] such a reference does not invalidate an otherwise intelligible warrant. Subsequently, in *Beneficial Finance*[96] Burchett J (with whom Sheppard J agreed and Pincus J substantially agreed) said of the question of the sufficiency of the statement of an offence in a search warrant:[97]

> The question should not be answered by the bare application of a verbal formula, but in accordance with the principle that the warrant should disclose the nature of the offence so as to indicate the area of search.

104 Obviously each statutory requirement or condition needs to be construed on its own terms and by reference to the statute in which it is to be found. However, common requirements for 'reasonable grounds for believing' (or suspecting) imposed on an applicant (as here under s 5(1)(b)), or upon an issuing justice (as in *Rockett*[98] or *Beneficial Finance*[99]) have a common derivation. The concern of the common law courts to avoid general warrants and to strictly confine any exception to the principle that a person's home was inviolable is the original source of common, although differently expressed, statutory requirements. These requirements have as their purpose the proper identification of the object of a search by reference to a particular offence. This in turn limits the scope of the search authorised by the search warrant … As stated in the judgment of this Court in *Rockett*:[100]

> [T]he description of the object of the search is a reference point for delimiting the scope of the warrant. … [T]he requirement of 'reasonable grounds for believing' … performs the important function of preventing the authority to search and seize which a warrant confers from being worded in unjustifiably wide terms.

105 Section 5(1)(b) should be construed by reference to the principle that the applicant is required to state reasonable grounds for believing in a particular offence so as to ensure that the issuing justice knows the specific object of the search warrant and accordingly limits its scope. Strict compliance, in the sense described in *Rockett*,[101] is achieved when that purpose is fulfilled. To invalidate the warrant here because of the incorrect reference in the application would not serve that purpose.

106 Here, the application stated an intelligible offence, namely 'possession of firearm', an offence which had been well known in New South Wales for decades. Prior to the Act, successive firearms legislation contained provisions for obtaining search warrants in respect of firearms.[102] The reasonable belief, which the applicant was required by the statute to have, and state, was a reasonable belief that there was 'a thing' (here, 'unspecified firearms') connected with 'a particular firearms offence' (here, 'possession of firearm'). It was the nature of the offence which was critical, not the reference to the section of repealed legislation which had

been replaced with cognate legislation. The nature of the offence had to be stated sufficiently to enable the issuing justice to understand the object of the search and to appreciate the boundaries of the authorisation to enter, search and seize.

107 Here there could be no mistake about the object of the search or about the boundaries of the search warrant. Given the construction of s 5(1)(b) stated above, the Court of Appeal erred in its approach. The reference to the repealed Act in the application form was mere surplusage, which did not detract from the statement of the nature of the offence or render the description of the object of the search unintelligible or ambiguous. Accordingly, the applicant complied with the statutory requirements and the warrant is not invalidated by the description of the offence in the application form.

…

Reasonable grounds

110 As mentioned already, the respondents supported their Notice of Contention with the submission that Acting Inspector Jago's statement in the application was not reasonable, because the identified offence did not technically exist.

…

114 The Court of Appeal acknowledged that the relevant police inspectors 'were concerned that Mr Corbett had a firearm and, in his fraught mental health, might cause harm, including to himself'.[103] The Court of Appeal further noted that 'Acting Inspector Jago gave evidence that he believed that the suspension of the licence "created what [he] believed to be an offence"' — that is unauthorised possession of a firearm.[104] Accordingly, the Court of Appeal rejected the respondents' contention that there were no reasonable grounds for belief that there would be firearms connected with an offence, located on the property. Given the conclusion stated earlier that s 5(1)(b) required Acting Inspector Jago to have a reasonable belief in an offence of a particular nature and his evidence relevant to that requirement, the Court of Appeal's conclusion should be upheld.

Conclusions and orders

115 For the reasons set out above, the statutory requirements were complied with and the search warrant was valid. In executing the search warrant, no trespass to the respondents' property was committed.

116 The appeal to this Court should be allowed, and the notice of contention dismissed. Orders 2–5 of the Court of Appeal, dated 13 June 2006, should be set aside and in place thereof the appeal to that Court should be dismissed. In accordance with the undertaking given by the appellant upon the grant of special leave to appeal, the costs order made by the Court of Appeal should not be disturbed, and the appellant should pay the costs of the respondents of the appeal to this Court.

[**Gleeson CJ** and **Gummow J** agreed with the reasoning of **Callinan** and **Crennan JJ**; **Kirby J** refrained from expressing an opinion on the issue. All five judges also allowed the appeal on another ground: that references in the Search Warrants Act to the 1989 Firearms Act were to be read as references to the corresponding provisions of the 1996 Act, by virtue of transitional provisions in the 1996 Act.]

Footnotes

32. *Corbett v State of New South Wales* [2006] NSWCA 138. McColl JA and Gzell J agreed with the reasons of Giles JA.
33. The Act applicable at the relevant time has since been repealed and replaced by the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW).
34. New South Wales, Legislative Assembly, Parliamentary Debates (Hansard), 27 February 1985 at 3859. See also s 10 of the Act.
35. Sched 2.31, which made the relevant amendments, came into operation on 26 November 1998.

...

37. *Corbett v State of New South Wales*, unreported, District Court of New South Wales, 22 October 2004.
38. [2006] NSWCA 138 at [86]–[87].

...

42. [2006] NSWCA 138 at [38].

...

59. (1990) 170 CLR 104 at 110–11 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. See also *Halliday v Nevill* (1984) 155 CLR 1 at 20 per Brennan J; cf *Coco v The Queen* (1994) 179 CLR 427 at 436 per Mason CJ, Brennan, Gaudron and McHugh JJ.
60. Section 679 provided:

> If it appears to a justice, on complaint made on oath, that there are reasonable grounds for suspecting that there is in any house, vessel, vehicle, aircraft or place —
>
> (a) Anything with respect to which any offence which is such that the offender may be arrested with or without warrant has been, or is suspected, on reasonable grounds, to have been, committed; or
>
> ...
>
> (c) Anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any such offence;
>
> he may issue his warrant.

61. *Semayne's Case* (1604) 5 Co Rep 91a at 91b [77 ER 194 at 195].
62. *Rockett* (1990) 170 CLR 104 at 110 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

...

83. (1937) 59 CLR 467 at 489.
84. *Johnson v Miller* (1937) 59 CLR 467 at 489–91 per Dixon J.
85. *Maher v The Queen* (1987) 163 CLR 221 at 230 per Mason CJ, Wilson, Brennan, Dawson and Toohey JJ.
86. *Kingswell v The Queen* (1985) 159 CLR 264 at 287 per Brennan J. See also *Smith & Kirton* (1990) 47 A Crim R 43; *R v McKinney & Judge*, unreported, New South Wales Court of Criminal Appeal, 6 September 1993; *R v Kaldor* (2004) 150 A Crim R 271 at 293 [84] per Howie J.
87. (1991) 31 FCR 523.
88. (1991) 31 FCR 523 at 533.
89. (1969) 14 FLR 101.
90. Section 10 provided:

> If a Justice of the Peace is satisfied by information on oath that there is reasonable ground for suspecting that there is in any house, vessel, or place —

(a) anything with respect to which any offence against any law of the Commonwealth or of a Territory has been, or is suspected on reasonable grounds to have been committed;

...

he may grant a search warrant ... to seize any such thing.

91. (1969) 14 FLR 101 at 113–14. Fox J referred to Holdsworth, *A History of English Law*, (1938), vol 10 at 659, 660, 667–72 and Burn, *Justice of the Peace and Parish Officer*, 27th ed (1836), vol 3 at 799.
92. *Crowley v Murphy* (1981) 34 ALR 496; *Parker v Churchill* (1986) 9 FCR 334; *Beneficial Finance* (1991) 31 FCR 523; *Dunesky v Elder* (1994) 54 FCR 540.
93. (1986) 9 FCR 334.
94. (1985) 9 FCR 316 at 319.
95. (1986) 9 FCR 334 at 340.
96. (1991) 31 FCR 523.
97. (1991) 31 FCR 523 at 543.
98. (1990) 170 CLR 104, dealing with s 679 of the Criminal Code (Qld).
99. (1991) 31 FCR 523, dealing with s 10 of the Crimes Act 1914 (Cth).
100. (1990) 170 CLR 104 at 118.
101. (1990) 170 CLR 104 at 111.
102. See, for example: Gun License Act 1920 (NSW), s 14; Pistol License Act 1927 (NSW), s 14; Firearms Act 1936 (NSW), s 2, which inserted Pt IIA containing s 41I into the Police Offences Act 1901 (NSW); and Firearms and Dangerous Weapons Act 1973 (NSW), s 76.
103. [2006] NSWCA 138 at [71].
104. [2006] NSWCA 138 at [83].

Arrest, Bail and Investigative Procedures

CHAPTER 25

INTRODUCTION

25.1 This chapter is concerned with the powers of the police to arrest suspects or otherwise take them into custody and with the subsequent conditional release of persons on bail.

- In Queensland, police powers of arrest are consolidated in the Police Powers and Responsibilities Act 2000 (Qld) (PPR Act (Qld)) Ch 14. Citizens' powers of arrest are found in the Criminal Code (Qld) (Code (Qld)): see **25.20**.
- In Western Australia, police powers of arrest are consolidated in the Criminal Investigation Act 2006 (WA) (CI Act (WA)) Pt 12. Citizens' powers of arrest are set out in the CI Act (WA) Pt 3.
- See also Crimes Act 1914 (Cth) (Crimes Act (Cth)) Pt IAA, Div 4.

25.2 This chapter also outlines police powers to conduct certain investigative procedures on suspects. Queensland and Western Australia have created elaborate statutory regimes to govern procedures such as searching bodily cavities and taking fingerprints and footprints, voiceprints, photographs of features, dental impressions, and samples of bodily material such as blood, saliva and hair: PPR Act (Qld) Ch 17; Criminal Investigation (Identifying People) Act 2002 (WA); CI Act (WA) Pts 8–10. See also Crimes Act (Cth) Pt ID.

Serious loss of privacy and dignity can be involved in some investigative procedures. The legislative schemes regulate how the procedures are to be conducted both with and without consent. The procedures are discussed in this chapter because they are often performed when a person is in custody.

MEANING AND ROLE OF ARREST

25.3 The traditional conception of 'arrest' was confined to detention for the purpose of bringing an accused before a court to face a charge: *Williams v R* (1986) 161 CLR 278; 66 ALR 385, discussed in *Norton v R (No 2)* [2001] WASCA 207; (2001) 24 WAR 488 at 25.66C. Other terms, such as 'detention', have been used to describe the use of physical restraint for other purposes relating to law enforcement, such as securing identification, conducting bodily searches and questioning.

25.4 A broader conception of arrest by police has been introduced by modern legislation:

- In Queensland, the detention of a person by police for effectively any lawful purpose other than punishment is now called an arrest. A person can be 'arrested' when this is reasonably necessary for achieving any of a list of specified purposes:
  - preventing the commission of an offence (PPR Act (Qld) s 365(1)(a));
  - making inquiries to establish the identity of a suspect (s 365(1)(b));
  - ensuring appearance before a court (s 365(1)(c));
  - obtaining or preserving evidence (s 365(1)(d));
  - preserving the safety or welfare of a person (s 365(1)(g));
  - questioning a suspect about an indictable offence or investigating such an offence: s 365(2).

  A 'reserve' provision is contained in PPR Act (Qld) s 365(1)(k), which makes it lawful to detain a suspect simply 'because of the nature and seriousness of the offence'.
- In Western Australia, the term arrest covers the lawful detention of a suspect by police for various purposes including doing a search, investigating offences, interviewing the suspect, and deciding whether or not to lay a charge: CI Act (WA) s 139(2).
- See also Crimes Act (Cth) s 3W(1).

25.5 There are two forms of arrest. Although many arrests will involve actual physical restraint through the application of some force, an arrest can also be made by words accompanied by submission of the suspect to the authority of the person making the arrest. Essentially, the suspect must accept that physical restraint will occur if there is any resistance. The words spoken by the person making the arrest must indicate that an arrest is being made and there must be some indication of submission by the suspect either by word or conduct: see, for example, *Dellit v Small; Ex parte Dellit* [1978] Qd R 303 at 25.68C.

25.6 A person who has been arrested should ordinarily be released if the reason for the arrest no longer applies: PPR Act (Qld) s 376(1)–(2); CI Act (WA) s 142(3); Crimes Act (Cth) s 3W(2).

25.7 A person who is held under arrest must generally be brought before a court as soon as is reasonably practicable. An exception is made when an arrest has been made for recognised investigative purposes: 25.11–25.14.

The precise terminology for describing the timeframe within which there must be an appearance before a court varies between statutory provisions:

- The Justices Act 1886 (Qld) s 65 and the Bail Act 1982 (WA) s 6 require an accused to be taken before a justice as soon as 'practicable'.
- The PPR Act (Qld) s 393(1) uses the expression 'reasonably practicable'.
- The Code (Qld) s 552 insists that the accused be taken before a justice 'forthwith'.

In *Williams* (1986) 161 CLR 278; 66 ALR 385, the High Court interpreted similar phrases under other statutory provisions as all having the same meaning, namely that the accused must be taken before a justice as soon as is reasonably practicable. This could mean promptly if the arrest occurs during the day. On the other hand, there could be a delay if the accused is arrested

at night. Police workload can affect the determination of what is reasonably practicable in a particular situation, as can distance to a court, a relevant factor in vast states like Queensland and Western Australia.

25.8 Failing to take an accused before a court as soon as reasonably practicable may render a detention unlawful. The High Court has taken the view that the lawfulness of the detention may fluctuate back and forth with the circumstances: see *Michaels v R* (1995) 184 CLR 117; 130 ALR 581, discussed in *Norton* at 25.69C. Thus, a detention that was originally lawful may become unlawful because of delay in proceeding to court but may then become lawful again when the decision to proceed to court is made.

25.9 At common law, police who are obliged to take a person before a justice as soon as is reasonably practicable can question the person while awaiting the court appearance. Incidental questioning is permitted at common law as long as this is not for the purpose of delay in bringing the accused before a justice and it results in no actual delay: *Williams*, above, discussed in *Norton* at 25.69C. However, the regimes for investigative detention in Queensland and Western Australia may now leave little room for common law principles to operate.

25.10 An arrest or a detention is a physical restraint on a person's freedom of movement, often with force or threat of force being used to impose the restraint. Unless there is lawful authority for the restraint, adverse consequences can follow:

- There is potential for tortious liability for false imprisonment and for both tortious and criminal liability for assault.
- Evidence that is obtained in consequence, such as evidence of a confession by the detained person, is liable to be excluded: 22.14–22.20; and see, for example, *Foster* at 22.28C.

The lawfulness of an arrest or detention determines whether a person who resists or attempts to escape commits an offence: PPR Act (Qld) s 790; Code (Qld) s 340(a)–(b); Criminal Code (WA) (Code (WA)) s 317(c). It also determines if it is permissible to use force in responding to any force, or attempted or threatened force, used in effecting the arrest or detention: see the discussion on self-defence in Chapter 14. In *R v Hardy* [2010] QCA 28 at [29] it was said:

> If an arrest is unlawful … acts done in effecting and in pursuance of the arrest will be illegal. Resistance to an arresting officer may not be an assault unless disproportionate force is used.

Investigative arrest

25.11 There is a need to balance the right of a person not to be held in custody indefinitely, against the need for police to have adequate time to investigate properly a possible offence. In modern times, arrest for investigative purposes has been widely recognised, but subject to time limits.

25.12 In Queensland, the PPR Act (Qld) ss 365(2), 403–404 authorise detention of a person reasonably suspected of having committed an indictable offence *for a reasonable time* for investigative purposes, including questioning and performing forensic procedures.

Ordinarily, the period of the detention must not exceed 8 hours (including 4 hours of questioning and 4 'time-out' hours) but there is provision for this standard period to be extended

by a justice or magistrate: ss 403, 405–406. An order for extended detention may authorise questioning for a reasonable time of not more than 8 hours: s 406(2). Only a magistrate may authorise total questioning for more than 12 hours: ss 405(3), 406(3).

When a detention period has expired and the suspect has been released, new evidence is required before there can be a re-arrest: s 381.

25.13 In Western Australia, the CI Act (WA) ss 139(2), 140(2) authorise detention of an arrested suspect for a reasonable period for investigative purposes including searching and questioning. Factors to be taken into account in determining what is reasonable include the number and complexity of offences to be investigated, the time needed for officers with responsibility for the investigation to travel, and the time needed to interview witnesses and other suspects: s 141.

Ordinarily, detention of an arrested suspect must not exceed 6 hours: s 140(3)(a). A senior officer may authorise detention for a further period of 6 hours: s 140(4). Within that period the investigating officer, with approval of a senior officer, may apply to a magistrate for further authorisation. A magistrate may authorise a further period of 8 hours and may authorise further periods of 8 hours each on application: s 140(6), (8).

25.14 A similar scheme operates for Commonwealth offences including those committed in Queensland and Western Australia. Detention is permitted for a time that is *reasonable*, subject to standard maximum time periods of 2 hours for minors and for Aboriginal persons and Torres Strait Islanders, and 4 hours for other persons: Crimes Act (Cth) s 23C. The time can be extended by a magistrate or justice for up to 8 hours: ss 23D–23DA. Longer extensions are permitted if the suspected offence is a terrorism offence: ss 23DB, 23DE–23DF.

POWERS OF ARREST

25.15 Powers of arrest *without warrant* differ for police officers and private citizens:

- In Queensland, arrests without warrant by police officers are governed by the PPR Act (Qld) ss 365–368, 374. Arrests by private citizens are governed by the Code (Qld) ss 546–552.
- In Western Australia, police powers are set out in the CI Act (WA) Pt 12. Citizens' powers are set out in the CI Act (WA) Pt 3.
- For Commonwealth offences, there are separate provisions for police officers and private citizens: Crimes Act (Cth) ss 3W–3Z.

25.16 Provision for arrest *with warrant* is made under Queensland and Commonwealth legislation:

- For Queensland, the primary provisions governing the issue of warrants are found in the PPR Act (Qld) ss 369–373.
- For warrants relating to Commonwealth offences, see the Crimes Act 1914 (Cth) s 3ZA.

In Western Australia, some written laws still require an arrest warrant for certain offences but most arrests are now made without warrant. The power of arrest pursuant to warrant is not a subject covered by the CI Act (WA).

Arrest without warrant: police powers

25.17 Police have broad powers of arrest without warrant:

- In Queensland, a police officer may arrest a person without warrant if the officer reasonably suspects the person has committed or is committing an offence or reasonably suspects that some other prescribed justification for an arrest exists: PPR Act (Qld) ss 365–368, 374. Power to arrest for investigative purposes only arises in relation to indictable offences: PPR Act (Qld) s 365(2). An arrest must generally be 'reasonably necessary' for one of the prescribed purposes of an arrest: PPR Act (Qld) s 365; see **25.4**.
- In Western Australia, a police officer may arrest a person without warrant for a '*serious offence*' (one punishable by 5 or more years imprisonment) if the officer reasonably suspects the person has committed, is committing or is just about to commit the offence: CI Act (WA) s 128(1)–(2). A police officer may arrest a person for a *non-serious offence* if, in addition, the officer reasonably suspects that if the person is not arrested it will not be possible to verify their identity or that they will continue to offend, endanger others, obstruct justice, conceal evidence, or their own safety is endangered: CI Act (WA) s 128(3).
- For Commonwealth offences, an officer may arrest for an offence which has been, or is being, committed: Crimes Act (Cth) s 3W(1)(a). It is a condition that proceeding by way of summons would not be effective: s 3W(1)(b).

25.18 In making arrests, officers often rely on what they have been told by their superiors or colleagues.

In *O'Hara v Chief Constable of the RUC* (25.70C), the House of Lords refused to accept that an order to make an arrest would be sufficient by itself to provide reasonable grounds for suspicion. However, it was accepted that such grounds could be established by information conveyed by the superior in a briefing. The principles outlined in *O'Hara* are applicable in Queensland.

In Western Australia. *O'Hara* has been distinguished. In *Cotchilli v The State of Western Australia* [2008] WASC 103 at 25.71, it was held that because there is a delegation power in the CI Act (WA) s 12, an officer who holds a reasonable suspicion may delegate the power of arrest to an officer who does not have a reasonable suspicion.

25.19 There are safeguards against abuses of police power.

One form of safeguard is provided by the requirements detailed in **25.18** for an arrest to be reasonably necessary for one of the prescribed purposes (Queensland) or for proceeding by way of summons to be ineffective (Commonwealth). In Western Australia, a similar result is achieved by the detailed specifications for an arrest for a non-serious offence.

Another safeguard is that the person arrested must, generally, be taken before a justice as soon as is reasonably practicable: see **25.7**.

Arrest without warrant: citizens' powers

25.20 In Queensland, citizens' powers of arrest are restrictive. Under the Code (Qld), arrests without warrant are limited to certain types of offences, defined in s 5 to mean crimes (as opposed to misdemeanours or simple offences: see further 1.24) and other offences that are expressly stated to be offences for which there is a power to arrest without warrant. These

limitations in effect restrict powers of arrest without warrant under the Code (Qld) to serious offences such as murder, manslaughter, rape and stealing.

A private citizen can usually activate these arrest powers only where an offence has actually been committed or is being committed: Code (Qld) ss 546(c)–(d), 548(2) and 549. It is not enough that a citizen suspects or believes that an offence has been or is being committed. A citizen risks acting unlawfully if there is a misapprehension about whether an offence has actually been committed, although a defence of mistake of fact under Code (Qld) s 24 may be available in the event of a mistake that was reasonable under the circumstances. Even where the perceptions of the person making an arrest are relevant to its lawfulness, the applicable standard is belief rather than just suspicion: Code (Qld) s 546(d) (that is, with respect to the identity of the person who has committed the offence — the offence itself must have been actually committed), ss 546(e), 550, 551; see also **24.12** on the distinction between suspicion and belief.

25.21 In Western Australia a citizen may make an arrest for an offence punishable by imprisonment if the citizen reasonably suspects that the suspect has committed or is committing such an offence: CI Act (WA) s 25(2). A citizen is not entitled to enter a place or vehicle where the suspect is believed to be: s 25(4). Once an arrest is made, the citizen must arrange for a police officer to attend or take the suspect to a police officer with any thing relevant to the offence as soon as practicable and may detain the suspect accordingly: s 25(5)–(6). The police officer may or may not arrest the suspect and, if the police officer does not make an arrest, the suspect is free to go: s 25(7).

25.22 For Commonwealth offences, private citizens can arrest for past offences only if they have just been committed: Crimes Act (Cth) s 3Z. Under the Commonwealth scheme, the standard for making a citizen's arrest is a belief held on reasonable grounds rather than a suspicion held on reasonable grounds.

Arrest with warrant

25.23 The existence of an arrest warrant, issued by a justice, removes the need for the person making an arrest to hold any personal suspicion or belief about the person to be arrested. Arrest warrants operate in much the same way as do search warrants: see **24.32–24.48**. The justification for the arrest is provided through a complaint made to a justice. A warrant is then issued which can be executed by any person named therein.

The following discussion will focus on Queensland, since there is no longer any general provision for arrest warrants in Western Australia: see **25.16**.

25.24 There is no limitation on the type of offence for which an arrest warrant may be issued. There are, however, suggestions that a warrant should be an exceptional occurrence for a simple offence. The PPR Act (Qld) s 371(b) prescribes that a warrant is only to be issued for 'an offence other than an indictable offence' if it is reasonably suspected that alternative ways of proceeding to court would be ineffective.

25.25 The issue of a warrant is dependent upon a sworn application being made to a justice stating the grounds for seeking the warrant:

- For Queensland offences, the relevant standard is 'reasonable grounds for suspecting' that the person has committed the offence: PPR Act (Qld) s 371.

- For Commonwealth offences, the relevant standard is 'believing' that the person has committed the offence: Crimes Act (Cth) s 3ZA.

Telewarrants, which are warrants issued by remote communication, are possible: PPR Act (Qld) s 800(2); CI Act (WA) s 13; Crimes Act (Cth) s 3R.

25.26 A warrant must identify the applicant, state that any police officer may arrest the person named and describe the offence: PPR Act (Qld) s 372. For the description of the offence, it is sufficient that the words of the statutory description are used.

25.27 Special protection against civil or criminal liability is afforded under the Code (Qld) to the person making an arrest under warrant if he or she acts in good faith, regardless of defects which might invalidate the warrant:

1. Section 250 covers the situation where, despite there being jurisdiction to issue such a warrant, there is no authority for its issue in the particular case.
2. Section 251 covers the situation where there is no jurisdiction.
3. Section 253 covers situations where the warrant is defective on its face.

Where the wrong person is arrested, protection is afforded by s 252(1).

MAKING AN ARREST

25.28 The general principle respecting the use of force is that as much may be used as is 'reasonably necessary'. This expression recurs in the relevant statutory provisions in Queensland and Western Australia:

- Queensland — PPR Act (Qld) ss 615–616; Code (Qld) ss 254, 257–258. The use of force by police officers is governed by the PPR Act (Qld), with the Code (Qld) now applying only in relation to arrests by private citizens.
- Western Australia — CI Act (WA) s 16(1); Code (WA) ss 231, 233, 235.
- The Commonwealth requires an arresting person not to use more force or subject the other person to greater indignity than is 'necessary and reasonable': Crimes Act (Cth) s 3ZC(1).

25.29 Special restrictions are placed on the use of lethal force; that is, force likely to cause death or grievous bodily harm:

- In Queensland, lethal force is expressly excluded from the general authorisation for police officers to use as much force against an individual as is reasonably necessary: PPR Act (Qld) s 615(3). Instead, a separate provision authorises the use of force likely to cause death or grievous bodily harm only for arrests for offences punishable by life imprisonment or likely to cause death or grievous bodily harm: s 616(4). Before using this degree of force, a police officer must first call on the person to stop doing the 'act' (which might include resisting or fleeing from arrest) if this is practicable: s 616(5).
- The use of lethal force in citizens' arrests is subject to restrictions under the Code (Qld): see **25.30**.
- In Western Australia, a police officer making an arrest or exercising other powers under the CI Act (WA) may use any force reasonably necessary to exercise the power and overcome resistance to exercising the power that is offered or that the police officer reasonably suspects

will be offered: CI Act (WA) s 16. However, the section specifically makes the use of force subject to the Code (WA) Ch XXVI, entitled 'Assaults and violence to the person generally: Justification, excuse and circumstances of aggravation'. The Code restricts the use of lethal force: **25.30**.

- For Commonwealth offences, force likely to cause death or grievous bodily harm may only be used to protect life or prevent serious injury: Crimes Act (Cth) s 3ZC(2). The person against whom the force is used must, if practicable, be called on to surrender and there must be a reasonable belief that the person cannot be apprehended in any other manner.

25.30 The scheme under the Codes is complicated. One complication is that a distinction is drawn between overcoming resistance to arrest and preventing escape from or after arrest. There is no express prohibition on the use of lethal force to overcome resistance to arrest; the express requirement is just that the force be reasonably necessary: Codes s 254 (Qld)/s 231(1) (WA). Nevertheless, in determining whether any force used was reasonably necessary, account will be taken of the degree of force. It will often be very difficult to justify the use of lethal force in order to make an arrest, even though there is no express prohibition or restriction.

In contrast, there are express restrictions under the Codes on the use of force to prevent escape from or after arrest:

- In Queensland, where the Code applies only to arrests by persons other than police officers, lethal force cannot be used to prevent escape from an arrest in process: Code (Qld) s 257(2). After an arrest has been effected, lethal force can be used to prevent an escape only in relation to offences for which the offender may be arrested without warrant: s 258(2).
- In Western Australia, the Code applies to police officers as well as other persons. Lethal force can be used if the suspect takes flight or appears about to, but only by a police officer or someone assisting. Lethal force can only be used if the suspected offence is one that is punishable by life imprisonment and only after the person has been called on to surrender: Code (WA) s 233. Lethal force can be used to prevent escape after arrest only in respect of offences punishable by imprisonment for 14 years and upwards: s 235.

25.31 A person making an arrest, with or without a warrant, must inform the arrested person of the basis for the action as soon as practicable: PPR Act (Qld) s 391(1); CI Act (WA) ss 138(2)(a), 138(3)(b); Crimes Act (Cth) s 3ZD.

25.32 In Western Australia, formal recognition has been given to a range of rights for an arrested suspect: the right to necessary medical treatment, to a reasonable degree of privacy from the mass media, to a reasonable opportunity to communicate with a relative or friend and to an interpreter if there is a language problem: CI Act (WA) s 137.

The rights of arrested suspects in Western Australia additionally include rights in the CI Act (WA) s 138 that in other jurisdictions are treated as rights of suspects to be questioned:

1. the right to be informed of the offence suspected of being committed;
2. the right to be cautioned before interview as a suspect;
3. the right to have a reasonable opportunity to communicate or to attempt to communicate with a lawyer; and
4. if there is a language difficulty, the right not to be interviewed until an interpreter is available.

These rights will be examined in **Chapter 26**.

25.33 Queensland and Western Australia have some different requirements respecting making an arrest with warrant:

- In Queensland, a person executing any warrant is obliged to carry it if reasonably practicable and to produce it if required: Code (Qld) s 255(1). In addition, an officer making an arrest with warrant must inform the person 'of the nature of the warrant': PPR Act (Qld) s 391(2).
- In Western Australia, possession of the warrant at time of arrest is unnecessary: CI Act (WA) s 144.

25.34 Failure to observe procedural provisions does not make an arrest unlawful; however, the failure is a factor to be taken into account in determining whether any force used was reasonably necessary: Codes s 255(3) (Qld)/s 231(2) (WA). There is no express provision to this effect in the PPR Act (Qld) s 391, respecting notification of the grounds for the arrest: see 25.31. It is unclear whether the notification required by s 391 would be interpreted as mandatory, so that breach may make the detention unlawful, or merely directory, with the result that there would be police misconduct but the arrest would still be lawful.

25.35 There are ancillary powers to enter and search places in order to make an arrest. A police office has power to enter and search a place and to stop, detain and enter a vehicle in order to make an arrest: PPR Act (Qld) s 21; CI Act (WA) s 132. Where a dwelling is to be entered, the officer must reasonably suspect that the person to be arrested is in the building.

ALTERNATIVES TO ARREST

25.36 In Queensland, there are, in effect, three ways in which an accused can be brought before a court:

1. Arrest without warrant: PPR Act (Qld) ss 365–368.
2. Arrest with warrant: PPR Act (Qld) ss 369–373.
3. Summons (Justices Act 1886 (Qld) ss 53, 58) or notice to appear: PPR Act (Qld) ss 382–390. A summons is simply a document signed by a justice requiring the accused to attend court on the designated date and time and to answer the charges noted in the summons. A notice to appear is a document similar to a summons but issued by a police officer.

25.37 In Western Australia, the wide power of arrest is used in practice for most criminal offences. For persons not in custody, following the filing of a prosecution notice with the court, a hearing notice or a summons will be issued to require their attendance at court: Criminal Procedure Act 2004 s 28.

25.38 An arrest is a serious infringement upon individual liberty. Arrest should not be used if a summons or hearing or appearance notice would be effective. This principle is enshrined in the Crimes Act (Cth) s 3W(1)(b). It has not been expressly incorporated in state legislation.

- Nevertheless, with respect to Queensland, it could be argued that, if other means would be effective, an arrest would not be 'reasonably necessary' as required by the PPR Act (Qld) s 365. Moreover, a person who has been arrested must be released if it would be more appropriate to proceed to court by way of a notice to appear or a summons: s 377(2)(b).
- In Western Australia, there is no such implication in respect of 'serious offences' but the implication for other offences is that an arrest should not be made unless one of the other factors set out in **25.17** is present: CI Act (WA) s 128.

BAIL

25.39 Bail is a process whereby an arrested accused is released from custody while awaiting trial or during the course of a trial. The grant or refusal of bail may be contentious. At one time, the chief purpose of bail was to release an accused with sufficient safeguards to ensure attendance at trial. While this remains an important purpose, the Bail Acts that have replaced the common law in Queensland and Western Australia take into account other considerations including the protection of the community from further possible offending: Bail Act 1980 (Qld) (Bail Act (Qld)); Bail Act 1982 (WA) (Bail Act (WA)). This must be balanced against the presumption of innocence that every accused enjoys and the protection of individual rights and freedoms. The grant of bail is an exercise of discretion in each case guided by the requirements of the Bail Acts.

For particularly serious offences, the tensions between the competing public interests of law enforcement and of individual freedoms and liberties are greater, with heightened concern that the accused may fail to appear, reoffend or expose others to risk of harm. Bail may be more difficult to secure for particularly serious offences. For murder/wilful murder offences, bail can only be granted by the Supreme Court and is likely to be granted only in exceptional cases: Bail Acts s 13 (Qld)/s 15 (WA).

25.40 Police have power to grant bail to an arrested person who cannot be taken promptly before a court:

- In Queensland, the power is restricted to police officers of a certain rank: Bail Act (Qld) s 7.
- In Western Australia, the arresting officer must consider and may grant bail. In other cases, an authorised officer, a police officer of the rank of sergeant or higher, or in charge of a police station or lock-up, may grant bail: Bail Act (WA) ss 6, 13.

25.41 Police power to grant bail is expressed in discretionary terms. Nevertheless, in Queensland, bail must be granted, other than in cases of arrest for investigative purposes, if it is not reasonably practicable to bring the person before a court within 24 hours: Bail Act (Qld) s 7(1A).

When bail is refused, the accused must be provided with reasons for the refusal (Bail Acts s 7(4) (Qld)/s 26 (WA)) and the accused is required to be taken before a justice.

25.42 A court has a broad power to grant bail to any person appearing on charges before it: Bail Acts s 8 (Qld)/s 13 (WA). A court must consider a number of factors in determining any application for bail, including:

1. the nature and seriousness of the offence charged;
2. the personal character and other social, personal and residential aspects of the accused;
3. whether there is an 'unacceptable risk' that the accused will not appear in court on the due date; and
4. importantly, whether there is an unacceptable risk of the accused reoffending or endangering the lives of others or, indeed, even interfering with witnesses before the trial.

See Bail Acts ss 15–16 (Qld)/Sch 1, Pt C, ss 1, 3–3A, and Sch 2 (WA).

- In Queensland, there is an initial presumption that bail will be granted, subject to consideration of the reasons why it might be refused: s 9 (Qld). In some instances, however, such as when the alleged offence was committed while the accused was at large awaiting trial for another offence, cause must be shown why continued detention would be unjustified: s 16(3) (Qld).
- In Western Australia, a person charged with a serious offence who allegedly commits another serious offence while on bail will only receive a further grant of bail if exceptional circumstances can be shown: Sch 1, cl 3A (WA).

25.43 Attendance at court by the accused is made more likely by the requirement that the accused undertake in writing to attend on the date and at the time specified in the document: Bail Acts s 20 (and see definition of 'undertaking in s 6) (Qld)/s 28 (WA). A failure to attend as directed constitutes an offence, with additional powers of arrest where there has been a breach of any condition of bail or even where a breach of a bail condition is anticipated: Bail Acts ss 33, 29, 24(1) (Qld)/ss 51, 54, 46 (WA). The undertaking by the accused to attend court as directed may be further secured by imposing additional conditions, such as the requirement to pay money, or to provide some other security for attendance. For example, there could be an undertaking by another person to ensure the accused's attendance on the due date. Such an undertaking imposes liability on the third person for a failure of the accused to attend as required: Bail Acts ss 11, 20–26 (Qld)/ss 17, 35–50, Sch 1, Pt D (WA).

CUSTODIAL SEARCHES

25.44 As an incident of custody, police officers may search persons and take certain items. There is a difference between a basic search, such as frisking a person, and a strip search. There is also a difference between those searches and intimate, perhaps invasive, searches for forensic samples.

25.45 Ordinary custodial searches can be conducted by officers without warrant and for a variety of purposes: PPR Act (Qld) s 443 (1); CI Act (WA) s 135(4).

- In Queensland, no particular objectives for the searches are specified: PPR Act (Qld) s 443(1).
- In Western Australia, a search is authorised only for a 'security risk item': CI Act (WA) s 135(4). 'Security risk item' is defined broadly to cover things that could be used to endanger anyone, that could be used to assist an escape, and that could adversely affect the security, good order or management of the place: s 135(1).

In ordinary custodial searches there is no requirement for a reasonable suspicion about what will be found. In this respect, powers of custodial search are unlike powers of search in non-custodial situations: contrast, for example, PPR Act (Qld) s 29; CI Act (WA) s 68. The main restriction on powers of custodial search is the requirement, stemming from general principle, that the search be conducted in accordance with the objectives of the legislation: see 24.12.

Seizure of items found is authorised: PPR Act (Qld) s 443; CI Act (WA) s 135(6).

25.46 It is implicit in any power to conduct a non-consensual search that reasonably necessary force may be used. General authority to use such force as is reasonably necessary in exercising police powers is found in PPR Act (Qld) s 615; CI Act (WA) s 16.

Custodial searches are subject to the same safeguards respecting the maintenance of dignity as apply to non-custodial searches. In Queensland, these safeguards include requirements that minimal embarrassment be caused and reasonable care be taken to protect dignity and that searches ordinarily be conducted by an officer of the same sex as the person searched: PPR Act (Qld) s 624.

25.47 For searches under Commonwealth arrest powers, see the Crimes Act (Cth) ss 3ZE–3ZI. Powers to conduct custodial searches for Commonwealth offences are subject to a requirement for reasonable suspicion about what may be found: ss 3ZE–3ZF. The objectives of a lawful search are also specified: evidence or 'seizable items'. Seizable items are defined in s 3C to mean things 'that would present danger to the person or that could be used to assist a person to escape from lawful custody'.

TAKING 'IDENTIFYING PARTICULARS'

25.48 The most common form of identification is a person's personal details: full name, date of birth, actual and usual living address. Police officers may demand such details under certain circumstances: 24.19–24.21.

25.49 Police are also empowered to take 'identifying particulars' of certain persons, such as fingerprints and photographs of features: PPR Act (Qld) ss 467–473; Criminal Investigation (Identifying People) Act 2002 (WA) ss 47–51; Crimes Act (Cth) ss 3ZJ–3ZL. 'Identifying particulars' can be used in two different ways — first, to establish the identity (name etc) of a suspect, and second, to establish that a suspect (whomever he or she may be) was the person who committed the offence under investigation.

Special restrictions apply to particularly intrusive procedures such as the taking of dental impressions and samples of blood. The special restrictions are discussed at 25.54–25.64.

Queensland

25.50 The PPR Act (Qld) authorises any police officer to take identifying particulars in relation to 'identifying particulars offences': ss 467(1), 468(2), 470(3), 473. 'Identifying particulars offences' are offences with maximum penalties of at least one year's imprisonment, together with certain other specified offences. 'Identifying particulars' are defined for this purpose as palm prints, fingerprints, handwriting, voiceprints, footprints and photographs of features and certain measurements. See the definitions in Sch 6.

25.51 Identifying particulars may be taken of a person in custody: s 467(1). In addition, persons who will be proceeded against by appearance notice, complaint or summons may be detained or required to attend a police station in order for identifying particulars to be taken: ss 468–470. See also ss 471–473, which provides for a court order for identifying particulars to be taken and for a person to be detained for the purpose.

No special standard is prescribed for the exercise of the power.

Western Australia

25.52 The Criminal Investigation (Identifying People) Act 2002 (WA) sets out a comprehensive regime for taking identifying particulars from different categories of people. The category determines the powers of police to take identifying particulars. The discussion in this book focuses on taking identifying particulars from suspects. However, the scheme extends to a number of other categories, including volunteers, victims and witnesses: Criminal Investigation (Identifying People) Act 2002 (WA) Pts 4–5.

'Identifying particulars' mean a print of the person's hands (including fingers), feet (including toes), or ears, a photograph of a person including an identifying feature of the person, an impression of an identifying feature of a person including a dental impression, a sample of the person's hair taken for purposes other than obtaining the person's DNA profile, and a person's DNA profile. Unlike forensic procedures (see **25.54, 25.62**), an identifying procedure does not often involve the possibility of an intimate procedure.

25.53 *Uncharged suspects* who are suspected of committing a serious offence, defined as one punishable by more than 12 months' imprisonment, may be requested to undergo an identifying procedure. If the uncharged suspect is a child or incapable person, and does not consent or a responsible person does not consent, a magistrate may issue an IP warrant. If the uncharged suspect is an adult, and does not consent, a senior police officer may order a non-intimate identifying procedure and a JP may issue a warrant authorising an intimate identifying procedure: Criminal Investigation (Identifying People) Act 2002 (WA) Pt 6.

There are two classes of *charged suspects*: those charged with a serious offence and those otherwise charged. Common identifying particulars for both are a print of the suspect's hands (including fingers), feet (including toes), or ears, a photograph of the suspect including any identifying feature, and a measurement of any identifying feature of the suspect. Suspects charged with a serious offence have, in addition, the suspect's DNA profile. If the charged suspect does not consent, a police officer may arrest the suspect if not already in custody, detain the suspect, and do the identifying procedures against the suspect's will: Criminal Investigation (Identifying People) Act 2002 (WA) Pt 7.

FORENSIC PROCEDURES

Queensland

25.54 Under the PPR Act (Qld), special conditions must be met for the use of 'forensic procedures'.

A distinction is drawn between 'intimate forensic procedures' and 'non-intimate forensic procedures'. In addition, a distinction is drawn between different kinds of 'non-intimate forensic procedures'. These terms are defined in Sch 6:

1. 'Intimate forensic procedures' are particularly intrusive. They include:
   - examinations of and taking samples from the external genital or anal area, the buttocks or the female breasts;
   - internal examinations of body cavities;
   - taking samples of hair from the genital or anal areas;
   - taking samples and things from body cavities other than the mouth;
   - taking X-rays, dental impressions and blood samples.
2. 'Non-intimate forensic procedures' include some intrusive procedures such as:
   - strip searches;
   - taking samples from the person's body;
   - taking DNA samples; and
   - taking samples of saliva.

   The term also extends to taking 'identifying particulars' such as fingerprints and photographs of features: see **25.50, 25.52**.
3. The term 'non-medical examination' is used for 'non-intimate forensic procedures' other than taking DNA samples and things that are 'identifying particulars', which are subject to separate conditions.

25.55 'Non-medical examinations' include strip searches. These are also subject to the general safeguards respecting the maintenance of dignity: see PPR Act (Qld) ss 624, 630; see also **24.22**. These safeguards include:

1. requirements that minimal embarrassment be caused and reasonable care be taken to protect dignity;
2. that searches ordinarily be conducted by an officer of the same sex as the person searched;
3. that strip searches be conducted as quickly as possible and with the person permitted to keep some clothes on at each stage of the search; and
4. that searches of genital or anal areas by officers be confined to visual examinations.

25.56 Special qualifications are required to perform forensic procedures: PPR Act (Qld) ss 445–446. Procedures are divided into four main categories:

1. Doctors may perform all forensic procedures, including 'intimate forensic procedures', and dentists may perform those involving the mouth: ss 445(2), 446.
2. 'DNA samplers' may take DNA samples: s 445(3). 'DNA samplers' include doctors, nurses and certain police officers: see the definition in Sch 6. Police officers may be specifically authorised to perform DNA procedures because of their experience, expertise or training: s 476. Watch-house officers may also be authorised: s 651.
3. 'Authorised examiners' may perform 'non-medical examinations': s 445(4). 'Authorised examiners' are police officers who are specifically authorised to perform

'non-medical examinations' because of their experience, expertise or training: see the definition in Sch 6; see also s 497.

4. All police officers are qualified to take 'identifying particulars': s 445(5).

25.57 A person may consent to the performance of a forensic procedure. Consent is, however, only recognised if the person is provided with certain information, including advice that consent may be refused: PPR Act (Qld) s 454. The giving of the information and the consent must both be recorded: s 455.

A police officer asking for consent for an intimate forensic procedure must suspect that the person has committed an offence: s 449(2).

25.58 Unless the person consents, a warrant from a magistrate or an approval from a senior officer is required for forensic procedures other than taking 'identifying particulars': PPR Act (Qld) s 447(1).

A warrant to authorise a forensic procedure is called a 'forensic procedure order': s 458(1). Such an order is essential for a non-consensual 'intimate forensic procedure': s 502(1).

In the case of DNA samples and 'non-medical examinations', however, senior officers may give approval in cases where proceedings have commenced by way of arrest, complaint or summons: ss 481–482, 496, 498–499.

25.59 Section 461(1) of the PPR Act (Qld) prescribes the standard to be applied by a magistrate in deciding whether to approve a forensic procedure order. It provides:

> A magistrate may make a forensic procedure order in relation to a person only if satisfied on the balance of probabilities there are reasonable grounds for believing performing the forensic procedure concerned on the person may provide evidence of the commission of an indictable offence the person is suspected of having committed (a 'suspected offence') and carrying out the forensic procedure is justified in the circumstances.

In deciding whether the procedure is justified, the magistrate must balance 'the rights and liberties of the person and the public interest': s 461(2).

25.60 Similarly, a senior officer who approves a 'non-medical examination' must be satisfied that it may provide evidence of the commission of an indictable offence: PPR Act (Qld) ss 495, 498(4), 499(3).

No specific standard is prescribed for approving the taking of a DNA sample. The senior officer must, however, have regard to 'the rights and liberties of the person and the public interest': s 481(4).

25.61 The drafting of the provisions respecting orders and approvals is curious because, while reference is made to the higher standard of 'belief' rather than just 'suspicion', this is qualified by the inclusion of the word 'may'. See 24.12 on the difference between suspicion and belief. It could be argued that there is no difference between believing that evidence may be present and suspecting that it is present. The latter drafting would have been more consistent with the general approach taken in the Act. For example, the relevant standard for an arrest without warrant is reasonable suspicion that an offence has been or is being committed: PPR Act (Qld) s 365. Similarly, the standard for a non-custodial search is reasonable suspicion that a person has something: s 29.

Western Australia

25.62 The CI Act (WA) prescribes the law for forensic procedures. There are three types of procedure:

- A non-intimate procedure which may involve among other things taking a swab, or use other means, to detect a relevant thing on the external parts of the person's body, other than his or her private parts: s 74.
- An intimate forensic procedure involves taking a swab or sample or impression of the genitals or a blood sample: s 75.
- An internal forensic procedure involves the search of a person's internal parts for a relevant thing using x-rays, ultrasound or similar means, a search of orifices other than the mouth and taking a swab and removing any relevant thing: s 76.

The category of persons liable to a forensic procedure is similar to that for identifying procedures: see **25.52–25.53**.

25.63 Forensic procedures can be performed by a doctor, dentist, nurse or a person qualified under the Regulations to do a particular procedure. A table sets out the procedure and the persons authorised to perform it: s 103.

25.64 A suspect who is an adult may consent to a procedure. If the suspect does not consent, a senior officer may order a non-intimate or intimate forensic procedure and a JP may issue a warrant for an internal forensic procedure. If the suspect is a child or incapable person who does not consent or a responsible person does not consent, a JP may issue an FP warrant for any of the three forensic procedures: Pt 9 Div 5. In exercising authority to order a forensic procedure without consent, a senior officer, JP or magistrate must be satisfied that there are reasonable grounds for suspicion, and that the seriousness of the suspected offence and the interests of justice justify doing the procedure.

Commonwealth Offences

25.65 The Crimes Act (Cth) draws a distinction between a 'non-intimate forensic procedure' and an 'intimate forensic procedure' which is similar to that found in the law of the states: see the definitions in s 23WA.

- Both types of procedure may be performed with the 'informed consent' of a suspect: s 23WD.
- A senior constable may order a 'non-intimate forensic procedure' to be performed on a suspect in custody: s 23WN.
- A magistrate may order either type of forensic procedure to be performed on a suspect whether or not the person is already in custody: ss 23WQ–WR.

25.66 Similar criteria apply to making of requests and for orders for both non-intimate and intimate procedures: ss 23WI, 23WO, 23WT. There must be satisfaction on a balance of probabilities that:

(a) the person is in lawful custody (for orders by a senior constable) or is a suspect (for requests or for orders by a magistrate);

(b) there are reasonable grounds to believe that the suspect committed a relevant offence;
(c) there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed a relevant offence; and
(d) the carrying out of the forensic procedure without consent is justified in all the circumstances.

25.67 Procedures may generally be carried out by persons qualified under the Regulations as well as by medical practitioners and nurses: see the references to 'appropriately qualified person' in s 23XM and see the definition in s 23WA.

25.68C **Dellit v Small; Ex parte Dellit**
[1978] Qd R 303
Full Court Supreme Court of Queensland

Lucas J: This is an appeal by way of order to review against a decision of the stipendiary magistrate given on February 28, 1978 whereby he dismissed two charges against the respondent, the first charge being that the respondent had resisted a member of the police force in the execution of his duty and the second charge being a charge under the Traffic Act 1949–1977 that the respondent had failed to provide a specimen of his breath for analysis upon a requisition to do so.

The matter turns only on one very short point. The reason why the magistrate dismissed both charges was because he came to the conclusion that there had been no proper arrest and the reason why he came to that conclusion was because he accepted evidence to the effect that at the time of the arrest the police officer had not actually touched the respondent.

The evidence given by the police officer was that after a conversation with the respondent, during which the police officer came to the conclusion that the respondent was under the influence of liquor, he said to him 'I am of the opinion that you are under the influence of liquor or a drug and I am arresting you on a charge of driving this motor vehicle whilst under the influence of liquor or a drug. Would you get into the rear of the police car, please?' He said that the respondent walked towards the police vehicle and, when approaching the rear door, he suddenly stopped. The witness was asked if there was any physical activity when the police used the words of arrest and the police officer said, 'Yes, I did touch him lightly on the shoulder'. This, however, was not accepted by the magistrate. Nevertheless, it is quite clear that the respondent did get into the police car and it is not necessary to inquire whether he was placed in the police car as a consequence of a struggle or otherwise.

The law is clear that what is required to constitute an arrest does not necessarily include any touching or physical contact between the arresting person and the person arrested. The matter is dealt with in *Alderson v Booth* [1969] 2 QB 216, which was the unanimous decision of a Divisional Court. At 220 Lord Parker CJ said:

> There are a number of cases, both ancient and modern, as to what constitutes an arrest, and whereas there was a time when it was held that there could be no lawful arrest unless there was an actual seizing, or touching, it is quite clear that that is no longer the law. There may be an arrest by mere words, by saying 'I arrest you' without any touching, provided, of course, that the defendant submits and goes with the police officer. Equally it is clear, as it seems to me, that an arrest is constituted when any form of words is used which in the circumstances of the case were calculated to bring to the defendant's notice,

and did bring to the defendant's notice, that he was under compulsion and thereafter he submitted to that compulsion.

In my opinion it is clear on the evidence in the case accepted by the magistrate that a lawful arrest had been effected and in my opinion the magistrate was wrong in concluding that because of the absence of any physical contact there had been no lawful arrest.

The magistrate completed the hearing of the case and discharged the respondent. In my opinion the appeal should be allowed, the order and decision of the stipendiary magistrate set aside and the matter should be remitted for retrial by stipendiary magistrate …

…

[**W B Campbell** and **Hoare JJ** agreed, with **Hoare J** adding the following caution:]

… the reference to compulsion in *Alderson v Booth* should not be misconstrued to mean a continued submission to compulsion. The reference to compulsion means that as long as the person arrested has it brought home to him that he is being arrested, and he understands the situation, then the arrest is complete without any touching. I agree with the proposed order.

25.69C

Norton v R (No 2)

[2001] WASCA 207; (2001) 24 WAR 488
Western Australia Court of Criminal Appeal

Roberts-Smith J…

3 After a trial held before a Judge and jury from 9 to 18 April 2001, the applicant was convicted of one count of stealing with actual violence whilst armed and in company and one count of assault with intent to steal and with actual violence and whilst armed and in company.

4 Prior to trial, objection had been taken to the admission of two video records of interview ('VROI') police had with the applicant on 19 May 2000 … His Honour rejected the submissions made on behalf of the applicant and ruled that the records of interview were admissible and that he would not exclude them in the exercise of his discretion. It is that decision which is the subject of this application for leave to appeal.

5 The proposed ground of appeal is:

The Trial Judge erred in the exercise of his discretion to admit into evidence a video taped record of interview obtained in circumstances of:

1. Unlawful detention

Particulars:

(a) The Applicant was effectively held in custody for a period of eight hours prior to the second record of interview being video taped.

(b) At the time of taking the Applicant into custody, Police Officers were aware of an existing warrant of apprehension pursuant to Section 59 of the Justices Act 1902 requiring the Applicant 'to be brought before Justices to answer the complaint or to be further dealt with according to law.

…

9 I will set out the course of events in a general way and then return to the aspects which were in dispute or are said to be of significance.

10 On 19 May 2000 DSC Chadwick was conducting inquiries in relation to an assault in a park at Burswood ('the Burswood Park') the previous day. Information received led him to understand that the applicant may have been one of those involved. Police records indicated the applicant had a criminal record which involved violence. The investigators obtained a search warrant for his address, the purpose being to search for a baseball bat and other articles. The police understood the residence was occupied by the applicant and probably others who may have been involved in the offences. Because of the seriousness of the offences, the allegations of the use of weapons and the background of the applicant, they decided to use a forced entry. They were prepared to encounter violence. Because of the background check they had done on the applicant they were also aware of outstanding matters in relation to him. Officers at the Victoria Park Police Station wished to speak to him in relation to an inquiry they were conducting as to certain assaults and there was an outstanding warrant of apprehension for breach of a community release order.

11 Approximately 10 officers attended the applicant's unit. Some were dispersed outside to prevent any attempts to escape. Two officers wearing vests used a sledge hammer to gain entry. Two uniformed officers with drawn service revolvers entered immediately after them and DSC Chadwick followed next. He did not have his firearm drawn. As the police entered the applicant was walking from the bedroom and was in the lounge room a few metres in front of the officers. The uniformed officers had their firearms pointed at a 45 degree angle to the ground. As soon as they saw the applicant DSC Chadwick and the others yelled out to him to 'get down'. He was made to lie on the ground on his stomach and put his hands behind his back, which he did. He was then handcuffed. Questions were then asked of him directed to ascertaining whether there was anyone else in the unit. There was one other person in the unit, a female.

12 Officers entered the bedroom where they found the female occupant. They asked her to get out of bed and she and the applicant were brought into the living area and sat down on the lounge. DSC Chadwick informed them who he was and why they were there and showed them the search warrant. He explained that the police were there to search for the articles nominated on the warrant and that it was in relation to an incident that had happened at the Burswood park the previous night involving an assault and the stealing of a motor vehicle.

13 The applicant appeared calm, responding to the police but not in a hostile manner. As a result DSC Chadwick formed the impression that he was not a threat and he was subsequently released from his handcuffs. It was said he was handcuffed for 5 to 10 minutes, not longer. Once the handcuffs had been removed DSC Chadwick told the applicant the police were going to search the premises. They did so in the presence of the applicant and the female. Some items of interest to the police were located, namely a baseball bat and some clothing. When they were found, DSC Chadwick told the searching officers to withdraw to the living room, notify the forensic officers and request them to attend and to secure the exhibits in the meantime.

14 The officers remained at the unit for about 1½ hours. It took some time for the forensic officers to attend. About 11.55 am the investigating officers told the applicant they wished to ask him questions and asked him to accompany them to the police station. He agreed to do so. He had not been arrested. They went to the Cannington detectives' office, arriving there just

after 12 pm. On arrival they placed the applicant in a holding room, DSC Chadwick advising him that he needed to make some further inquiries and would return to speak to him shortly. DSC Chadwick then spoke to other officers conducting the inquiry in relation to other possible offenders and about the outcome of the interview which was then being conducted with the female who had been present in the applicant's unit.

…

[The first VROI with the applicant began at about 12.50 pm. The applicant made no admissions during this VROI but did make admissions in two subsequent VROIs.]

46 In relation to the applicant's question at the conclusion of the first VROI about whether he was under arrest or not, [the arresting officer, DSC Chadwick] agreed that he told the applicant he was not under arrest. It was put to him that he told the applicant that with the knowledge that there was a warrant for apprehension which demanded that he be detained in custody until taken before a court, to which he said 'exactly right'; at the time of making that statement he was focused on the inquiry at hand …

…

51 Constable Stephen testified that he and Constable McArthur attended the Cannington Police Station at approximately 2.15 pm where they were advised they could take the applicant to the Victoria Park Police Station to interview him in relation to the matters they were inquiring about. He said that at that time he was aware the applicant had an outstanding warrant of apprehension. He said they were asked if once they had finished with the applicant they could lodge him at the East Perth lock-up on the warrant and that is what they did after interviewing him at Victoria Park Police Station. He said they got to the East Perth lock-up at 3.55 pm that day.

[During the course of cross-examination on the voir dire, the applicant was asked:]

> Had you been arrested? — Well, it felt like it.
> But did anyone say to you that you were under arrest? — No.
> …

57 … He denied being shown a search warrant and when it was put to him that he was asked to accompany the police to Cannington he said 'No' that he was taken there.

…

Unlawful detention

84 I accept that for relevant purposes the applicant was effectively in custody for some 8 hours prior to the second VROI and that at the time he was taken into custody, DSC Chadwick and DC Kelly were aware there was an outstanding warrant of apprehension pursuant to s 59 of the Justices Act 1902 (WA) in respect of him. But the question is how these facts go to the exercise of his Honour's discretion to exclude the second VROI, and in particular whether the applicant was unlawfully detained.

85 The warrant was not before us, but there seems to be no dispute that it was a warrant under s 59 of the Justices Act (WA), which empowers a Justice before whom a complaint is made of a simple offence, substantiated on oath, instead of issuing a summons in the first instance, to issue his warrant:

> … to apprehend the defendant, and to cause him to be brought before Justices to answer the complaint and to be further dealt with according to law.

86 Section 60(1) of the Justices Act states that such a warrant may be directed either to a police officer or officers by name or to all police officers within the State. Section 60(2) of the Justices Act states that any police officer may execute any warrant as if directed specially to that officer by name. Sections 61 and 62 are also relevant. Section 61 provides that:

> A warrant shall state shortly the offence or matter of the complaint on which it is founded, and shall name or otherwise describe the person against whom it is issued, and it shall order the police officers to whom it is directed to apprehend the defendant, and to bring him before justices in any jurisdiction to answer the complaint and to be further dealt with according to law.

87 Section 62 provides that a warrant remains in force until executed.

88 The search warrant was executed about 10.30 am on 19 May. About 11.55 am the applicant was asked to accompany the officers to Cannington Police Station and (as his Honour found) he accompanied them there voluntarily. The first VROI was conducted between 12.50 pm and 1.16 pm. The Victoria Park officers collected the applicant about 2.15 pm and took him to the Victoria Park Police Station where they conducted their interview with him after which they charged him with two counts of assault. They then took him to the East Perth lock-up where he was arrested on the outstanding warrant and about 3.55 pm he was lodged in custody on that and the two assault charges.

89 Ms Amsden's cross-examination of DSC Chadwick and her submissions tended to assume that from 10.30 am the applicant was in custody pursuant to the warrant and so the officers were obliged to deal with him in accordance with its direction to bring him before Justices to answer the complaint. However, in my view, that is neither a fair nor accurate understanding of the position. It is clear DSC Chadwick did not arrest the applicant on the warrant. It is also clear that he would have done so if the applicant had refused to accompany them to Cannington Police Station — but he did not refuse and so it did not get to that point. I consider that all DSC Chadwick was saying in response to counsel's proposition that the applicant was effectively in his custody from 10.30 am because he was aware there was an outstanding warrant in respect of the applicant, was that the applicant was effectively in police custody in the sense that had he tried to leave or refuse to accompany them, he would then have been arrested on the warrant. That does not constitute execution of the warrant. The question therefore becomes whether in the circumstances DSC Chadwick was obliged to execute it. Before addressing that question it is necessary to consider the issue of arrest or detention for interrogation generally.

90 It has long been established at common law that arrest or detention is not permissible merely for the purpose of asking questions (*Williams v The Queen* (supra); *Bales v Parmeter* (1935) 35 SR (NSW) 182, 188). A police officer's power to arrest is to take the person apprehended before a Justice to be dealt with according to law without unreasonable delay and by the most reasonable direct route (*Clarke v Bailey* (1933) 33 SR (NSW) 303). That common law position is maintained in Western Australia (*Salihos v The Queen* (1957) 78 ALR 509; 27 A Crim R 319).

91 It is not necessarily improper to question a person once he or she has been arrested and before they are taken before a Justice. Such questions may relate either to the crime for which the arrest was made or to other crimes …

[His Honour discussed *Williams v The Queen* (1986) 161 CLR 278, particularly the judgment of Mason and Brennan JJ, who were part of the majority:]

95 In their Honours' view, the emphasis throughout was on the right to personal liberty … :

> If a person cannot be taken into custody for the purpose of interrogation, he cannot be kept in custody for that purpose, and the time limited by the words 'as soon as practicable' cannot be extended to provide time for interrogation. It is therefore unlawful for a police officer having the custody of an arrested person to delay taking him before a justice in order to provide an opportunity to investigate that person's complicity in a criminal offence, whether the offence under investigation is the offence for which the person has been arrested or another offence.

(per Mason and Brennan JJ at 295, ibid)

96 The divergent development of the common law in English, from *Dallison v Caffery* [1965] 1 QB 348 (especially per Lord Denning MR at 367) to *Holgate-Mohammed v Duke* [1984] AC 437, 445, which had come to permit arrest and detention on reasonable suspicion of guilt for the purpose of questioning a suspect was not to be followed in Australia. As their Honours said (ibid, 299):

> That proposition is opposed to the view which has been taken of the common law in this country. The jealous protection of personal liberty accorded by the common law of Australia requires police so to conduct their investigation as not to infringe the arrested person's right to seek to regain his personal liberty as soon as practicable. Practicability is not assessed by reference to the exigencies of criminal investigation; the right to personal liberty is not what is left over after the police investigation is finished.

97 This is not to say that further enquiries cannot be made nor further questions asked of a suspect once they are in custody. The point is they cannot be arrested nor detained for the purpose of questioning nor can their presentation to a justice be delayed for such purpose. Thus:

> There is nothing to prevent a police officer from asking a suspect questions designed to elicit information about the commission of an offence and the suspect's involvement in it, whether or not the suspect is in custody. But if the suspect has been arrested and the inquiries are not complete at the time when it is practicable to bring him before a justice, then it is the completion of the inquiries and not the bringing of the arrested person before a justice which must be delayed.

(ibid, 300–301)

98 The other members of the majority (Wilson and Dawson JJ) expressed themselves in similar terms (see eg at 305–308; 312–313).

99 Thus police officers have no power to arrest or detain a citizen for the purpose of questioning them or of facilitating their investigation and the fact that there is no formal

arrest does not alter the position. Every restraint of the liberty of a person under the custody of another is in law an imprisonment whether or not there has been a formal arrest (*R v Banner* [1970] VR 240, 249).

100 A person does not have to have been arrested to be in custody in the context of a consideration of the admissibility or exclusion of confessional statements. Any person who is taken to a police station under such circumstances that they believe they must stay there is in the custody of police. They may go only in response to an invitation and the police may have no power to detain them, but if the police act so as to make them think they can detain them then they are in police custody (certainly for the purposes of the Judges' Rules) (per Williams J in *Smith v The Queen* (1957) 97 CLR 100).

101 It will be concluded a person is under arrest if they are not free to go. To avoid a conclusion that a person is under arrest or in custody the police officers must make it clear they are free to go (*R v Lavery* (1978) 19 SASR 515, 516–517; *R v O'Donoghue* (1988) 34 A Crim R 397, 401).

102 I shall return to the broader issue of detention in the context of this case later, but at this point turn to consider whether the applicant had been arrested or otherwise taken into custody in such circumstances as to give rise to an obligation on the part of the police officers to take him before a Justice as soon as reasonably practicable.

103 It is the decision to arrest and then retain custody of the person which activates the duty to take him before a Justice (*Drymalik v Feldman* (1966) SASR 227, 234).

104 It is clear that DSC Chadwick did not arrest the applicant pursuant to the warrant; he did not mention the warrant to the applicant until after the first VROI at Cannington Police Station and he was deliberately keeping it in reserve insofar as he would have executed it had the applicant refused to accompany them.

…

112 Neither DSC Chadwick nor DC Kelly offered s 232 of the Criminal Code (WA) as a reason for not arresting the applicant on the warrant, but it is a reasonable inference on the evidence that they were proceeding on the understanding that because the warrant was at Central Police Station (which is where the Police lock-up is) the applicant would have to be taken there for the formalities of arrest on the warrant to be completed. That is how it was eventually done by the Victoria Park officers.

113 In general a warrant is an authority or order directed to a person to do something which would otherwise be unlawful (*Corbett* (1932) 47 CLR 317, 333). The warrant and the legislative provisions under which it has been issued must be carefully scrutinised when considering what is required or authorised to be done under it, and strict compliance with the statutory requirements and those of the warrant itself will be demanded (*Noordhof v Bartlett* (1986) 31 A Crim R 417).

…

115 DSC Chadwick testified it was his intention that the applicant would be arrested on the warrant — but not until he and the Victoria Park police officers had finished questioning him about their respective inquiries, or at the point at which the applicant refused to cooperate with them.

116 DSC Chadwick was investigating serious offences in which he believed the applicant may have been involved. It was in the course of making inquiries about the applicant for that purpose as part of his preliminary action before executing a search warrant, that he became aware of the existence of the outstanding warrant of apprehension. When attending the applicant's premises, police officers did so to execute the search warrant and to continue their inquiries in respect of the Burswood offences. DSC Chadwick was mindful of the existence of the warrant of apprehension but that was not his focus. In my view it was appropriate for him in these circumstances to defer execution of the outstanding warrant until the search warrant had been executed (which included having the applicant present whilst that was being done) and then waiting at the applicant's unit for the arrival of the forensic officers.

117 However, I consider that at that point, when the forensic officers arrived and his execution of the search warrant was completed, he was obliged to arrest the applicant on the outstanding warrant and make the necessary arrangements to present him before a Justice as soon as reasonably practicable. As noted above, that would not have precluded DSC Chadwick from further questioning the applicant about the Burswood offences (which in fact he did later, after the applicant had been arrested on the warrant). The only reason DSC Chadwick delayed executing the warrant once he was finished at the applicant's unit, was for the purpose of further questioning him in an attempt to obtain admissions. This was not a situation in which DSC Chadwick had to interrupt other investigations to go out and look for the applicant, or because of pressure of work he was not able to locate him. The applicant was with him and the warrant commanded DSC Chadwick to apprehend him.

118 As Hunt CJ at CL pointed out in *C*, compliance with an obligation to bring an arrested person before a Justice 'forthwith' (or 'as soon as practicable') can be judged against an identifiable event, viz the apprehension, and there is no such identifiable event against which compliance with an obligation to apprehend the person 'forthwith' (or 'as soon as practicable') can be judged. Furthermore, there may be many reasons why it would not be possible for police officers to apprehend a person in respect of whom a warrant has been issued, for some time. However, it must, I think, be the case that where circumstances arise in which it is practicable for a police officer to effect the arrest — once it becomes in fact possible for him to do so — then the command in the warrant, itself drawn from s 61 of the Justices Act (WA), must be obeyed unless there is a proper and reasonable reason why it could not be. There may be many such reasons; they would include those suggested by Hunt CJ at CL and by Smart J. But with respect, I agree with Smart J that the discretion which police must have as to the time at, and circumstances in which they execute a warrant by arresting the person named in it, does not extend to delaying the arrest for no other reason than so they can question the person with the object of obtaining admissions about either that offence or some other.

119 If (as I have concluded) DSC Chadwick was obliged to arrest the applicant on the outstanding warrant at the conclusion of the search of his unit (ie once the forensic officers had arrived), but did not do so solely because he wanted to ask him further questions, it becomes necessary to consider what the applicant's status actually was.

120 He had not been arrested in any formal sense for any offence connected with the Burswood incident. The officers had insufficient evidence to charge him. That was so even after the first VROI. That fact was recognised by DSC Chadwick, which is why, when the

applicant asked him at the end of that interview at Cannington Police Station whether or not he was under arrest, DSC Chadwick told him he was not. But that does not mean he was not in custody.

121 A person will be relevantly arrested or in custody if police, by words or conduct, have caused him to believe that he would not be allowed to leave and that belief is reasonable in the circumstances. It does not matter that the police do not intend to convey that impression (*R v Amad* [1962] VR 545, 546–547; *R v O'Donoghue* (supra) at 401).

122 As the majority (Brennan, Deane, Toohey and McHugh JJ), explained in *Michaels v The Queen* (1995) 184 CLR 117 at 126, arrest is a situation or continuing act and whether there has been an arrest is a question of fact, not dependent upon the legality of the arrest but on whether the person has been deprived of liberty to go where he or she pleases. The important consideration is whether it has been made clear to the person that he was not free to leave (ibid 127).

...

125 The applicant testified on the voir dire that he was not invited, but told, he was going to Cannington Police Station, having been handcuffed for the whole time he was in the flat, and was taken there with the handcuffs still on. The learned trial Judge obviously disbelieved him about this and other aspects of his evidence. We have not had the opportunity of seeing or hearing the witnesses and clearly much turned on his Honour's assessment of their credibility. An appeal court will be slow to interfere with the decision of a trial Judge in these circumstances (*Rosenberg v Percival* (2001) 178 ALR 577). It cannot be said his Honour was wrong in making the findings of fact that he did. This is particularly so in light of the applicant's evidence that he asked 'all the time' if he was under arrest and the officers told him he was not. In these circumstances it has not been shown that his Honour's conclusion that the applicant voluntarily accompanied the police officers to the Cannington Police Station and there took part in the first VROI was wrong. As King CJ said in *Lavery* (supra) a suspect's liberty is not under restraint simply because the police officers would or might arrest him if he ceased to cooperate. However, with respect, his Honour's obiter comment (at [64]) that even if it be held that the applicant was detained at Cannington Police Station that was not (ie would not have been) unlawful in that he was not detained for the purpose of questioning and was brought before a court in due course when circumstances permitted, cannot be accepted for the reasons I have already given above. But nothing turns on that comment here because his Honour's discretion was not exercised on that basis; it was founded on his finding that the applicant was not in fact detained.

126 At the conclusion of the first VROI the applicant asked if he was under arrest and DSC Chadwick told him he was not. After the interview, DSC Chadwick told the applicant that Victoria Park police wished to speak to him about other matters and there was also a warrant of apprehension out for him. DSC Chadwick testified he told the applicant to wait where he was while he made further inquiries. On any view the applicant was in custody from that point and he was in custody when he was handed over to the Victoria Park police about 2.15 pm. DSC Chadwick had not arrested him in respect of the Burswood offences and could not have done because at that stage the applicant had made no admissions and there was insufficient other evidence against him. He had not been apprehended on the warrant. He was being held in custody solely for the purpose of further questioning by the Victoria Park officers. That custody was unlawful (*Williams*, supra).

127 There was no evidence about the circumstances of the applicant's interview at Victoria Park Police Station other than that at the conclusion of it he was charged with two counts of assault. In the circumstances it is neither possible nor necessary to make any findings about his status or the lawfulness or otherwise of his detention (if he remained in custody, as seems likely) until the conclusion of the Victoria Park interview. What can be said is that at that time his continued detention became lawful.

128 The status of a person may change from time to time. The notion that a detention which is unlawful may become lawful was discussed in *Michaels v The Queen* (supra).

129 At 125, ibid, the majority said that the notion is to be found in *R v Banner* (supra). In that case the appellant had been arrested without reasonable cause but, whilst in custody, gave the police information which justified his arrest on the ground that there was then cause to suspect him of having committed a felony. The Full Court in *Banner* (ibid 249) pointed out that when the appellant made a confessional statement, the legal situation had changed:

> The police then had reasonable and probable cause for suspecting that the applicant had committed a felony. They, therefore, would have been entitled, had he been at large, to arrest and detain him. And as he was already in custody, though until then unlawfully, they became lawfully entitled to detain him.

130 In *Michaels* the appellant had been arrested pursuant to s 210 of the Customs Act 1901 (Cth) and was subsequently detained at the Australian Federal Police headquarters for approximately 1½ hours before he was interviewed. He made certain admissions during the interview, after which the police told him he would be charged and they thereafter made the necessary arrangements for him to be brought before a Magistrate. A little later he escaped by smashing a window in the police interview room and was charged with escaping from lawful custody. He contended that because of the delays in bringing him before a Magistrate and because he was detained by police for the purpose of questioning, his detention was unlawful at the time of his escape and therefore he could not be convicted of the offence charged. As to this, the majority said (ibid 126):

> In the case of the present appellant, there came a time when questioning rendered his detention unlawful. That detention could become lawful so that an escape would be an offence if the officers concerned then formed an intention to take the appellant before a justice without undue delay and he understood that he was under arrest for that purpose.
>
> … the important consideration is whether it was made clear to the appellant that he was not free to leave because he was to be brought before the court.

131 The majority found there was no doubt that he was, and understood he was, in lawful custody at that time.

132 Once the present applicant was arrested by the Victoria Park officers, he was taken to the East Perth lock-up where he was charged with the assault offences and apprehended on the outstanding warrant. He was then placed in custody in the lock-up pending his appearance before a Magistrate the following morning.

133 DSC Chadwick and DC Kelly attended the lock-up at approximately 6 pm. As I have observed, the applicant was then in lawful custody. That was no impediment to them conducting a further interview with him, provided he took part in that voluntarily (*Williams*, supra, 285). There is no question of unlawful detention in respect of the second VROI. Nor, as can now be seen from the foregoing analysis, does any question of his unlawful detention arise in respect of the first VROI.

134 Paragraph 1 cannot succeed.

[The judge then dealt with other grounds of appeal relating to the VROI. **Wallwork J** and Pidgeon Aux J agreed that the appeal should be dismissed.]

25.70C O'Hara v Chief Constable of the RUC

[1997] AC 286; [1997] 1 All ER 129
House of Lords

Lord Hope of Craighead:

At about 6.15 am on 28 December 1985 police officers entered the appellant's house at 72 Duncreggan Road, Londonderry and conducted a search of the premises. At the conclusion of the search, at about 8.05 am, they arrested the appellant under section 12(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1984. They took him to Castlereagh Police Office, where the police questioned him in a series of interviews. On 29 December 1985 an order was made by the Secretary of State under section 12(4) of the Act of 1984 extending the period of 48 hours provided by that subsection by five days. On 13 January 1986 the appellant was released without being charged either then or subsequently with any offence. Later that year he brought an action of damages against the respondent for various tortious acts said to have been committed against him by the police officers, including wrongful arrest, assault and unlawful confiscation of documents.

On 14 September 1990, following a trial which took place on 16 and 17 January 1989, the learned trial judge, McCollum J, in a reserved judgment dismissed all the appellant's claims except his claim for the unlawful confiscation of documents. He ordered the documents to be returned to the appellant and that a sum of £100 be paid to him as compensation for their confiscation. He was not satisfied on balance of probabilities that the appellant had been assaulted during his detention at Castlereagh Police Office. No appeal has been taken against his decision on either of these points. In regard to the claim for wrongful arrest, the trial judge held that the appellant's arrest had been lawful. This was because he was satisfied on the evidence of Detective Constable Stewart, who was the arresting officer, that he was entitled to arrest the appellant without warrant under section 12(1)(b) of the Act of 1984 because he had reasonable grounds for suspecting the appellant to be a person who had been concerned in the commission, preparation or instigation of acts of terrorism. On 6 May 1994 the Court of Appeal (Kelly LJ, Pringle and Higgins JJ) (unreported) upheld the decision of the trial judge and dismissed the appeal. The appellant has now appealed with leave to this House.

The Prevention of Terrorism (Temporary Provisions) Act 1984 expired on 21 March 1989 and has been replaced by the Prevention of Terrorism (Temporary Provisions) Act 1989. Section 12(1) of the 1984 Act — see now section 14(1) of the Act of 1989 — is in these terms:

> Subject to subsection (2) below, a constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be —
> (a) a person guilty of an offence under section 1, 9 or 10 above;
> (b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this Part of this Act applies;
> (c) a person subject to an exclusion order.

Detective Constable Stewart said in his evidence that at 5.30 am on 28 December 1985 he attended a briefing at Strand Road Police Station. The purpose of the briefing was to mount an operation to search houses and to arrest a number of people in connection with the murder of Mr Kurt Koenig about two months previously. It was common ground that the murder of Kurt Koenig, which had been committed in Londonderry in November 1985, was an act of terrorism within the meaning of section 12(1) of the Act of 1984. The briefing was conducted by Inspector Brown and it was attended by a number of other police officers. The purpose of the search was to look for weapons or other evidence. Detective Constable Stewart went with a search party to 72 Duncreggan Road to carry out a search there, to arrest the appellant and to convey him to Castlereagh Police Office. He said that his reasonable grounds for suspecting that the appellant was involved in the murder were based on the briefing which he had received, in the course of which he was told that the appellant had been involved in the murder and was also told to arrest him. When he arrested the appellant under section 12(1)(b) of the Act of 1984 he told him that he suspected him of having been concerned in the commission, preparation or instigation of acts of terrorism. In cross-examination he said that he had no other basis for the suspicion apart from what he had been told at the briefing, and that he did not specify any particular offence when he was arresting the appellant. Neither party sought to elicit from him the details of the information which the briefing officer had disclosed to him and the briefing officer, Inspector Brown, did not give evidence.

The learned trial judge noted that the burden of proving that the arrest was lawful was on the respondent. He found on the evidence that burden had been satisfied, for the reasons expressed in the following passage of his judgment:

> I would not wish to lay down the proposition that reasonable suspicion could in all circumstances be based on the opinion of another officer expressed without any supporting allegations of fact. But it does seem to me that a briefing officially given by a superior officer would give reasonable grounds for suspicion of the matters stated therein. The fact that I have such scanty evidence of the matters disclosed to Detective Constable Stewart means that I am only just satisfied of the legality of the arrest, but I am fortified in my view by the lack of detailed challenge in cross-examination as to the nature of the information given to him.

The judgment of the Court of Appeal was delivered by Kelly LJ, who said that, although the information given at the briefing to the arresting officer was 'scanty', to use the words of the learned trial judge, it was sufficient to constitute the required state of mind of an arresting officer under section 12(1)(b) of the Act of 1984.

My Lords, it is important to observe that the position of the arresting officer was not simply that he had been told to arrest the appellant. Nor was it that he had simply been told that the appellant had been concerned in the commission, preparation or instigation of acts of terrorism. His position, as stated by him in evidence, was that he suspected the appellant of having been concerned in such acts, and that his suspicion was based on the briefing

which had been given to him by his superior officer. The trial judge accepted the arresting officer's evidence on both points. The question is whether he was entitled also to hold that the arresting officer had reasonable grounds for this suspicion, as the only evidence about these grounds was what the arresting officer himself said about them in the witness box.

The appellant maintains that section 12(1)(b) requires proof not only that the arresting officer had the suspicion which that subsection requires but also that the reasonable grounds on which he based his suspicion existed in fact. It is said that, in order to prove that the alleged grounds were reasonable in the objective sense, the respondent must prove that reasonable grounds for the suspicion did exist, not only that the arresting officer had knowledge of them at the time of the arrest. As he developed these arguments, however, Mr Kennedy accepted that it was not necessary for a prima facie case to be established, nor was it necessary for the evidence about the grounds for the suspicion to disclose the sources of that evidence. He accepted that the police were entitled to proceed upon hearsay evidence, and that evidence which could give rise to a reasonable suspicion might turn out later to be wrong. But he said that it was necessary nevertheless for the court to be given some evidence, in addition to that of the arresting officer, to enable it to hold that reasonable grounds existed. The objective test required proof of something more than what was in the mind of the arresting officer.

…

My Lords, the test which section 12(1) of the Act of 1984 has laid down is a simple but practical one. It relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism. In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.

This means that the point does not depend on whether the arresting officer himself thought at that time that they were reasonable. The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer. It is the arresting officer's own account of the information which he had which matters, not what was observed by or known to anyone else. The information acted on by the arresting officer need not be based on his own observations, as he is entitled to form a suspicion based on what he has been told. His reasonable suspicion may be based on information which has been given to him anonymously or it may be based on information, perhaps in the course of an emergency, which turns out later to be wrong. As it is the information which is in his mind alone which is relevant however, it is not necessary to go on to prove what was known to his informant or that any facts on which he based his suspicion were in fact true. The question whether it provided reasonable grounds for the suspicion depends on the source of his information and its context, seen in the light of the whole surrounding circumstances …

Copland v McPherson 1970 SLT 87 shows how the question whether the constable had reasonable cause to suspect may arise in a case where the exercise of the power is the result of cooperation between several police officers. The respondent in that case was driving along a road when he was stopped by two plain clothes police officers. They noticed a smell of alcohol on his breath, so they sent for uniformed police officers and breath sampling equipment for the carrying out of a roadside breath test. The respondent refused to provide a sample of his

breath when he was required to do so by the uniformed officers. He was removed to a police station where he again refused to provide a breath sample. He was charged with offences under section 2(3) of the Road Safety Act 1967. He was acquitted by the sheriff on the ground that the uniformed police officers had not seen the respondent driving or attempting to drive before they required him to submit to the breath test. On appeal by the prosecutor it was held that the uniformed police officers had reasonable cause to suspect the respondent of having alcohol in his body and that, as it was conceded that the respondent at the time was a person who came within the category of 'a person driving … a motor vehicle', they were acting within their powers when they required the respondent to provide a sample of his breath. Lord Cameron, at p 90, rejected the respondent's contention that reasonable cause could not exist in any case in which the uniformed police officers did not themselves see the person suspected himself driving or attempting to drive the motor car. He pointed out that to hold otherwise would involve that a uniformed constable could never act in such a case on information received, however compelling and reliable in quality and source. He went on to say this:

> The issue then becomes purely one of fact: the findings in the case, in my opinion, clearly support the conclusion that the uniformed police officers who were called to the scene at the request of their plain clothes colleagues had such reasonable cause. No doubt the 'reasonable cause' must have arisen in the mind of the officer before he makes the statutory request of a person in the necessary category but when, as here, uniformed officers are called on by plain clothes colleagues to attend on a driver whose conduct has led to such a call and for so obvious reason as is found in this case, I think that in such circumstances the uniformed officers have in fact very reasonable cause for suspicion that the driver has alcohol in his body.

Many other examples may be cited of cases where the action of the constable who exercises a statutory power of arrest or of search is a member of a team of police officers, or where his action is the culmination of various steps taken by other police officers, perhaps over a long period and perhaps also involving officers from other police forces. For obvious practical reasons police officers must be able to rely upon each other in taking decisions as to whom to arrest or where to search and in what circumstances. The statutory power does not require that the constable who exercises the power must be in possession of all the information which has led to a decision, perhaps taken by others, that the time has come for it to be exercised. What it does require is that the constable who exercises the power must first have equipped himself with sufficient information so that he has reasonable cause to suspect before the power is exercised.

…

My Lords, in this case the evidence about the matters which were disclosed at the briefing session to the arresting officer was indeed scanty. But, as Mr Coghlin pointed out, the trial judge was entitled to weigh up that evidence in the light of the surrounding circumstances and, having regard to the source of that information, to draw inferences as to what a reasonable man, in the position of the independent observer, would make of it. I do not think that either the trial judge or the Court of Appeal misdirected themselves as to the test to be applied. I would dismiss this appeal.

Lord Steyn:

… The appeal can be decided on narrow grounds. The arrest was prima facie unlawful. At trial the respondent sought to justify the arrest under section 12(1) of the Prevention of Terrorism (Temporary Provisions) Act 1984 …

… The trial judge described the evidence as scanty. But he inferred that the briefing afforded reasonable grounds for the necessary suspicion. In other words the judge inferred that some further details must have been given in the briefing. The legal burden was on the respondent to prove the existence of reasonable grounds for suspicion. Nevertheless I am persuaded that the judge was entitled on the sparse materials before him to infer the existence of reasonable grounds for suspicion. On this basis the Court of Appeal was entitled to dismiss the appeal. That means that the appeal before your Lordships House must also fail on narrow and purely factual grounds.

Plainly, leave to appeal was granted by the Appeal Committee because it was thought that the appeal raised an issue of general public importance … during his oral submissions Mr Coghlin QC on behalf of the respondent raised an issue of principle. He submitted that the order to arrest given by the superior officer to the arresting officer in this case was by itself sufficient to afford the constable a reasonable suspicion within the meaning of section 12(1). This point is of continuing relevance in relation to the Prevention of Terrorism (Temporary Provisions) Act 1989 which contains a provision in identical terms to section 12(1)(b) of the Act of 1984. But the point is also of wider importance. In the past many statutes have vested powers in constables to arrest where the constable suspects on reasonable grounds that a person has committed an offence or is committing an offence … Moreover, the point is of considerable practical importance since orders to arrest are no doubt routinely given by superior officers to constables …

…

Certain general propositions about the powers of constables under a section such as section 12(1) can now be summarised. (1) In order to have a reasonable suspicion the constable need not have evidence amounting to a prima facie case. Ex hypothesi one is considering a preliminary stage of the investigation and information from an informer or a tip-off from a member of the public may be enough: *Hussien v Chong Fook Kam* [1970] AC 942, 949. (2) Hearsay information may therefore afford a constable a reasonable grounds to arrest. Such information may come from other officers: *Hussien's* case, ibid. (3) The information which causes the constable to be suspicious of the individual must be in existence to the knowledge of the police officer at the time he makes the arrest. (4) The executive 'discretion' to arrest or not as Lord Diplock described it in *Mohammed-Holgate v Duke* [1984] AC 437, 446, vests in the constable, who is engaged on the decision to arrest or not, and not in his superior officers.

Given the independent responsibility and accountability of a constable under a provision such as section 12(1) of the Act of 1984 it seems to follow that the mere fact that an arresting officer has been instructed by a superior officer to effect the arrest is not capable of amounting to reasonable grounds for the necessary suspicion within the meaning of section 12(1). It is accepted, and rightly accepted, that a mere request to arrest without any further information by an equal ranking officer, or a junior officer, is incapable of amounting to reasonable grounds for the necessary suspicion. How can the badge of the superior officer, and the fact that he gave an order, make a difference? In respect of a statute vesting an independent discretion in the particular constable, and requiring him personally to have reasonable grounds for suspicion, it would be surprising if seniority made a difference. It would be contrary to the principle underlying section 12(1) which makes a constable individually responsible for the arrest and accountable in law. In *Reg v Chief Constable of Devon and Cornwall, Ex parte Central Electricity Generating Board* [1982] QB 458, 474 Lawton LJ touched on this point. He observed:

> [chief constables] cannot give an officer under command an order to do acts which can only lawfully be done if the officer himself with reasonable cause suspects that a breach of the peace has occurred or is imminently likely to occur or an arrestable offence has been committed.

Such an order to arrest cannot without some further information being given to the constable be sufficient to afford the constable reasonable grounds for the necessary suspicion. That seems to me to be the legal position in respect of a provision such as section 12(1). For these reasons I regard the submission of counsel for the respondent as unsound in law. In practice it follows that a constable must be given some basis for a request to arrest somebody under a provision such as section 12(1), eg a report from an informer.

Subject to these observations, I agree that the appeal ought to be dismissed.

[Lords Goff of Chieveley, Mustill and **Hoffmann** agreed with **Lord Hope of Craighead** and **Lord Steyn.**]

Note

25.71 The principles outlined in *O'Hara* are applicable in Queensland. In Western Australia, however, a police officer may delegate the performance of a power to another officer: CI Act (WA) s 12. In *Cotchilli v The State of Western Australia* [2008] WASC 103, McKechnie J discussed how the law of Western Australia differs from the principles outlined in *O'Hara*:

> 22 The accused, through counsel, challenges the arrest or detention in two ways. First, it is submitted that Detective Sergeant Doyle relevantly had no reasonable suspicion. Next, it is submitted that he did not ensure that the officer to whom he delegated the power, Ripp, performed the duty. The *Criminal Investigation Act* s 12 provides:
>
> (1) An officer may delegate the performance of a power of the officer under the Act, other than this power of delegation, to another officer.
>
> (2) If an officer delegates the performance of a duty imposed on the officer by this Act to another officer, he or she must ensure the other officer performs the duty.
>
> 23 I deal first with reasonable suspicion. In the course of his evidence-in-chief the following occurs between the examiner and Detective Sergeant Doyle:
>
> And also on the video that we have just seen you indicated there in your questioning of the accused, 'I've received your name, okay, I've got the name of a girl, and then later we've spoken to a couple of your friends, okay, and they've told us about something that's happened.' Are you able to tell the court how you came to be aware of Mr Cotchilli's connection with some sex offences with this particular complainant, Natalia Timms? — I can't recall exactly. It would have been through speaking with other I suppose persons of interest or witnesses. It would have been communicated to me at some point in time. (ts 49)
>
> 24 What may constitute reasonable grounds for suspicion was the subject of a decision in *O'Hara v Chief Constable of Royal Ulster Constabulary* [1996] UKHL 6; (1997) 1 All ER 129. This case can be accepted as laying down the principle subject to one important

qualification. *The Prevention of Terrorism Temporary Provisions Act* of 1984 and 1989 under consideration in that case did not contain the delegation power similar to that in the *Criminal Investigation Act*, s 12 …

…

26 Extrapolating the principles set out to the position under the *Criminal Investigation Act*, a reasonable suspicion must be personally in the mind of the delagor — in this case Doyle. The general words of s 12 allow an officer who holds a reasonable suspicion to delegate the power of arrest to another officer who may not hold any suspicion. This is the essential difference with the United Kingdom. So it is in this case that the focus of attention must be in Doyle's belief, not Ripp's ….

Questioning and Confessions

CHAPTER 26

THE RIGHT TO QUESTION AND THE RIGHT TO SILENCE

26.1 There is no need for any special legal power to ask questions in the course of a criminal investigation. Any person is at liberty to ask a question of another person. This general liberty can be used by police officers who are investigating offences to ask questions of anyone who may be able to provide evidence, including a suspect who may provide a confession or make an incriminating admission: see 24.3.

The general liberty to ask questions is, however, matched by a general liberty to refuse to answer. The common law has long recognised a right to remain silent.

- This right has also been given statutory affirmation in the Police Powers and Responsibilities Act 2000 (Qld) (PPR Act (Qld)) s 397 and the Crimes Act 1914 (Cth) (Crimes Act (Cth)) s 23S(a). There is a reciprocal duty under the Police Responsibilities Code (Qld) s 35(3), which requires an officer to cease questioning a person who has confirmed a wish not to answer questions.
- The Criminal Investigation Act 2006 (WA) (CI Act (WA)) does not deal with these general liberties beyond acknowledging that a police officer may exercise powers in common with any citizen: s 8.

26.2 Because there is a right to remain silent, there is no duty to assist police by providing information. See *Rice v Connolly* [1966] 2 QB 414; [1966] 2 All ER 649 at 652, where Parker LCJ said:

> It seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is that right of the individual to refuse to answer questions put to him by persons in authority.

Nevertheless, like any right which is not constitutionally entrenched, the right to silence can be limited by statute. There are various statutory powers that require specific information to be provided. Statutory exceptions relating to the provision of identification are discussed at 24.19–24.21.

26.3 Of course, the right to silence would be weakened if its exercise could later be the subject of adverse comment at trial. The common law has protected the right to silence with

a rule prohibiting the drawing of any adverse inference at trial against an accused who has declined to answer questions.

26.4 The general principles respecting the right to silence and the prohibition on drawing adverse inferences were forcefully stated by Mason CJ, Deane, Toohey and McHugh JJ in *Petty & Maiden v R* (1991) 173 CLR 95; 102 ALR 129 at 131:

> A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the commission of an offence, the identity of the participants and the roles they played. This is a fundamental rule of the common law which, subject to some specific statutory modifications, is applied in the administration of the criminal law in this country. An incident of that right to silence is that no adverse inference can be drawn against an accused by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right to silence or to render it valueless.

26.5 Kirby J articulated some of the considerations underlying the right to silence in his judgment in *R v Swaffield* (1998) 192 CLR 159; 151 ALR 98 at 26.82C:

> There are many reasons, consistent with innocence, why a person might wish to remain silent when confronted by police investigating a crime. They may be shocked by the accusation and suspicion of their involvement. They may be upset or confused. They may want to protect someone else or themselves from embarrassing, but not necessarily unlawful, facts. They may lack the ability to articulate a defence or explanation for their actions. They may just be suspicious of police officers and other officials of the state. They may have been so advised by lawyers or others.

One theme underlying these observations is the potential unreliability of statements dragged from vulnerable suspects by police questioning. Another theme is a person's interest in privacy, that is, in being let alone and in being free to pursue a course of action without scrutiny and public exposure. Privacy has also been identified as one of the key interests underlying the more general privilege against self-incrimination: see *Environmental Protection Authority v Caltex Refining Co Ltd* (1993) 178 CLR 477, 499–500, 545–6; 118 ALR 392. The right to silence is seen as part of this more general privilege.

PROBLEMS WITH CONFESSIONAL EVIDENCE

26.6 Despite the limitations on police investigative powers, evidence is often presented at a trial of a confession or other incriminating statement of the accused person. Even if a full confession has not been made, there may be evidence of an incriminating admission, such as an admission of presence at the scene of a crime or participation in some aspect of it. There could also be a statement that is alleged to indicate guilt even though involvement in the crime is denied, such as a statement showing knowledge that only the perpetrator of the crime could have: see, for example, *Mallard v R* [2005] HCA 68; (2005) CLR 125 at 30.37C. The term 'confessional evidence' is used in this chapter to cover these kinds of incriminating statements.

26.7 Such evidence can be decisive, even if the accused claims that the statement was never made or that it was untrue. However, there are a number of problems with confessional evidence with which the courts have been concerned:

1. A statement may have been fabricated, particularly an alleged oral confession.
2. A statement may be unreliable. Even though the statement may have been made, the circumstances of its making may put the truth of its contents in doubt. For example, it may have been elicited by techniques of interrogation which may have led an innocent person to falsely confess.
3. A statement may have been obtained in a way that violated the procedural rights of the suspect. Some procedural improprieties will affect the reliability of the statement and will be handled through the mechanisms for dealing with the problem of unreliability. In other instances, however, the impropriety will not make the statement unreliable; for example, a confession may be elicited by quite proper techniques of questioning but the suspect may be illegally detained at the time when the questioning occurs.

Particular concern has been expressed about evidence of confessions and admissions made in custody. A custodial setting may facilitate fabrication of a statement. In addition, a person who is held in custody may be disoriented or frightened and, therefore, more likely to make an untrue statement.

26.8 Concerns about the fabrication of confessional evidence led to the decision of the majority of the High Court in *McKinney v R* (1991) 171 CLR 468; 98 ALR 577. It was ruled (at 476) that, in a case where the making of a confessional statement by a person in custody has been disputed and has not been reliably corroborated, the jury should be warned to give careful consideration to the dangers of convicting on the basis of that statement. This ruling only applied to alleged confessional statements made by a person in custody, but the underlying principle could justify a warning wherever the alleged statement was made.

It was suggested in *McKinney* that a signature would not always be reliable corroboration and that an audiovisual recording of the making of the confession would be preferable. It was also noted that there could be independent corroboration.

26.9 The decision in *McKinney* gave impetus to the practice of making audiovisual recordings of interviews with suspects, already becoming common at that time. From the standpoint of the police, recording has two attractions. It can establish that a confession or admission was actually made. It can also forestall any challenge to the reliability of the statement by showing the demeanour of the suspect and the manner in which the interrogation was conducted.

Recording interviews with suspects is now standard practice throughout Australia. Moreover, an audio or video recording has been made a statutory requirement for the admissibility of a confession or admission unless the case falls within certain exceptions: see PPR Act (Qld) ss 436–439; CI Act (WA) Pt 11; Crimes Act (Cth) s 23V.

26.10 The recording of interviews has largely eliminated the problem of fabrication. Although the problem of unreliability has not been eliminated, it has been alleviated. A lingering concern is the impact of what might have happened or been said before the recording commenced.

- The PPR Act (Qld) s 436(4) requires the recording of a confession or admission to be part of a recording of the entire questioning of the suspect.
- In *Pelham v R* (1995) 82 A Crim R 455, the Court of Criminal Appeal (WA) stressed that the whole of an interview should be recorded. In a serious case, an admission is inadmissible unless recorded (subject to certain exceptions): CI Act (WA) s 118.

EXCLUSION OF CONFESSIONAL EVIDENCE

26.11 In Queensland and Western Australia, there are four main bases on which evidence of an incriminating statement can be excluded at trial:

1. on the ground that it was unrecorded;
2. on the ground that it was involuntary;
3. on the ground that it might be unreliable so that its admission would be unfair to the accused; and
4. on the ground that procedural improprieties mean that its admission would be unfair to the accused and/or contrary to public policy.

The issue of exclusion is usually examined in the absence of the jury, in a pre-trial proceeding or a 'voir dire' within the trial.

Unrecorded admissions

26.12 To be admissible, confessions and admissions must generally be recorded. Unrecorded confessions and admissions will be inadmissible unless the prosecution establishes one of a restricted number of excuses for non-recording: PPR Act (Qld) ss 436–439; CI Act (WA) s 118; Crimes Act (Cth) s 23V.

Usually, the suspect will know that a recording is being made but this will not always be the case. In *Carr v The State of Western Australia* [2007] HCA 47; 232 CLR 138; 239 ALR 415 a suspect was apparently unaware that a camera and microphones were operating in a police lockup when he made a number of admissions. The High Court rejected an argument that a requirement for consent to a recording could be implied in the relevant legislative scheme (now superseded by that of the CI Act (WA)) pertaining to the recording of admissions. It is also unlikely that such an implication would be read into any other legislative schemes respecting recording.

26.13 In Queensland, admissions must be electronically recorded if practicable (PPR Act (Qld) s 436(2)) and the whole of the questions and answers must be recorded: PPR Act (Qld) s 436(4). Unrecorded admissions are generally inadmissible: PPR Act (Qld) s 436(3). However, when electronic recording was not practicable, a written statement may be admissible if the written record has been read to the suspect and there is an electronic recording of the reading and of anything said by or to the suspect: PPR Act (Qld) s 437; Police Responsibilities Code (Qld) s 42.

The requirement to record an admission arises when a police officer questions a 'relevant person' about an indictable offence: PPR Act (Qld) ss 414–415. Someone is a 'relevant person' 'if the person is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an indictable offence': s 415(1). There is no need for the person to be in custody or under arrest: *R v Smith* [2003] QCA 76; 138 A Crim R 172 at **26.80C**. The width of the requirement is narrowed by the exclusion of situations in which the officer is exercising a statutory power to detain and search or to require information to be provided: s 415(2).

There is a residual discretion to admit a confession despite lack of compliance by police if the court is satisfied that, in the special circumstances of the case, admission of the evidence would be in the interests of justice: PPR Act (Qld) s 439. The reason for the lack of recording

is a factor to be considered in the exercise of the discretion, but other relevant matters may also be considered: s 439(2).

26.14 In Western Australia, an admission in respect of a serious offence that has not been recorded audiovisually will be inadmissible unless the prosecution establishes on the balance of probabilities that there is a reasonable excuse for non-recording: CI Act (WA) s 118. A serious offence in the case of a child suspect is an indictable offence. In the case of an adult suspect, a serious offence is an indictable offence not capable of being tried summarily: s 118(2). The exclusionary scheme does not apply to admissions made before there were reasonable grounds to suspect that the person had committed the offence: s 118(4).

A court has a residual discretion to admit evidence of a confession if it is satisfied the desirability of admitting the evidence outweighs the undesirability of admitting the evidence: CI Act (WA) s 155. In *T v R* (1998) 20 WAR 130, Ipp J considered that, if a statement was made in fair circumstances and with nothing to suggest the statement might be false, these would constitute 'exceptional circumstances'. However, under s 155 a different standard, arguably one more favourable to the prosecution, now applies. In *Wright v The State of Western Australia* [2010] WASCA 199; 203 A Crim R 339 **(26.81C)** police attended at a house to arrest the accused who explained to his cousin why the police wanted him. The admissions made were allowed to be given as it was not reasonably practicable to record them.

26.15 For Commonwealth offences, the Crimes Act (Cth) s 23V governs the admissibility of a confession or admission by someone who was being questioned as a suspect.

Generally, the statement must have been tape-recorded where this was reasonably practicable: s 23V(1)(a). Even where tape-recording was not reasonably practicable, a tape-recording must be made of a subsequent reading of the alleged statement to the suspect and of anything said by the suspect at that time: s 23V(1)(b).

In the event of non-compliance with the statutory regime, the court still has a residual discretion to admit a statement: s 23V(5). The terms of the discretion are similar to those in the states: the court must be satisfied that 'in the special circumstances of the case, admission of the evidence would not be contrary to the interests of justice'.

Involuntary confessions and admissions

26.16 It has long been established at common law that a confession or other incriminating admission must be 'voluntary' if it is to be admitted as evidence at trial. This applies only to the statement itself, not to any real evidence discovered as a result.

The precise scope of this ground for exclusion has been subject to debate. It has been differently expressed by different courts. As formulated by the High Court in *Tofilau v R* [2007] HCA 39; 231 CLR 396; 238 ALR 650 **(26.83C)**, two categories of exclusion are involved:

1. There is a narrow rule excluding incriminating admissions induced by a threat or promise held out by a person in authority. Some of the judges in *Tofilau* called this 'the inducement rule'. In *Tofilau*, the majority of the court agreed that, for the purposes of this rule, a 'person in authority' must be someone perceived to be wielding the coercive power of the state. Hence, the rule does not apply to the actions of police officers working undercover.
2. There is a wider principle or rule (different judges have used different terminology) of 'basal involuntariness'. This requires the exclusion of any incriminating admission

which is involuntary in the sense that it was not made in the exercise of the person's free choice of whether to speak or stay silent. See also *R v Lee* (1950) 82 CLR 133 at 149; ALR 517, cited in *Foster v R* (1993) 113 ALR 1 (22.28C); *Swaffield* at 26.82C. This wider principle could encompass cases of intimidation and undue pressure as well as threats and promises.

26.17 Reliability is the principal concern in relation to voluntariness. This is, however, addressed with respect to the risks of types of behaviours and situations rather than with respect to the particular case. It was also noted in *Tofilau* that the voluntariness rules may reflect additional rationales such as concern about the propriety of police conduct.

26.18 Queensland has enacted two statutory versions of the narrower voluntariness rule. The Criminal Law Amendment Act 1894 (Qld) s 10 reads as follows:

> No confession which is tendered in evidence on any criminal proceeding shall be received which has been induced by any threat or promise by some person in authority, and every confession made after any such threat or promise shall be deemed to have been induced thereby unless the contrary is shown.

This rule is now also reflected in the PPR Act (Qld) s 416 which states: 'A police officer who is questioning a relevant person must not obtain a confession by threat or promise.'

Curiously, the Queensland courts have held that the Criminal Law Amendment Act 1894 s 10 did not displace the common law. The common law and statutory rules coexist and an accused can rely on either of them: *Walbank v R* [1996] 1 Qd R 78; *R v Kassulke* [2004] QCA 175 at [14]–[15]. Presumably, the courts have recognised coexistence in order that the development of the voluntariness rules should not be stultified by the wording of the statutory provisions.

26.19 Prior to *Tofilau*, the development of principles and rules on voluntariness appeared neglected, the courts having become more interested in exploring the dimensions of the discretion to exclude evidence on grounds of fairness to the accused. This discretion has occupied some of the ground which might otherwise have been covered by exclusion on grounds of involuntariness. See, for example, the fleeting acknowledgements of the rule relating to involuntary confessions in *Foster* (22.28C); see also the comments of Fitzgerald P in *Davidson* (1996) 92 A Crim R 1 at 15. *Tofilau* may stimulate a reversal of this trend and cause courts to focus again on the voluntariness of a confession or admission.

26.20 A point of distinction between voluntariness rules and the discretion to exclude evidence on grounds of fairness concerns the burden of proof. The evidentiary burden lies on the accused to point to some evidence putting the voluntariness of the confession in issue. The prosecution then assumes the burden to prove, on a balance of probabilities, that the confession was voluntary. This burden on the prosecution has no equivalent in relation to the other grounds for excluding confessional evidence. Once a confession has been held or assumed to be voluntary, the accused carries the burden of persuading a judge to exercise discretion to exclude the confession.

26.21 Another distinction between the voluntariness rules and the discretionary power can be drawn on the ground that the former are mandatory in application. This means that where a confession is held to be involuntary, it must be excluded. In contrast, the response

to unfairness has traditionally been viewed as a matter for the discretion of the court. The court can consider whether, in light of all the circumstances, the evidence should be admitted despite any unfairness. The use of the term 'discretion' might, however, be misleading where unfairness arises because a confession was unreliable. It was suggested in *Swaffield* (26.82C) that an unreliable confession should never be admitted in evidence.

'Unfairness' and 'public policy'

26.22 Australian common law has long recognised the existence of a judicial discretion to exclude evidence of a confession or admission on the ground that it would be unfair to use it against the accused: see 22.14–22.20. The traditional uses of the discretion included cases where the statement was voluntary but its reliability was still in question. The discretion has become increasingly important in recent years as courts have focused attention on unreliability and other problems with confessional evidence. In part this has been due to the increase in recorded confessions in all Australian jurisdictions and a corresponding decrease in challenges to the voluntariness of a confession.

Like the unfairness discretion, the public policy discretion has become increasingly important in recent years: *Foster* (22.28C); *Ridgeway v R* (1995) 184 CLR 19; 129 ALR 41 at 23.40C. The discretion can be invoked in relation to any type of evidence, including evidence of a confession or admission.

- Queensland and the Commonwealth both still rely on the common law to deal with the discretionary exclusion of confessions and admissions.
- In Western Australia, the matter is now largely governed by a statutory provision. The CI Act (WA) s 155 allows a court to admit evidence obtained in violation of the Act if the desirability of admitting the evidence outweighs the undesirability of admitting the evidence. A number of factors to be taken into account are listed: see 22.15. In *Wright* (26.81C) the court concluded that an interview and the DVD upon which it was recorded were each a 'thing' relevant to an offence under s 154. McLure P (Buss JA agreeing) left open the question whether voluntariness now fell to be decided under s 155. Blaxell J thought that it was encompassed within s 155.

26.23 In *Foster* (22.28C), the confession was challenged on several grounds: not only that it would be unfair to admit it, but also that it had been involuntary and that its admission would be contrary to public policy. The High Court indicated attraction for all three arguments, but chose the unfairness discretion as the centrepiece of its judgment.

The High Court suggested in *Foster* that, where voluntariness and unfairness are both in issue, the trial judge should usually deal first with the question of voluntariness but that the inquiry could start with unfairness if the evidence on that issue is simpler.

26.24 Fairness is still invoked mainly to deal with problems of unreliability in confessional evidence, excluding the issue of threats and inducements that are traditional concerns of the 'voluntariness rule'. Some problematic forms of interrogation are discussed below, at 26.50–26.53.

There has been some disagreement within the judiciary about how far, if at all, fairness can be used to exclude confessional evidence on grounds other than its probative value. Some judges have favoured the view that, when a reliable confession has been obtained by improper means, its admissibility should be determined by reference to public policy rather than fairness.

Other judges have preferred the view that, under some circumstances, it can be unfair to use a reliable confession against an accused as well as contrary to public policy.

26.25 The decision in *Foster* (22.28C) appeared to confirm that unreliability is not the sole test of unfairness. The confession in *Foster* was judged to be unreliable, yet the conclusion that it would be unfair to use the confession also rested on the unlawfulness of the appellant's original detention by the police. The infringement of the appellant's procedural rights appears to have been treated as a factor which, by itself, made the use of the resulting confession against him unfair.

This broader view of unfairness was eventually adopted expressly by a majority of the High Court in *Swaffield* (26.82C). That decision concerned the covert recording of confessional statements by undercover operatives. There was no question about the reliability of the statements in issue but their admission had been challenged on the ground of fairness. The majority of the High Court took the view that the right to silence would be violated if a confessional statement did not occur in natural conversation but, instead, was actively elicited. The reliability of the statement would not ensure its admissibility. Unfairness justifying exclusion could arise because of breach of 'procedural rights'. It was said: 'Unreliability is an important aspect of the unfairness discretion but it is not exclusive.' See further the discussion at 26.67–26.76.

26.26 As noted in Chapter 22 (see 22.18), the organisation of the common law discretions was reviewed in *Swaffield*. The majority of the High Court suggested that, instead of having one discretion for issues of fairness and another for issues of public policy, the better division would be between a discretion to deal with problems of reliability and an 'overall discretion' to deal with other problems of both fairness and public policy. As also noted in Chapter 22, subsequent decisions of state courts of appeal have generally interpreted *Swaffield* as simply reorganising the common law discretions, without reducing the scope to exclude evidence on grounds of fairness. Accordingly, confessional evidence can be excluded on grounds of fairness independently of issues of reliability. See the statements about the discretion in *R v Lobban* [2000] SASC 48 at [45], [51]–[58]; (2000) 77 SASR 24; *R v Juric* [2002] VSCA 77; 4 VR 411 at [50]; (2002) 4 VR 411; *R v Batchelor* [2003] QCA 246 at [12]; *R v Thomas* [2006] VSCA 165 at [103]; (2006) 24 VR 475; *R v Belford & Bound* [2011] QCA 43 at [62] (reasoning endorsed at [87], [131]). See also *Tofilau* (26.83C) at [399], where the organisation of the discretions was left as an open question.

In Western Australia, the CI Act (WA) s 155 establishes a single discretion in terms sufficiently broad to allow considerations of both fairness and public policy to be taken into account. Unlike the common law discretion to exclude evidence, however, s 154 renders evidence obtained improperly in breach of the CI Act (WA) inadmissible unless a court decides to admit the evidence under s 155.

26.27 Does it make any practical difference whether the question to exclude a reliable confession obtained in violation of a suspect's rights is considered in relation to issues of fairness or public policy? The answer depends on whether the criteria for the exercise of the two discretions differ. In particular, the answer turns on whether a confession which has been obtained improperly may nevertheless be admitted because of the seriousness of the offence in issue. Under the 'public policy' discretion, it is clear that the seriousness of the offence is to be weighed in the balance: *Ridgeway v R* (1995) 184 CLR 19; 129 ALR 41 (23.40C), discussed in 22.19. The answer is not as clear-cut where the issue is fairness.

26.28 The view expressed by Fitzgerald P in *Davidson & Moyle* [1996] 2 Qd R 505 at 507, was that 'the nature of the offence is immaterial to the unfairness discretion'. This may well be true where the reliability of a confession is in issue. In the majority judgment of Toohey, Gaudron and Gummow JJ in *Swaffield* (26.82C), it was said to be hard to understand why the likelihood of a confession being unreliable should not mandate its exclusion. However, it is questionable whether the seriousness of the offence can be dismissed in cases where the only issue is the violation of an accused's procedural rights. It was earlier argued that, in such cases, any unfairness for the accused may have to be balanced against the seriousness of the offence: see 22.20.

- In Queensland and the Commonwealth, the issue must be determined as a matter of common law. If issues of fairness and public policy arising from violations of procedural rights are now to be both subsumed within one 'overall discretion' (as suggested by the majority in *Swaffield*), then, presumably, the same general criteria for the exercise of the discretion will apply. The seriousness of the offence can, therefore, be taken into account even if the issue of admissibility is framed in terms of unfairness. It is only where an allegation of unfairness raises concerns about the reliability of the confession that the seriousness of the offence can be discounted.
- A balancing exercise was performed in *Batchelor* [2003] QCA 246 at [32]. In that case, evidence of statements by the accused was admitted despite the statements having been obtained in breach of what is now the PPR Act (Qld) ss 418 and 423. The court appeared to accept that the same general criteria govern the unfairness discretion and the public policy discretion.
- In Western Australia, the CI Act (WA) s 155 requires the seriousness of the offence to be taken into account in assessing whether evidence obtained in breach of procedural rights can be admitted.

26.29 Cases on unfairness have not analysed the basic concept of fairness itself. It would obviously be unfair to use an unreliable confession to convict an innocent person. However, the courts have not examined why it might be unfair to use a reliable confession to convict an accused just because some procedural right was violated. Can a person who commits an offence ever have a legitimate complaint about being tried for that offence? Is it ever unfair to convict a guilty person?

The value of equality before the law provides one possible answer to these questions. It might be unfair to convict a guilty person if another person who committed a similar offence were permitted to go free. Some offenders will undoubtedly escape conviction if police officers observe the limitations on investigative practices which have been established by the law of criminal procedure. If other offenders can be convicted despite the evidence having been obtained in breach of their procedural rights, the result will be some unfairness as between guilty persons. This might not be troubling if the division between those offenders who are convicted and those who go free were random. It would, however, be very troubling if those led to confess as a result of police misconduct happen to be, disproportionately, persons who are disadvantaged by factors such as immaturity, poor education, cultural differences, intellectual disability or mental disorder: see 22.2. In this sense, it may well be 'unfair' to use a confession against an accused, despite it having all the hallmarks of reliability.

STANDARDS FOR QUESTIONING

Sources of standards

26.30 Queensland, Western Australia and the Commonwealth have all created statutory regimes to govern the questioning of suspects: PPR Act (Qld) ss 414–441; Police Responsibilities Code (Qld) ss 32–42; CI Act (WA) s 28, 137–138; Crimes Act (Cth) ss 23F–23W. The legislation is not comprehensive and resort must still be had to common law principles.

The statutory schemes seek to secure a protective environment for questioning rather than to regulate actual methods of questioning. They cover only preliminary matters such as cautions, and access to friends, relatives and lawyers. Even in this respect, the legislation must still be supplemented by common law principles. Moreover, the common law is still the main determinant of what is acceptable in actual methods of questioning.

26.31 There are three conditions for the Queensland statutory regime to apply.

First, a police officer must be questioning someone overtly. The PPR Act (Qld) s 396 provides that the safeguards on questioning do 'not apply to functions of a police officer performed in a covert way': see also the Police Responsibilities Code s 2. Presumably, the safeguards are designed to counter any distorting effect of overt authority on the answers that are given. In addition, covert operations are incompatible with the scheme of safeguards. If such operations are justified, they must be exempted.

The second condition is that the questioning must relate to an indictable offence: PPR Act (Qld) s 414. This may be because the need for safeguards increases with the seriousness of the offence.

The third condition is that the questioning must be of a 'relevant person'. A 'relevant person' is a person who is 'in the company of a police officer for the purpose of being questioned about his or her involvement in the commission of an indictable offence', unless the officer is also exercising a statutory power to detain and search the person or to require information to be provided: s 415. The key question is why the officer is with the person. If questioning of a suspect is the explanation, the statutory regime generally applies. It does not apply, however, if the officer is there for some other purpose such as to question the person as a potential witness or informant: see, for example, *R v Kingston* [2008] QCA 193, [29]. Of course, communication might begin for one purpose and then switch to another. Suppose an officer began to question someone as a potential witness or informant but then formed a suspicion and decided to ask questions arising from that suspicion. From that point onwards, the person would be in the officer's company for the purpose of being questioned as a suspect.

26.32 The Western Australian scheme applies to 'an arrested suspect'; that is, a person arrested on suspicion of having committed an offence, whether or not he or she has been charged with the offence: CI Act (WA) s 138(1).

26.33 The Commonwealth scheme applies to the questioning of persons under arrest for a Commonwealth offence and to 'protected suspects'. A 'protected suspect' is a person who is not under arrest but who is in the company of an investigating official for the purpose of being questioned under circumstances where one of three conditions is met:

1. where the official believes that there is sufficient evidence to establish that the person has committed a Commonwealth offence (and therefore could lay a charge); or
2. where the official would not allow the person to leave; or

3. where the official has given the person reasonable grounds for believing that leaving would not be allowed (so that the suspect is effectively in custody even though not formally arrested): Crimes Act (Cth) s 23B(2).

As with the Queensland scheme, the Commonwealth definition of arrest excludes cases where the official is exercising certain statutory powers.

Information; cautions; access to friends, relatives and lawyers

26.34 A suspect who is to be questioned by a police officer may be entitled to receive a number of preliminary items of advice or warning before questioning starts:

1. A suspect who is not under arrest must be cautioned that he or she is free to leave.
2. The suspect must be cautioned about the right to silence and the potential consequences of speaking.
3. The suspect must be advised about persons he or she may contact and speak to and may be able to have present during the questioning.

26.35 Before questioning a suspect who is not under arrest, a police officer must caution the suspect that he or she is not under arrest and is free to leave.

- For Queensland offences, the Police Responsibilities Code s 33 requires an officer to caution a suspect who has not been arrested that he or she need not accompany the officer to a police station or can leave the station (as the case may be) and also, before questioning actually commences, that he or she is free to leave at any time. The latter caution must substantially comply with this form:

  Do you understand you are not under arrest?

  Do you understand you are free to leave at any time unless you are arrested?
- For Western Australian offences, the CI Act (WA) s 28 requires an officer to caution anyone requested to accompany the officer for the purposes of assisting an investigation that he or she is not under arrest, does not have to accompany the officer and is free to leave at any time unless arrested.

26.36 It has long been regular practice for a police officer to caution a suspect about the right to silence and the potential consequences of speaking. This caution has two components:

1. a reminder that there is no obligation to say anything, and
2. a warning that anything that is said may be given in evidence.

In *Carr v The State of Western Australia* [2007] HCA 47; 232 CLR 138; 239 ALR 415 at [2] and [38], the majority of the High Court denied that there is a principle of common law requiring a caution to be given or making a statement inadmissible if a caution was not given. It was said that the relevant principle of common law is merely that there is a judicial discretion to exclude a statement made in the absence of a caution. In any event, the discretion will usually be used to reject any confession or admission made without the benefit of a caution. Moreover, statutory requirements respecting cautioning have been introduced in recent years.

26.37 Cautioning with respect to the right to silence is now incorporated in statutory regimes in Queensland, Western Australia and the Commonwealth:

- In Queensland and for Commonwealth offences, it is a statutory requirement that the caution be given before questioning commences: PPR Act (Qld) s 431; Crimes Act (Cth)

s 23F. This requirement applies to most suspects, not only those who are under arrest: see **26.31, 26.33**.

- In Western Australia, a police officer is required to caution an arrested suspect before the interview: CI Act (WA) s 138(2)(b).
- The Western Australian legislation is silent as to the need to caution a suspect not under arrest. Common law requirements would apply in this situation. A police officer has all the powers, duties and responsibilities of a constable under the common law: CI Act (WA) s 7. A caution is sometimes required at common law, although there is some uncertainty as to when it is required: see **26.40**.

26.38 The traditional form of the caution about the right to silence has been: 'You are not obliged to say anything but anything you do say may be given in evidence.' This formulation is substantially repeated in the Crimes Act (Cth) s 23F(1).

- A more detailed version is now expressed in the Police Responsibilities Code (Qld) s 37(1):

  > Before I ask you any questions I must tell you that you have the right to remain silent.
  > This means that you do not have to say anything, answer any question or make any statement unless you wish to do so.
  > However, if you do say something or make a statement it may later be used as evidence.
  > Do you understand?

  The caution must be administered in a way 'substantially complying' with this version, although the exact words need not be recited. The Police Responsibilities Code (Qld) also provides that, if the officer reasonably suspects that the suspect does not understand the caution, the officer may ask the suspect to explain its meaning in his or her own words: s 37(2). If necessary, the officer must further explain the caution: s 37(3).
- The CI Act (WA) does not specify the contents of a caution.

26.39 The point at which the caution about the right to silence must be given varies between jurisdictions:

- In Queensland, a caution must generally be given whenever a police officer questions a person because of suspicions about that person's involvement in an indictable offence: see the discussion of the PPR Act (Qld) s 415 at **26.31**.
- In Western Australia, a caution must be given to an arrested suspect but the position respecting a suspect who has not been arrested is not yet settled: see **26.36**.
- For Commonwealth offences, the Crimes Act (Cth) s 23F requires a caution for 'protected suspects' as well as persons under arrest: see **26.33**.

26.40 In Western Australia, the position respecting a suspect who has not been arrested is governed by the common law, not the CI Act. However, an admission in a serious case must be recorded audiovisually: see **26.14** A major influence on the common law has been the English 'Judges' Rules': see the references in *Swaffield* (**26.82C**). The centrepiece of the Judges' Rules has been the requirement for the police to give a caution. However, different versions of the Rules have prescribed different times when it must be given. The 1964 version of the Judges' Rules ([1964] 1 All ER 237) requires a caution to be given as soon as an officer has reasonable grounds for suspecting that a person has committed an offence. However, under the 1930

version of the Rules (which have sometimes been suggested to be applicable in Australia), the threshold for the caution to be given does not arise until a decision is made to charge the suspect or the suspect is taken into custody: see *Lee* (1950) 82 CLR 133 at 142–3.

In *Dolan* (1992) 58 SASR 501 at 505, King CJ said about the common law:

> It has always been accepted that while the investigation is at the stage at which the police officer is simply gathering information or giving possible suspects the opportunity of clearing themselves, there is no need for a caution.

Dolan was followed by Anderson J in *Harling v Hall* (1997) 94 A Crim R 437 at 441. Anderson J did not consider that a caution should have been administered immediately after the appellant had produced the bowl containing the pipe and cannabis and before she was asked to whom they belonged.

In contrast, Malcolm CJ favoured requiring a caution once the police have sufficient evidence to justify laying a charge, even if the decision to do so has not yet been taken: *Pelham* (1995) 82 A Crim R 455.

26.41 The differences between these various positions can be illustrated by reference to the events in *Van der Meer v R* (1988) 82 ALR 10; 35 A Crim R 232 (HCA), a case occurring in Queensland when the common law still applied before the enactment of the PPR Act (Qld). A number of persons had been questioned about possible offences for several hours in a police station before they were eventually cautioned. One of them had first gone to the station about another matter; the others came to the station for questioning. A majority of the High Court dismissed complaints about the delay in cautioning on the ground that it had taken time for the investigating officer to be satisfied that there was a case against the suspects. This reflects the position under the 1930 version of the Judges' Rules, possibly still the position in Western Australia. Cautions would now be required much earlier under the Queensland and Commonwealth statutory regimes. Under the Queensland legislation, persons who had gone to the station for questioning would have had to be cautioned before the questioning commenced. Under the Commonwealth legislation, it might have been possible to delay the cautions for a while, if it was made clear that attendance at the station was voluntary. It seems unlikely, however, that a delay of several hours would be permitted.

26.42 In principle, the caution should be repeated or the suspect otherwise reminded of the right to silence whenever questioning has been suspended or delayed. There is an express provision to this effect in the Police Responsibilities Code (Qld) s 37(4).

As a matter of general principle, a suspect should also be advised of the nature of the offence with which the questioning is concerned, and of any other offence which may become an issue during the course of the questioning; for example, if the victim of an attack subsequently dies and the offence in issue becomes murder or manslaughter.

- Provisions in the Queensland statutory scheme are designed to ensure that the accused is aware, at least initially, of the nature of the offence in issue: the PPR Act (Qld) s 391, for arrested persons; the Police Responsibilities Code (Qld) s 33(2)–(3), for other suspects.
- In Western Australia, an arrested suspect must be informed of the offence suspected: CI Act (WA) s 138(2)(a).

However, the statutory schemes do not expressly require the suspect to be advised and re-cautioned when the focus of the investigation shifts or expands and new offences enter into the picture.

26.43 The caution protects the fairness of the investigative process in two rather different ways.

First, it enhances the reliability of any confession made after the caution has been administered. The suspect is put on notice that what is said may be taken seriously. This should minimise the chance of an untrue claim to have committed an offence being made as a show of bravado. It should also minimise the chance of a suspect deferring to the authority of the police by agreeing with suggestions which are wrong. It was earlier noted that the courts have been concerned to distinguish consent from compliance in the context of police requests to search a person or property: see **24.6**. Similar concerns about suspects simply deferring to the police have been suggested as the explanation for the caution: *O'Neill v R* [1995] QCA 331; [1996] 2 Qd R 326.

Second, the caution helps to maintain equality before the law. Some offenders will know that they have the right to silence when facing the police and will know how to exercise it. Other offenders will not appreciate their rights or how they can be exercised and will, therefore, be more likely to blurt out the truth. It could be argued that such vulnerable persons merely present a windfall for the process of criminal investigation. There is, however, a social cost if the law is seen to be enforced vigorously against those who are disadvantaged by factors such as immaturity, poor education, cultural difference, intellectual disability or mental disorder while its clutches are easily evaded by those whose backgrounds or personal attributes have brought them social and economic success: see **22.2**.

26.44 The rationales for administering the caution may suggest that it should generally be given before questioning anyone who is suspected of committing an offence, as is the position under the PPR Act (Qld) and the 1964 version of the Judges' Rules, not just to a person who will be charged or is in custody. The contrary argument is that it would unduly hamper police in their investigations if every suspect has to be cautioned. In this as in other areas of criminal procedure, a balance has to be struck between various competing interests. It might be argued that the value of protecting the unwary suspect is outweighed in the early stages of criminal investigation, and that the value only assumes pressing importance as the officer's suspicion hardens into belief and the decision is taken to lay a charge. Nevertheless, the jurisdictions that do insist on earlier cautions have not shown a drastically adverse impact on police efficiency.

26.45 The requirement to give a caution about the right to silence only applies where the police are openly exercising their authority. The courts have not accepted that the absence of the caution might make it unfair to use evidence of a confessional statement from a conversation where the police were not overtly involved. See also PPR Act (Qld) s 396 discussed at **26.31**. The evidence can be used even if the conversation was covertly recorded by an undercover operative or agent, as long as the confessional statement occurred naturally and was not actively elicited: *Swaffield* **26.82C**; see also the discussion at **26.68–26.72**.

26.46 It would be ingenuous to suppose that problems with confessional evidence only arise in the context of overt police questioning. The problems may, however, be greater where the authority of the police is openly exposed. Moreover, police are realistically the only audience for messages from the courts about how to collect confessional evidence. When such evidence comes from other than police sources, the courts can only make ex post facto judgments of reliability. To insist on the safeguard of a caution would make it virtually impossible ever to use such evidence.

26.47 The best protection for the unwary suspect may be the advice or presence of another person, especially a lawyer.

- Queensland and the Commonwealth have enacted statutory schemes imposing several requirements on the officer:
  - — to advise the suspect of the right to speak to a friend *or* relative *and* a lawyer and to ask those persons to be present during questioning;
  - — to allow the third party to be present during the questioning (under the Commonwealth scheme, the right to have another person present applies only in relation to a lawyer);
  - — to delay questioning for a reasonable time to allow contact to be made and communication to occur;
  - — to provide reasonable facilities for communication and, in relation to a lawyer, to allow the communication to occur in circumstances in which the conversation will not be overheard.

  See PPR Act (Qld) ss 418–419; Crimes Act (Cth) s 23G. The Police Responsibilities Code (Qld) s 34 prescribes the form of the advice to be given before questioning about Queensland offences and also requires the officer to provide a telephone directory and a regional lawyer list if no particular lawyer has been requested.
- In Western Australia, an arrested person has a right to a reasonable opportunity to communicate with a relative or friend to inform that person of his or her whereabouts: CI Act (WA) s 137(3)(c). An arrested suspect has an additional right to a reasonable opportunity to communicate or attempt to communicate with a lawyer: s 138(2)(c). There is no express responsibility to inform an arrested person of their rights to notify a friend or relative of their whereabouts or to communicate with a lawyer but the obligation is implicit. Except in the case of young offenders, there is no right to have another person present at interview. However, if a suspect is unable to understand or communicate in English sufficiently, there is a right to an interpreter: ss 137(3)(d), 138(2)(d).

These safeguards do not apply under some special circumstances, including where their effect is likely to be that an accomplice or accessory would avoid apprehension and where delaying questioning might endanger the safety of other people: PPR Act (Qld) s 441; CI Act (WA) s 138(4); Crimes Act (Cth) s 23L.

26.48 The general right to the advice or presence of another person is a right to seek these supports rather than to have them provided. For example, if efforts to obtain legal advice are unsuccessful and a reasonable time has elapsed, the police can proceed with questioning. What is a reasonable time depends on various factors. The PPR Act (Qld) s 418(6) provides that a delay of more than two hours may be unreasonable unless there are special circumstances.

Under the CI Act (WA) there is a right to a reasonable opportunity to communicate or attempt to communicate with a legal practitioner. In *Wright* (26.81C) McLure P (Buss JA agreeing) held that the right was satisfied once the police officer informed the arrested suspect. Blaxell J held that the right to be informed also carried with it the opportunity to exercise the right.

26.49 Recording requirements may apply to the giving of preliminary advice or warnings as well as to questioning:

- The Queensland and Commonwealth statutory schemes provide that, where an officer is required to give a person information (including a caution), the giving of the information and any response must be electronically recorded if practicable: PPR Act (Qld) s 435; Police Responsibilities Code (Qld) s 41 (which requires a written record if electronic recording is impracticable); Crimes Act (Cth) s 23U.
- The CI Act (WA) is silent as to the recording of a caution but, in practice, a caution is always recorded at the commencement of an interview.

Methods of questioning

26.50 Some methods of questioning may be unfair to the accused. In extreme cases, a resulting confession may be involuntary: see **26.16–26.21**, discussing the rule mandating the exclusion of involuntary confessions. However, even if a confession is voluntary, the circumstances in which it was obtained may still make it unfair to use it against the accused: see **26.22–26.29** on the discretion to exclude evidence on grounds of fairness. Standards for fair methods of questioning remain a matter of common law for Queensland and Western Australia and for Commonwealth offences.

26.51 Aggressive methods of questioning can be particularly problematic. If the officer makes threats, a resulting confession would be involuntary and must be excluded. Even if threats are avoided, verbal aggression in the form of shouting or making accusations could fluster the suspect and lead to things being said which were not meant. In *Van der Meer v R* (1988) 82 ALR 10; 35 A Crim R 232 (HCA), the questioning amounted to a cross-examination of statements made by the suspects. There was disagreement within the High Court as to whether any evidence in the case should have been excluded at trial. However, the High Court was united in condemning this style of questioning as overly aggressive and in viewing aggression as a defect that might lead to a confession being excluded under the unfairness discretion.

On the other hand, persistence alone appears permissible. The boundaries between persistence and unacceptable pressure received comment from Hunt CJ at CL in *R v Clarke* (1997) 97 A Crim R 414 at 419:

> It should be kept in mind that a police officer is under a duty to ascertain the facts which bear upon the commission of a crime, whether from the suspect or not, and the officer is not bound to accept the first answer given; questioning is not to be regarded as unfair merely because it is persistent. It is a question of degree as to whether persistence has crossed the line so as to render it unfair to use the answers in evidence. No doubt the evidence will eventually be excluded if there is any suggestion of intimidation, persistent importunity or sustained or undue insistence or pressure.

26.52 A more subtle form of intimidation might be misrepresentation of the strength of the case against a suspect: see, for example, *R v Mason* (1988) 86 Cr App R 349; see also the misrepresentation in *Foster* at **22.28C**. This could generate a false confession from a suspect who concludes that there is no point in denying the offence and that it is better to be seen to be co-operative.

26.53 The reliability of a confession may also be dubious if the suspect was prompted rather than being allowed to tell their own story. Prompting is prohibited under the Judges' Rules: [1964] 1 All ER at 239.

PERSONS REQUIRING SPECIAL PROTECTION

26.54 Standards of fairness in questioning may have to be adapted for suspects with particular vulnerabilities stemming from factors such as immaturity, poor education, cultural differences, intellectual disability or mental disorder. Such suspects may need supporting persons present during questioning. It may also be necessary to lower the threshold at which methods of questioning become unfair.

Special rules apply to the questioning of Aboriginal persons, Torres Strait Islanders, children, persons with impaired capacity, intoxicated persons, non-English speakers and foreign nationals.

26.55 Guidelines widely influential in relation to confessions by Aboriginal persons were promulgated by the Supreme Court of the Northern Territory in *R v Anunga* (1975) 11 ALR 412. The particular linguistic and cultural disadvantages of some Aboriginal persons were articulated by Forster J at 413–14:

> Aboriginal people often do not understand English very well and even if they do understand the words, they may not understand the concepts which English phrases and sentences express … Some words may translate literally into Aboriginal language but mean something different. 'Did you go into this house?' means to an English-speaking person, 'Did you go into the building?', but to an Aboriginal it may also mean, 'Did you go within the fence surrounding the house?' …
>
> Another matter which needs to be understood is that most Aboriginal people are basically courteous and polite and will answer questions by white people in the way in which they think the questioner wants. Even if they are not courteous and polite there is the same reaction when they are dealing with an authority figure such as a policeman. Indeed, their action is probably a combination of natural politeness and their attitude to someone in authority.

The special care which needs to be taken in questioning Aboriginal persons was therefore stressed: 'Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way': *Anunga* at 415. Stress was also placed on the desirability of the suspect having a supporting person present during the questioning: *Anunga* at 414. The *Anunga* rules can be viewed as patronising in their depiction of modern indigenous people. However, the basic principles are adopted by most courts. In Western Australia they are adopted as guidelines for the questioning of suspects in the Commissioner's Orders and Procedures Manual.

Statutory protections in Queensland and the Commonwealth

26.56 The idea that certain categories of vulnerable persons should not be questioned except in the presence of a support person has provided the central thrust for legislative schemes in Queensland and the Commonwealth.

Queensland and the Commonwealth have both enacted protective schemes to ensure that a vulnerable Aboriginal person or Torres Strait Islander, or a young person, has a support person present during the questioning: PPR Act (Qld) ss 420–421; Police Responsibilities Code (Qld) s 36; Crimes Act (Cth) ss 23H–23K. Queensland extends this protection to persons with impaired mental capacity: PPR Act (Qld) s 422.

26.57 The Queensland and Commonwealth legislative protections for Aboriginal persons and Torres Strait Islanders are very similar. They are designed to protect not all such persons but rather those whose backgrounds put them at a particular disadvantage in questioning. Therefore, the protections do not apply if, 'having regard to the person's level of education and understanding', the officer reasonably suspects (Queensland) or believes on reasonable grounds (Commonwealth) that the person is 'not at a disadvantage' in comparison with the Australian community generally: PPR Act (Qld) s 420(3); Crimes Act (Cth) s 23H(8).

Under the Queensland scheme, an officer who reasonably suspects that a suspect is Aboriginal or a Torres Strait Islander must first ask questions to establish the person's level of education and understanding before going on to ask questions about the offence: Police Responsibilities Code 2000 s 36(1)–(2).

26.58 The Queensland protections are triggered when an officer 'reasonably suspects' that a person meets the prescribed conditions: PPR Act (Qld) s 420(1)(b). The equivalent Commonwealth expression is 'believes on reasonable grounds': Crimes Act (Cth) s 23H.

These are curious expressions. The combination of subjective and objective features fits the use of statutory powers but seems out of place for protective provisions. Read literally, the expressions might suggest that the protections do not apply when an officer fails to notice an obvious characteristic of a suspect. It would be better if the provisions had used purely objective tests such as 'reasonable grounds to suspect' or 'reasonable grounds to believe'. The difficulty was noted in *R v Cho* [2001] QCA 196 at [20]–[27], but no resolution was proposed.

26.59 The Queensland and Commonwealth statutory schemes establish two main protections for Aboriginal persons and Torres Strait Islanders:

1. Unless the police officer is aware that arrangements have been made for a lawyer to be present during the questioning, a representative of a legal aid organisation must be notified and the suspect must be advised that this will happen: PPR Act (Qld) s 420(2); Police Responsibilities Code (Qld) s 36(3); Crimes Act (Cth) s 23H(1).
2. A 'support person' (Queensland) or 'interview friend' (Commonwealth) must be present during the questioning and, if practicable, the suspect must be allowed to communicate beforehand with the person in circumstances in which the conversation will not be overheard: PPR Act (Qld) s 420(4); Police Responsibilities Code (Qld) s 36(4)–(6); Crimes Act (Cth) s 23H(2)(c). 'Support person' or 'interview friend' is defined to cover a lawyer or representative of a legal aid organisation, a relative or other person chosen by the suspect, or a person whose name is included on a list maintained for this purpose: definition of 'support person' in PPR Act (Qld) Sch 6 (Qld); Crimes Act (Cth) ss 23H(9), 23J.

Suspects from all racial backgrounds have the right to seek the presence of a support person during questioning: see **26.47**. However, the presence of a support person is mandatory for Aboriginal persons and Torres Strait Islanders who are subject to the protective schemes. Accordingly, there is a right to have a support person provided and not just to have such a person present if arrangements can be made: Police Responsibilities Code (Qld) s 36(6). The statutory schemes do, however, allow for the right to a support person to be waived: PPR Act (Qld) s 420(5); Crimes Act (Cth) s 23H(2)(d).

26.60 A 'support person' or 'interview friend' is also required under the Queensland and Commonwealth legislation when children are questioned because of suspicion about their

involvement in an offence. A child for this purpose means a person under 17 years (for Queensland offences) and under 18 years (for Commonwealth offences): definition of 'child' in the PPR Act (Qld) Sch 6 (reference to the Juvenile Justice Act); Crimes Act 1914 (Cth) s 23K(1). The support person must be present during the questioning and, if practicable, the child must be allowed to communicate beforehand with the friend in circumstances in which the conversation will not be overheard: PPR Act (Qld) s 421(2); Crimes Act (Cth) s 23K(1). 'Support person' or 'interview friend' includes, in relation to a child, a parent, guardian or lawyer and (for Queensland offences) a representative of a legal services agency: definition of 'support person' in the PPR Act (Qld) Sch 6; Crimes Act (Cth) s 23K(3). These are the primary categories of support persons — if no one from them is available, certain other persons, such as a relative or friend of the child, can substitute.

26.61 There is a protective scheme for persons suffering from impaired mental capacity under the PPR Act (Qld) s 422. It applies to a suspect 'whose capacity to look after or manage his or her own interests' is impaired either by damage to mental functions or by 'an obvious disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment, or that results in disturbed behaviour': see the definition of 'person with impaired capacity' in Sch 6. As with other vulnerable persons, the protection required is the presence during questioning of a support person, coupled with, if practicable, an opportunity for the suspect and the support person to speak in circumstances in which the conversation will not be overheard: s 422(2). 'Support person' is defined to mean 'a parent or another adult who provides or is able to provide support necessary to help care for the person by looking after or managing the person's interests': Sch 6.

26.62 In Queensland, intoxicated persons are singled out for the greatest protection: PPR Act (Qld) s 423, which wholly prohibits the questioning of a suspect who is apparently under the influence of liquor or a drug. The officer must delay questioning until 'reasonably satisfied the influence of the liquor or drug no longer affects the person's ability to understand his or her rights and decide whether or not to answer questions': s 423(2). There may well be questions about the reliability of statements made by intoxicated persons. However, the immediate focus of s 423 is not upon the reliability of a statement but rather upon a suspect's understanding of her or his procedural rights; in particular, the right to silence.

Presumably, intoxicated suspects are singled out for unique protection because their disadvantage is temporary. Once it has passed, they can be questioned in the standard way. For suspects with longer-term disadvantages of cultural background, immaturity or mental capacity, the questioning can proceed as long as a support person is present.

26.63 Both Queensland and the Commonwealth require interpreters to be provided for persons who cannot speak English with reasonable fluency: PPR Act s 433; Crimes Act (Cth) s 23N. They also require that foreign nationals without rights of residence in Australia be advised that they may contact their embassies or consular offices: PPR Act (Qld) s 434; Crimes Act (Cth) s 23O.

Statutory protections in Western Australia

26.64 Western Australia does not have the extensive range of statutory protections found in Queensland and the Commonwealth. Nevertheless, similar protections are likely to be recognised as a matter of common law.

Police must notify a responsible adult if possible before questioning a juvenile offender: Young Offenders Act 1994 (WA) s 20.

COVERT RECORDINGS AND UNDERCOVER OPERATIVES

26.65 In most instances where it is alleged that it would be unfair to admit a confession or admission, the claim is that the statement was obtained by the misuse of the authority of the police. However, police can obtain confessions or admissions in ways other than overt questioning. For example, they may be able to secretly record a conversation between the suspect and another person using a wiretap or listening device. Police can also use undercover operatives and agents to obtain recordings. With advances in technology, the covert recording of conversations between suspects and other persons has become easier and more common.

26.66 Evidence obtained by the lawful use of wiretaps or listening devices (see 24.54–24.57) is generally admissible. Of course, a suspect whose conversations with friends or acquaintances are covertly recorded does not have the benefit of a caution that anything said may be used in evidence. The requirement for a caution has traditionally been formulated as a guideline for police questioning of suspects rather than as a general standard for the admissibility of confessional evidence. If the covert recording of a conversation happens to capture a confession or admission, any risk of unreliability can be assessed at trial. The fact that the statement was covertly recorded does not by itself make it unfair to admit the statement as evidence.

26.67 Concerns are sometimes expressed about undercover operatives obtaining a confession or incriminating admission by actively questioning the suspect about the offence. This might undermine the right to silence, by enabling the police to bypass the procedural protections for that right such as the requirement for a caution when overt questioning is conducted.

26.68 The High Court in *Swaffield* (26.82C) drew a distinction between two kinds of cases involving covert recordings by undercover operatives or agents:

1. those in which the confessional statement is made as part of a natural conversation; and
2. those in which the confessional statement is actively elicited.

No concern was voiced about confessional statements that occur in natural conversation. Actively eliciting a confession, on the other hand, was regarded as a violation of the right to silence or, as the court described it, 'the right to choose whether or not to speak'.

In *Swaffield*, an undercover police officer had told a false story in order to initiate a conversation in which a confessional statement might be made. The High Court excluded the confessional statement on the ground that its admission would be unfair to the accused.

26.69 The distinction between actively eliciting a confession and merely allowing it to occur is not clear-cut. In *Pavic*, a case decided together with *Swaffield* and forming part of the same judgment, the majority in the High Court could find no active elicitation even though the person making the recording took an active role in the conversation and asked questions. It seems therefore that merely asking questions does not amount to active elicitation if they arise in the natural flow of conversation. Something more is required to cross the line into

active elicitation. In *Swaffield*, the line had been crossed because a false story had been told in order to induce the confession. More commonly, the line will be crossed because questioning amounts to interrogation. Attention was drawn to the distinction between an interrogation and a natural conversation in *Swaffield*.

26.70 In *Swaffield*, the police had attempted to overtly question the suspects before the undercover operations. The undercover operations were initiated when overt questioning failed in the face of the exercise of the right to silence. The extent to which the right to silence should be protected was, therefore, immediately in issue.

In *R v Belford & Bound* [2011] QCA 43, a majority of the Queensland Court of Appeal upheld the trial judge's decision to admit evidence of a covert recording. It was said at [100] and [140] that one of the relevant considerations was that the suspect had not unambiguously refused to speak to the police.

26.71 The incriminating statement in *Swaffield* (26.82C) was obtained by an undercover officer; in *Pavic*, it was obtained by a police agent. There was no suggestion in the judgment that different principles might apply to agents. Nevertheless, the Queensland Court of Appeal has held that statements obtained by agents can only be excluded if the agents were acting within the scope of their authority from the police: *R v Fraser* [2004] QCA 92; 2 Qd R 544. In that case, the agent had acted on his own initiative in eliciting statements from the suspect. There was held to be no discretion to exclude the evidence.

26.72 Why should it be unfair to admit a statement that was actively elicited by an undercover operative or agent for the purpose of recording it? There was no indication in *Swaffield* that the High Court was seriously worried about the magnitude of any risks of unreliability associated with a confessional statement having been actively elicited rather than having occurred naturally. The High Court appeared to focus on active elicitation because it was concerned with maintaining the status of the right to silence in the face of overt police questioning and with preventing police from resorting to undercover operations as a way of evading the traditional safeguards for the exercise of this right.

If reliability is not the issue, exclusion of the evidence should presumably be discretionary rather than mandatory: see **22.20, 26.27–26.28**. The strength of the case for exclusion may depend on the view taken of the rationales for the safeguards governing overt police questioning: see **26.43**.

26.73 Following a Canadian initiative, police have sometimes used complex scenarios to create an environment whereby undercover operatives pose as members of a criminal gang and offer a suspect inducements to disclose any offences which may have been committed. See *Tofilau* (**26.83C**), where challenges to the admissibility of several 'scenario evidence' confessions were dismissed by a majority of the High Court, Kirby J dissenting. It was held that the statements were voluntary and that the methods used did not justify exclusion on discretionary grounds.

26.74 *Tofilau* was decided nine years after *Swaffield*. In *Tofilau*, the role of the undercover operatives in extracting the 'scenario evidence' was active: Callinan, Heydon and Crennan JJ acknowledged (at [413]) that there had been psychological pressure and active elicitation. The different results may possibly be explained by the fact that different issues were argued by counsel. There were four separate appeals in *Tofilau* and counsel for most of the appellants confined their arguments to the issue of voluntariness. In the one appeal where discretionary

exclusion was argued, the evidence was not subjected to the kind of inquiry which led to the ruling of inadmissibility in *Swaffield*.

It might be possible to distinguish the two cases by reference to several features of *Tofilau* which were mentioned at [413]:

- no right to silence had been claimed during the earlier formal interview by the police;
- the questioning in the undercover scenario was patently an interrogation; and
- the appellant actively co-operated in this interrogation.

Any violation of the right to silence was, therefore, arguably less serious than in *Swaffield*. However, it may also be that *Tofilau* represents a retreat from the protectionist view of the right to silence which had been taken in *Swaffield*.

26.75 The authority of *Swaffield* may also have been restricted or undermined by the decision of the High Court in *Em v R* [2007] HCA 46; 232 CLR 67; 239 ALR 204. In that case, police officers had interviewed a suspect with limited success because of his aversion to anything being recorded. Later, without concealing their identity, they met the suspect and covertly recorded a conversation with him in a park. He was told that he was not under arrest and that he did not have to speak to them; he was not, however, warned that anything he said might be recorded and used in evidence. The admissibility of the recording was challenged under the Evidence Act 1995 (NSW) s 90, which confers a discretion to exclude evidence of an admission if, having regard to the circumstances in which it was made, its use would be unfair. A majority of the High Court ruled that admitting the evidence would not be unfair.

Only Kirby J, in dissent, openly addressed the authority of *Swaffield*. He argued (at [232]) that there was no material difference between *Swaffield* and the present case and that the outcome should therefore be the same:

> In the light of the reasoning in *Swaffield*, it cannot seriously be suggested that a failure to provide a caution … is irrelevant to the fairness to the defendant of the use of evidence gathered after that failure. This is so whether no caution at all was administered (as in *Swaffield*) or whether the caution was only half given and then undermined by deception, tricks and the venue chosen for the conversation (as was the case here). The result is the same. The consequent admissions are subject to exclusion as their use would be unfair to the defendant.

He also openly accused the majority of shifting from the direction pursued in a line of cases that had culminated in *Swaffield*: see *Em v R*, above, at [238].

There were two majority judgments in *Em*. The authority of *Swaffield* was confronted in neither of them. Gummow and Hayne JJ appeared to avoid the issue by a narrow construction of s 90 which excluded the appellant's claims of unfairness from any consideration. Gleeson CJ and Heydon J may have accepted that deceptive tactics such as those adopted by the police could produce unfairness in some cases. They denied, however, that unfairness had been established on the facts of *Em* itself. Their view was that the police had not induced the appellant to believe his statements could not be used against him; he had simply made an assumption to this effect: see [64]–[65].

26.76 It could be argued that in *Em*, as in *Tofilau*, any violation of the right to silence was less serious than that in *Swaffield*. Nevertheless, the majorities in *Em* and *Tofilau* did not expressly distinguish *Swaffield* on this ground. This leaves the current status of *Swaffield* open

to question. There has been no suggestion in the later decisions that the 'unfairness' discretion might be confined to cases where the evidence obtained was unreliable. However, there is uncertainty about the circumstances under which reliable evidence can be excluded under this discretion.

THE RIGHT TO SILENCE AND EQUALITY BEFORE THE LAW

26.77 Kirby J dissented and argued for the exclusion of the covertly recorded admissions in both *Tofilau* (26.83C) and *Em* [2007] HCA 46; 232 CLR 67; 239 ALR 204. He also dissented in *Carr v The State of Western Australia* [2007] HCA 47; 232 CLR 138; 239 ALR 415 (see 26.11), where the recording was not covert but the suspect had been unaware of it when speaking to the police. Each of these dissents was framed in terms of the different issues of statutory construction that had been argued in the particular cases. However, a recurrent theme was the importance of the right to silence, and of protecting it through cautioning, in order to ensure equality before the law: see *Em* at [227]–[231]; *Carr* at [136]–[137], [170].

Kirby J was concerned, not about persons who foolishly 'blurt out' confessions and admissions, but about persons from whom statements are extracted by deceptive and manipulative techniques: see *Em* at [224]; *Carr* at [170]. His concern about the use of these techniques against vulnerable persons was expressed in striking terms. For example, in *Carr* (at [137]), he said:

> I cannot share a view of the right to silence that effectively confines its availability to educated and wealthy suspects who know of their rights or who can afford experienced lawyers to advise them. That is an elitist view of the protections of the common law that is alien to my understanding.

In *Em* (at [230]), Kirby J insisted that the 'ignorant' and 'stupid' needed protection; in *Carr* (at [170]), he argued that the appellant deserved protection despite being 'a smart alec for whom it is hard to feel sympathy'.

26.78 The majorities in *Em* and *Carr* did not reject the proposition that equality before the law is an underlying value of the criminal justice system. In each case, they largely avoided the issue by confining their reasons to questions of statutory construction. However, in *Em* Gleeson CJ and Heydon J observed at [77] that 'every day police officers take advantage of the ignorance or stupidity of persons whom they eventually prosecute'. Moreover, the majority in *Carr* explicitly denied that any principle of common law (as opposed to a statutory provision) requires a caution to be given, holding merely that the absence of a caution enlivens a discretion to reject a subsequent confession or admission: see 26.36.

26.79 It was argued earlier that equality before the law is one of the rationales for the caution respecting the right to silence: see the discussion in 26.43. The caution provides some correction for the imbalance between those persons who know their rights and how to exercise them and those persons who do not. That argument was made with respect to disadvantaged persons who are not responsible for their disadvantage. The stance taken by Kirby J is not subject to this qualification. However, without some such qualification, equality concerns seem unlikely to drive further developments in the law respecting the right to silence.

26.80C

R v Smith

[2003] QCA 76 138 A Crim R 172
Court of Appeal, Queensland

McMurdo P:

1 On 9 August 2002, the appellant was convicted after a jury trial of two counts of assault occasioning bodily harm. He then immediately assaulted one of the complainants in the court room. His sentence was adjourned until 12 August 2002 when he pleaded guilty by way of ex officio indictment to a further count of common assault arising out of the court room incident. He was sentenced to nine months imprisonment for the common assault, cumulative upon an 18 month term of imprisonment for the two counts of assault occasioning bodily harm, which was in turn cumulative upon a 16 month suspended sentence activated by the subsequent convictions. He appeals against his two convictions based on the jury verdicts.

2 The prosecution case concerns two separate attacks on two young men on The Strand in Townsville at about 7.45 pm on 21 October 2001, one following the other. Both complainants and eye witnesses gave descriptions of the attacker, some of which described him as wearing a white shirt with 'Kani' and '23'. About 20 minutes after the attack the complainant in count 2 believed he saw his attacker and two companions walk towards a carpark near The Strand and phoned police. At about this time, police officer Swenson, armed with the description given by the first complainant, spoke to the appellant and his two companions in a carpark near The Strand. He wrote down a description of the appellant which included that the appellant was wearing a shirt with 'Kani' and '23'. The descriptions of the attacker given by eye witnesses in this and other, but not all, respects matched the description of the appellant recorded by police officer Swenson. Police officer Kitching ('Kitching') questioned the appellant about the assaults in an unrecorded conversation in November 2001 in which he heard the appellant say, 'I had a short scuffle over a girl. I wouldn't call that an assault.' Some months after the attack, the complainant in count 2 identified the appellant from photo boards as resembling his attacker (although other attempts at identification by photo board by both complainants were mistaken).

3 The appellant gave evidence denying the conversation with Kitching and any involvement in the offence; he stated that both he and a companion that evening, Mr Kake, were wearing 'Kani' shirts with '23' on them, although Mr Kake's shirt was greeny-grey with navy sleeves, whilst his was cream. Another of his companions that evening, Mr Jay Jobson, gave evidence that the appellant was not involved in these assaults.

…

7 The appellant next contends that the learned primary judge erred when he allowed evidence to be given of the statement: 'I had a bit of a scuffle over a girl. You wouldn't call it an assault' because this was not an admission against interest and was irrelevant. His Honour rightly rejected that contention. If the jury was satisfied the statement was both made and true, the evidence was capable of being an admission against interest to the effect that the appellant had been involved in some violent behaviour that day. That was a further circumstantial fact capable of supporting the prosecution case.

8 The appellant alternatively contends the learned primary judge erred in admitting evidence of that statement which was not recorded either electronically or in writing until over six months later; it did not comply with the Police Powers and Responsibilities Act 2000 (Qld) ('the Act') …

9 This contention was raised by the appellant's counsel at the commencement of the trial. No evidence was called on a voir dire although Kitching's statement was handed to the judge. In that statement, Kitching said that he and police officer Paff went to Lot 2, Woodstock Road, Giru and executed a search warrant on Jay Jobson. The appellant was also present. Police took possession of two pairs of black shorts with red stripes down the sides. The police officers then transported the appellant to the Giru police station in relation to this and other matters where Kitching had a short conversation with him in the presence of police officer Paff. Kitching said, 'Nathan, I also need to speak to you about two assaults at The Strand in Townsville that occurred on the night of 21 October this year. Do you know what I'm talking about?' The appellant replied, 'No. What assault?' Kitching said, 'Mate, two people were assaulted on The Strand near the basketball courts there and you and your mates were located by police shortly afterwards and fitted the description of the person responsible.' The appellant said, 'I had a bit of a scuffle over a girl. You wouldn't call it an assault.' Kitching then invited the appellant to take part in a record of interview but the appellant declined.

10 Kitching's statement makes clear that the appellant was a 'relevant person' under s 263 of the Act and that he was being questioned by a police officer when he made the alleged admission. The conversation was not recorded electronically; it was only recorded in written form many months later. In his evidence at trial, Kitching subsequently agreed that at the time of the questioning he had a field tape recorder available for use. His Honour does not seem to have taken cognisance of s 263(3) of the Act which ordinarily only allows evidence of an admission to a police officer during questioning to be received if it is electronically recorded[2] or, as soon as reasonably practicable afterwards, is recorded in writing[3] and is read to the person in the language used by the person during the questioning and the person is given a copy of the record.[4] As the conversation occurred at the police station and Kitching was in possession of a field tape recorder, it was obviously practicable for him to have either electronically recorded the conversation or made a written record of it, and to have otherwise complied with s 264 of the Act but neither course was adopted. Section 263(3) of the Act rendered Kitching's evidence of his conversation with the appellant inadmissible.

11 Section 266 of the Act allows a record of questioning to be admitted despite non-compliance with the Act where the court is satisfied 'in the special circumstances of the case, admission of the evidence would be in the interests of justice'. Here, however, it was not sought to tender any written record but rather Kitching was permitted to give oral evidence of the conversation. The discretion conferred by s 266 was therefore of no assistance to the respondent but in any case there were no circumstances, special or otherwise, which suggested the admission of a written record of Kitching's evidence would be in the interests of justice. To allow in such evidence here would be to ignore the safeguards for those the subject of police investigation and questioning provided by Ch 7 of the Act and to risk a return to an earlier less accountable period when police evidence of verbal admissions was regularly challenged in the courts as fabricated, often with justification. Kitching's evidence was wrongly admitted.

12 The respondent contends that, nevertheless, the conviction may be upheld because the admission of this evidence has caused no substantial miscarriage of justice.[5] In the circumstances here, where the evidence was finely balanced and turned on an identification based on pieces of circumstantial evidence, I am far from satisfied that a reasonable jury properly instructed would inevitably have convicted the appellant if that evidence had not been admitted: *Festa v The Queen*.[6] It follows that the appeal must be allowed and it becomes unnecessary to consider the numerous other grounds of appeal raised by the appellant.

13 A retrial must be ordered on these counts …

McPherson JA:…

22 The provisions of Part 3 of Chapter 7 therefore extended to the appellant on this occasion. The real issue is, however, whether Division 5 operated at that stage of the police investigation. By s 263(1), the provisions of s 263 apply to the 'questioning' of a relevant person. The problem here is to determine whether 'the questioning' of the appellant as a relevant person had then begun. For that purpose, it is necessary to look again at what was said by Kitching. If he had done no more than identify himself and the occasion or incident about which he wished to interview the appellant, there would, I think, be little doubt that the questioning could not be said to have begun. However, he also asked the appellant 'Do you know what I am talking about?'. This was a question, and it was what led the appellant to respond by asking 'What assault?'; and then, after being informed of evidence which the police had about his description, to make the admission on which the prosecution relied at the trial. Its particular relevance was not only that it could be considered an implied admission that he was present at the place and date specified by Kitching but also that it volunteered the further information that the assault or 'scuffle' was, as he said, 'over a girl'. In the circumstances, it provided evidence that could be used to show that he was, or might have been, the perpetrator of the offence of assault.

23 In my opinion, it was when the question was asked 'Do you know what I am talking about?' that the questioning began. Some leeway must be allowed to the police to identify themselves, the person to whom they were speaking, and the subject of their inquiry; but on this occasion matters went further than that, and a question was asked which led to a potentially incriminating admission by the appellant. The 'questioning' related to a matter that was relevant to the appellant's guilt, and not to some other and quite unrelated matter.

24 Once the questioning was entered upon, as in my opinion at that point it was, it was incumbent on Sgt Kitching to comply with s 263(2) by electronically recording the questioning 'if practicable'. It is perhaps arguable that at the precise moment at which the questioning began it would not have been 'practicable' in the circumstances to record what was being said on the field tape recorder or other electronic facilities that were available to Kitching. If that is so, he should not have asked the question he did. However that may be, it did not prevent compliance with the provisions of s 264, notably s 264(3). Even if a written record was not made of the things being said by or to the appellant during that questioning, it could, as s 264(3) requires, have been made 'as soon as reasonably practicable thereafter'. In that event, s 263(4)(a) would have required that it be read to the appellant.

25 Given the appellant's uncooperative attitude, it might have been difficult to comply with that requirement; but the same cannot be said of s 263(4)(b). The appellant could have been given a copy of the record of the things said to or by him if they had been recorded 'as soon as practicable thereafter', even if some of the other requirements of s 264 might not have been so easy to comply with. In fact, however, Det Sgt Kitching did not record what had been said until 16 May 2002, which was some six months or more after the conversation or questioning had taken place on 6 November 2001. It was then recorded in the statement in form QP 125E which he prepared as a witness for the proceedings that were taken against the appellant by summons issued on 1 February 2002. The appellant was presumably supplied with a copy of that statement dated 16 May 2002 at that or some other but unspecified later date.

26 It is evident that it would have been possible for s 264(3) to have been complied with soon after the conversation on 6 November 2001, and certainly well before the statement was prepared and signed on 16 May 2002. There is nothing to suggest that Mr Kitching was incapacitated from doing so, or anything else to suggest it was not 'practicable' for him to have done so earlier. In my opinion, therefore, there was a plain breach of or non-compliance with the requirements of s 264(3) and s 264(4), as well as s 263(2) of the Act.

27 Under s 266(1) it was nevertheless open to the court to exercise a discretion to admit in evidence 'a record of questioning' or 'a record of a confession or admission' even though it considered that Division 5 had not been complied with or there was not enough evidence of compliance. The word 'record' in this context is not defined, but it is not easy to equate it with Kitching's unrecorded recollection of the conversation at any time before to 16 May 2002, when he first wrote it down in his witness statement. After that date, there was a 'record' in the form of the witness statement which he prepared for the proceedings against the appellant. However, it was not that 'record' or written statement that the trial judge was asked to admit in evidence at the trial. Instead, it was Kitching's oral evidence based on his recollection of the conversation that was tendered and admitted. He may in fact have refreshed his memory by reading his statement again before giving evidence at the trial on 7 August 2002. He did not, however, ask for leave to do so at the trial, but gave his evidence of the conversation as something he was able to do of his own unaided and independent recollection. It was something he was not questioned about. According to the decision in *King v Bryant (No 2)* [1956] St R Qd 570, he was not obliged to seek leave to refresh his memory in that way. Doing so would not in any event have made his statement or 'record' of the conversation admissible unless defence counsel had chosen to make it so by cross-examining him and then tendering it, which it was hardly likely he would have wished to do.

28 The result is that his Honour had no power or discretion under s 266 to admit, or for that matter to reject, the evidence of Det Sgt Kitching. It was not 'a record of questioning' or 'a record of confession or admission' that was tendered at the trial, but Kitching's independent recollection of what had been said to him in the course of the conversation on 21 October 2001. In consequence, s 266 did not apply so as to authorise the court to admit the evidence if it was not otherwise admissible under the Division. Even though it was not a 'record' of the questioning or the confession or admission, was it otherwise not admissible? That inquiry must in my opinion be answered in the affirmative. Section 263(3) renders a confession or admission admissible in evidence in a proceeding against the person making it *only* if it is recorded as required by s 263(4) (electronically) or s 264 (in writing). The confession or admission here was, for the reasons I have given, not recorded as required by s 264(4) and by force of s 263(3), was not admissible in evidence at the appellant's trial. Under s 266(1), the judge had no power or discretion to admit …

[**Mullins J** agreed with the judgments of **McMurdo P** and **McPherson JA**.]

…

Footnotes

2. Section 263(4) of the Act.
3. Section 264(3) of the Act.
4. Section 264(4) of the Act.
5. Section 668E(1A), Criminal Code.
6. (2001) 76 ALJR 291.

26.81C Wright v The State of Western Australia

[2010] WASCA 199 203 A Crim R 339
Supreme Court of Western Australia; Court of Appeal

1 McLure P: The relevant facts, background material and grounds of appeal are set out in the reasons of Blaxell J. I too would dismiss the appeal. However, I wish to state my position on the important issues of construction of the *Criminal Investigations Act 2006* (WA) (the Act) that arise for determination in this appeal. The issues in the appeal relate to the admissibility of admissions made by the appellant prior to trial.

2 The appellant was convicted of the sexual penetration and murder of the complainant, Dan Gojiao. The complainant was murdered on 8 October 2007.

3 On 12 October 2007 the police arrested the appellant at a house in Innaloo where the appellant was visiting his cousin, Justin Bullock. Four police officers in the course of executing a search warrant located the appellant and Mr Bullock in the lounge room. The police arrived at the house at 12.22 pm and gained entry shouting 'police, search warrant' (ts 98). Detective Sergeant Leonhardt was in the lead, and he was followed in turn by Detectives Mulhall, Glynn and then Powell. The appellant was seated on a couch with his cousin Justin Bullock seated to his right. It was the evidence of the first three detectives who entered the lounge room that upon their entry the appellant turned to Justin Bullock and said, 'I really fucked up with that girl the other night' (the oral statement). Detective Powell, the last detective to enter the lounge room, said the appellant turned slightly towards his cousin and said 'I've fucked up, I've fucked up really bad' (ts 416).

4 The police officers and the appellant left the house at approximately 12.42pm. The appellant was placed in the rear of a police vehicle and taken to a video interview room in Curtin House at Perth. The appellant was not questioned by police before the formal interview which commenced at 2.07 pm.

5 At the commencement of the interview, the appellant said he was 'really really wasted from smoking cannabis' (ts 3). One of the police officers conducting the interview then informed the appellant that he was entitled to communicate with a lawyer following which he was cautioned in the usual terms, namely that he did not have to say anything but anything he did say would be recorded and may be given in evidence. The appellant acknowledged that he understood the caution and that he did not have to talk to the officers. The questioning proceeded. When he was being asked about his mental health the appellant said he was 'really stoned and couldn't handle the questions' (ts 7). Approximately halfway through the interview, the appellant requested a lawyer. There was some brief further questioning and the police officers offered the appellant a telephone so he could make a call to a lawyer. The appellant did not immediately take up that offer and said he was happy to continue with the interview. A short time later he again said he wanted a lawyer. The interview ceased while one of the police officers obtained a telephone book. When the interview resumed, the appellant made an unsuccessful attempt to telephone the Legal Aid Commission. The appellant was then reminded of the caution and questioning resumed. Not long after, the appellant was asked if he wanted to try again for a lawyer. That resulted in a further call to the Legal Aid Commission and advice being given to the appellant that he should cease answering questions. The interview then terminated.

6 The appellant's objections to the admissibility of the confessional evidence were determined on a voir dire. The appellant claimed that the oral statement was inadmissible under s 118 of the Act because of the absence of an audiovisual record. He claimed that the audiovisual record of his interview with police (the record of interview) was inadmissible at common law on the ground that it was involuntary or should be excluded on public policy or unfairness grounds. The appellant's position was foreshadowed in written submissions. He relied on the extent of his cannabis intoxication and importunity arising from the denial of his right to a lawyer.

7 The prosecutor called a number of witnesses, including Detective Leonhardt, a police officer involved in the arrest and formal questioning of the appellant. The appellant did not give evidence. At no stage prior to or during the voir dire did the appellant foreshadow or pursue a claim that the record of interview was inadmissible under the Act. Although s 138 of the Act was referred to in the appellant's written submissions, it was not relied on in the voir dire because (I infer) of counsel's understanding that the appellant was not an arrested suspect for the purposes of s 138 (ts 149). As a result, evidence relevant to the issues under the Act was not adduced on the voir dire.

8 The trial judge ruled the oral statement and the record of interview admissible. In the course of ruling on admissibility, the trial judge (without hearing submissions on the point) made obiter observations confirming the correctness of his view expressed in *Malgil v The State of Western Australia* [2008] WASC 290 [19]–[20] that s 154 and s 155 of the Act had no application to evidence of admissions obtained in contravention of s 137 or s 138 of the Act. Contrary views had been expressed by other single judges: *Marshall v The State of Western Australia* [2008] WASC 99 [29]–[31] (McKechnie J); *JWRL v The State of Western Australia* [2009] WASC 285 (Blaxell J). It is apparent from the appellant's written submissions that the correctness of *Malgil* was accepted.

9 At the hearing of the appeal the court questioned the correctness of the construction in *Malgil*. The relevant provisions of the Act are as follows. Under s 138(2)(c) an arrested suspect is entitled to a reasonable opportunity to communicate or to attempt to communicate with a legal practitioner. Under s 138(3)(a), the officer in charge of the investigation must, as soon as practicable after the arrest of a suspect, inform the suspect of his or her rights under, inter alia, subs (2)(c). It was common cause in the appeal that the appellant was an 'arrested suspect' for the purposes of s 138 of the Act. An 'arrested suspect' is defined to mean a person who is under arrest, having been arrested under s 128, under an arrest warrant, or under another written law, on suspicion of having committed an offence (s 138(1)).

10 Section 154 relevantly provides:

> (2) If in the purported exercise of a power conferred by this Act … —
> (a) a thing relevant to an offence is seized or obtained; and
> (b) a requirement of this Act in relation to exercising the power … , including a requirement that arises before or after the exercise of the power … , is contravened, any evidence derived from the thing referred to in paragraph (a) or from the exercise of the power is not admissible in any criminal proceedings against a person in a court unless —
> (c) the person does not object to the admission of the evidence;
> (d) the court decides otherwise under section 155; or
> (e) [not presently relevant].

11 Section 155 provides:

(1) This section applies if under another section a court may make a decision under this section in relation to evidence that is not admissible in proceedings in the court.
(2) The court may nevertheless decide to admit the evidence if it is satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.
(3) In making a decision under subsection (2) the court must take into account —
  (a) any objection to the evidence being admitted by the person against whom the evidence may be given;
  (b) the seriousness of the offence in respect of which the evidence is relevant;
  (c) the seriousness of any contravention of this Act in obtaining the evidence;
  (d) whether any contravention of this Act in obtaining the evidence —
    (i) was intentional or reckless; or
    (ii) arose from an honest and reasonable mistake of fact;
  (e) the probative value of the evidence;
  (f) any other matter the court thinks fit.
(4) The probative value of the evidence does not by itself justify its admission.

12 The other sections to which s 155(1) refers are s 48, s 118 and s 154 of the Act. Unlike the common law, the discretion in s 155(2) is to admit otherwise inadmissible evidence not to exclude otherwise admissible evidence. The considerations in subs (3) are both mandatory and exhaustive.

13 As a consequence of this court raising with both counsel the correctness of the obiter view in *Malgil*, the appellant sought and obtained leave to amend his grounds of appeal to ventilate the issues. The new ground is inadequately expressed as a 'failure to consider' s 154 and s 155 of the Act. However, during the course of the hearing the court canvassed with both parties what it had identified as the relevant issues and questions of statutory construction requiring determination. They are broadly as follows:

(1) what is meant by the expression 'as soon as practicable after arrest' in s 138(3) and was that obligation complied with;
(2) what is meant by the expression 'reasonable opportunity' in s 138(2)(c); insofar as it relates to time, is it affected by whether, and if so when, the obligation in s 138(3)(a) is complied with; is the reasonableness of the opportunity affected by an arrested suspect's indication that he does not wish to communicate with a lawyer; are police officers prohibited from interviewing an arrested suspect until after a reasonable opportunity has been provided to communicate with a lawyer;
(3) is an interview of an arrested suspect and/or a recording thereof a 'thing relevant to an offence' for the purposes of s 154(2)(a); if so, was it obtained in the purported exercise of a power under the Act and if so, what power.

14 For the sake of convenience I propose to deal with the grounds of appeal in reverse order.

Ground 3 — breach of the Act

The proper construction of s 154

15 The effect of ground 3 is that the record of interview was inadmissible at trial because (1) there was a contravention of s 138(2)(c) of the Act; (2) the contravention was in the exercise

of the power to detain the appellant for the purpose of interviewing him (s 139(2)(c)); (3) the DVD was a 'thing' relevant to an offence under s 154; and (4) the court did not exercise its power to admit the evidence under s 155 (the trial judge concluding it had no application).

16 I propose to start with the proper construction of s 154 of the Act. For present purposes I will assume that there was a contravention of s 138 of the Act. For analytical purposes, the constituent elements of s 154(2) are as follows:

1. if in the purported exercise of a power conferred by the Act
2. a thing relevant to an offence is obtained
3. and a requirement of the Act in relation to the exercise of the power (including a requirement that arises before or after the exercise of the power) is contravened
4. any evidence derived from the thing or from the exercise of the power is not admissible
5. unless the person does not object to the admission of the evidence or the court decides otherwise under s 155.

17 The expression 'thing relevant to an offence' is defined in s 5. It relevantly provides:

> For the purposes of this Act, a thing is a thing relevant to an offence if it is reasonably suspected that —
> …
> (d) the thing is or may afford —
> (i) evidence relevant to proving the commission of an offence or who committed an offence; or
> (ii) …
> (2) For the purposes of this Act, a thing relevant to an offence may be material or non-material, animate (other than human) or inanimate.

18 The term 'material' is not defined in the Act and thus has its natural and ordinary meaning of 'formed or consisting of matter; physical; corporeal': *The Macquarie Dictionary* (3rd ed revised, 2001), 1180. Its opposite, 'non-material' means 'incorporeal; not material; without material existence'. Thus, the statutory meaning is sufficiently broad to include information provided or statements made by a person, such as for example, responses made by a person to questioning. Prima facie, the appellant's interview with police officers and the audiovisual record of that interview are things relevant to the offences with which the appellant was charged.

19 That construction of s 5 is consistent with the scheme of the Act as a whole. In particular, s 154 is the only section of the Act that provides an express statutory avenue for the potential consequence of a failure to comply with the duties in, inter alia, s 137 and s 138 of the Act. It is to be expected that a statute creating obligations to be performed by police in the investigation of criminal offences would also expressly provide for the consequences of a failure to comply with them. The only alternative would be to construe the Act as containing an implication that a failure to comply with a duty under the Act is relevant to the admissibility of confessional evidence at common law. It would be difficult to draw such an implication when the Act expressly provides an avenue for dealing with contraventions.

20 The next question is whether the relevant things (the statements made by the appellant and the audiovisual recording thereof) were obtained in the purported exercise of a power conferred by the Act. The Act does not expressly empower police officers to interview a suspect.

However, s 139 of the Act provides for the detention of 'arrested suspects' as that expression is defined in s 139(1). It is common cause that the appellant was an arrested suspect within that definition. Under s 139(2)(c), a police officer may detain an arrested suspect after the suspect is arrested for the purposes of interviewing the suspect in relation to any offence that the suspect is suspected to have committed. The appellant was detained for that purpose. Thus the interview and the record thereof are 'things' obtained in the purported exercise of the power under s 139(2)(c), which satisfies the first two elements of s 154(2).

21 The next issue is whether a requirement of the Act in relation to exercising the power (the power to detain an arrested suspect for the purposes of interview) is contravened. Section 138 is a requirement of the Act and it relates to the rights of an arrested suspect. Although the definition of arrested suspect in s 138(1) is wider than that in s 139(1), the appellant is an arrested suspect for the purposes of both s 138 and s 139. Thus the requirements in s 138 in the circumstances of this case relate to the exercise of the power to detain an arrested suspect for questioning. The third element of s 154 is satisfied.

22 Finally, the interview and the record thereof are evidence derived from the exercise of the power in s 139(2)(c) to detain the appellant for the purposes of interview. The fourth element is also satisfied.

23 Thus, if there was a breach of s 138, the record of interview was improperly obtained and inadmissible unless the court otherwise decided under s 155 of the Act. The court did not otherwise decide (nor was it asked to).

The construction and application of s 138

24 Section 138 of the Act relevantly provides:

> (2) In addition to the rights in section 137 an arrested suspect is entitled —
> (a) to be informed of the offence for which he or she has been arrested and any other offences that he or she is suspected of having committed;
> (b) to be cautioned before being interviewed as a suspect;
> (c) to a reasonable opportunity to communicate or to attempt to communicate with a legal practitioner;
> (d) if he or she is for any reason unable to understand or communicate in spoken English sufficiently, not to be interviewed until the services of an interpreter or other qualified person are available.
> (3) The officer in charge of the investigation must, as soon as practicable after the arrest of an arrested suspect —
> (a) inform the suspect of his or her rights under section 137(3)(c) and subsection (2)(c); and
> (b) afford the suspect his or her other rights under section 137 and subsection (2).

25 Section 137(3)(c) provides that an arrested person is entitled to a reasonable opportunity to communicate or to attempt to communicate with a relative or friend to inform that person of his or her whereabouts. The other rights under s 137 include necessary medical treatment, a reasonable degree of privacy from the mass media and the provision of an interpreter or other qualified person if the arrested person is unable to understand or communicate in spoken English sufficiently.

26 Subsections (2) and (3) of s 138 are interrelated. Subsection (2) identifies the arrested suspects' rights and subs (3) identifies upon whom the duty falls, the scope of the duty and when the duty (to confer the rights) must be exercised. As to timing, the duty must be performed 'as soon as practicable after arrest'. The word 'practicable' is not defined and has its natural and ordinary meaning of 'capable of being put into practice, done or effected, especially with the available means or with reason or prudence; feasible': *Macquarie Dictionary* 1494.

27 The police officer who gave evidence at the voir dire was not examined or cross-examined with the object of establishing compliance or non-compliance with any duty in s 138(3)(a) or s 138(2)(c) of the Act. Detective Leonhardt was not asked whether he informed the appellant of his right to communicate with a lawyer some time before the commencement of the record of interview and if not, why not. As previously noted, counsel for the appellant did not understand the appellant to be an arrested suspect for the purposes of s 138 (ts 149).

28 What is 'as soon as practicable after arrest' is a matter of fact to be determined in the circumstances of each case. Prima facie, it would have been feasible to inform the appellant of his entitlement to a reasonable opportunity to communicate with a legal practitioner shortly after his arrest, which was at around 12.22 pm. That proposition involves implicit rejection of the notion that it is appropriate to wait until the performance of the statutory duties can be objectively confirmed on the record which, it may be speculated, explains the police procedures in this case. On the assumption that the appellant was first informed of his right under s 138(2)(c) during the interview, and in the absence of any explanation for the delay, I would conclude that the appellant was not informed of his right to communicate with a lawyer as soon as practicable after the arrest.

29 The proper construction of s 138(2)(c) is not without difficulty. What is relatively clear is that it is not the source of any duty imposed on police. Sections 138(3)(a) is the source of the duty on police. The two provisions have to be read together to determine the scope of the duty on police in relation to a suspect's right under s 138(2)(c). The only express duty on police is to *inform* the suspect of his right to communicate with a lawyer. That is to be contrasted with the obligation of the officer in charge under s 138(3)(b) which is to *afford* the suspect his or her *other* rights under s 137 and subs (2). The word 'inform' means tell and the word 'afford' means supply or furnish. The word 'other' can only mean other than the provisions expressly referred to in s 138(3)(a), which includes s 138(2)(c). Accordingly, the officer in charge is under a duty to caution the suspect or if the suspect is unable to understand or communicate in English, to provide an interpreter. The only obligation of the officer in charge in relation to s 138(2)(c) is to inform the suspect of his entitlement to a reasonable opportunity to communicate with a legal practitioner. However, what is a reasonable opportunity will depend on all the circumstances, including the suspect's access to the means to communicate. Thus there is every practical incentive on police to permit access to the means necessary to facilitate communication.

30 Although the officer in charge is not obliged to supply or furnish an arrested suspect with any facilities (for example, a telephone or a telephone directory) which are reasonably necessary for the suspect to take advantage of his or her entitlement under s 138(2)(c) (namely, a reasonable opportunity to communicate or attempt to communicate with a legal practitioner), police must not by any act or omission prevent the suspect's exercise of that entitlement.

31 By s 139(2), a police officer or a public officer may detain an arrested suspect, after the suspect is arrested, for the purposes specified in that subsection. By s 139(3), an arrested suspect who is detained under s 139(2) must be detained in the company of an officer and not in a lock-up or other place of confinement, unless the circumstances make it impracticable to do so.

32 If an arrested suspect wishes to take advantage of his or her entitlement to a reasonable opportunity to communicate or attempt to communicate with a legal practitioner, what will constitute a 'reasonable opportunity' will, of course, depend on the particular facts and circumstances of each case. But, ordinarily, the 'reasonable opportunity' will include the suspect travelling in the company of a police officer (see s 139(2) and (3)) to obtain access (if necessary) to a telephone and a telephone directory within the vicinity of the place where the suspect is being detained.

33 The next issue is whether the opportunity to communicate must be prior to interview. Construing s 138(2)(c) in its broader context, there is no such requirement. There is no express provision to that effect nor can such a requirement be implied having regard to pars (b) and (d) of s 138(2), both of which expressly provide that the right be afforded prior to interview. The omission in s 138(2)(c) is explicable on the basis that under s 138(2)(b) a suspect must be cautioned before being interviewed as a suspect. The caution (that the suspect does not have to say anything but anything he does say would be recorded and may be given in evidence) sufficiently protects the interests of the suspect. A suspect who wishes to communicate with a lawyer, will be aware that he is not obliged to answer any questions. Further, the practical effect of the obligation in s 138(3)(a) to inform the suspect of his right to communicate with a lawyer as soon as practicable after arrest will ordinarily require that the information be provided prior to interviewing the suspect.

34 What is a 'reasonable opportunity' will be assessed from the time the suspect was informed of his right to communicate with a lawyer (or perhaps earlier if it is established that the suspect was otherwise aware of his rights). However, it is entirely a matter for the suspect as to whether or not he wishes to exercise the right. Thus, what is a reasonable opportunity will depend upon the suspect's attitude to communicating with a lawyer. If the suspect expressly or impliedly indicates that he does not want to do so, no further time is required. I will assume without deciding that a suspect can in those circumstances subsequently avail himself of the right.

…

36 The questions whether there had been a breach of s 138 of the Act and if so whether the court should exercise its discretion under s 155 were not litigated in the voir dire. What evidence there is supports an inference that the officer in charge did not inform the appellant of his right to communicate with a lawyer as soon as practicable after his arrest. As the issue was not litigated, there is no direct evidence as to whether the delay in providing the information occasioned any prejudice to the appellant. Having regard to his conduct at the interview, I would decline to conclude that the position would have been different if the appellant had been advised earlier.

37 In the introductory part of the interview, the appellant was informed of his right to communicate with a lawyer and was cautioned. His answers disclose that he understood the effect of the caution (ts 5). The appellant then proceeded to answer questions put to him by

police. About halfway through the interview, the appellant unequivocally stated he wanted a lawyer (ts 18). After a few further questions, a police officer informed the appellant that if he wanted to contact a lawyer the appellant could use his phone. The appellant was then asked whether he was prepared to continue with the interview and he said yes (ts 19–20). The questioning continued and the appellant again asked for a lawyer (ts 27). The police then provide the appellant with a telephone book and a telephone and the appellant attempted to contact the Legal Aid Commission. He was unsuccessful. One of the police officers asked the appellant what he wanted to do and reiterated the caution. The appellant continued to answer questions (ts 30–31). A short time later, a police officer asked whether the appellant wanted to try again to contact a lawyer. On this occasion the appellant was successful and he acted on advice not to answer any further questions.

38 I have concluded that the only relevant obligation of a police officer under s 138 is to inform a suspect of his right to communicate with a lawyer. Having exercised that duty, the onus is effectively cast on the suspect to exercise the right if he or she so desires. There is no duty on the police to cease questioning the suspect. If that is correct, it cannot in my view be said that in the formal interview the appellant was denied his right to a reasonable opportunity to communicate with a lawyer.

39 The next question is whether, and if so on what ground, this court must act under s 30(3) of the *Criminal Appeals Act 2004* (WA). Section 30 relevantly provides:

> (2) Unless under subsection (3) the Court of Appeal allows the appeal, it must dismiss the appeal.
> (3) The Court of Appeal must allow the appeal if in its opinion —
> (a) the verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence, it is unreasonable or cannot be supported;
> (b) the conviction should be set aside because of a wrong decision on a question of law by the judge; or
> (c) there was a miscarriage of justice.
> (4) Despite subsection (3), even if a ground of appeal might be decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

40 The issue is whether in the circumstances of this case par (b) or par (c) applies. Criminal proceedings are adversarial in nature with the consequence that ordinarily the parties thereto expressly or impliedly determine the matters of fact in issue: *MacKenzie v the Queen* [2004] WASCA 146 [74]. As is apparent from the written submissions and the proceedings on the voir dire, the appellant accepted that s 154 and s 155 had no application to confessional evidence and based his challenge to the admissibility of the record of interview solely on the common law. The observations made by the trial judge concerning the non-applicability of s 154 and s 155 were obiter.

41 In those circumstances, the trial judge did not make a wrong decision on a question of law for the purposes of s 30(3)(b): *R v Soma* (2003) 212 CLR 299 [42] (McHugh J). Thus, the appellant must establish that there has been a miscarriage of justice. Where the irregularity in issue results from the deliberate conduct of counsel based on an erroneous view of the law or the facts, it is appropriate to focus on what the outcome would have been if the issue

had been raised at the appropriate time: *TKWJ v The Queen* (2002) 212 CLR 124 [79]. That is, the appellant must demonstrate that if the issue had been raised, the court would have declined to admit the evidence under s 155. Having regard to the evidence referred to above, I would infer that any breach of s 138 was neither deliberate nor (having regard to the opacity of its terms) reckless and that it occasioned no proven prejudice. Taking into account all of the mandatory considerations in s 155(3), the weight of the relevant considerations strongly favours the admission of the evidence. Thus, the appellant has not established any miscarriage of justice.

42 In any event, even if the record of interview was inadmissible, I agree with Blaxell J for the reasons he gives that there is no substantial miscarriage of justice, because its admission into evidence would and should have had no significance in determining the verdict returned by the jury: *Weiss v The Queen* [2005] HCA 81; (2005) 224 CLR 300; *Mahmood v The State of [No 2]* [2008] WASCA 259. I would dismiss ground 3.

…

Ground 1 — the oral statement

50 The appellant contends the trial judge erred when he failed to exclude the oral statement pursuant to s 118 of the Act. Section 118 relevantly provides:

> (1) In this section —
> ***admission*** means an admission made by a suspect to a police officer or a CCC officer, whether the admission is by spoken words or by acts or otherwise;
> ***adult*** means a person who has reached 18 years of age;
> ***child*** means a person who is under 18 years of age;
> ***reasonable excuse***, for the absence of an audiovisual recording of an admission, includes —
> (a) the admission was made when it was not practicable to make an audiovisual recording of it;
> (b) equipment to make an audiovisual recording of the admission could not be obtained while it was reasonable to detain the suspect;
> (c) the suspect did not consent to an audiovisual recording being made of the admission;
> (d) the equipment used to make an audiovisual recording of the admission malfunctioned.
> …
> (3) On the trial of the suspect for the offence, evidence of any admission by the suspect is not admissible unless —
> (a) the evidence is an audiovisual recording of the admission; or
> (b) in the absence of an audiovisual recording of the admission —
> (i) the prosecution proves, on the balance of probabilities, that there is a reasonable excuse for the absence; or
> (ii) the court decides otherwise under section 155.
> (4) Subsection (3) does not apply to an admission by a person made before there were reasonable grounds to suspect that he or she had committed the offence.

51 The structure of the provision is as follows. Prima facie, evidence of an admission by a suspect is not admissible unless there is an audiovisual recording of the admission. The

evidence will be admissible in the absence of an audiovisual recording if (1) the prosecution proves that there is a reasonable excuse for the absence; or (2) the court decides otherwise under s 155.

52 Section 118 replaces s 570D of the *Criminal Code* which was considered by the High Court in *Carr v The State of Western Australia* (2007) 232 CLR 138 and *Nicholls v The Queen* (2005) 219 CLR 196. The explanatory memorandum for the Criminal Investigation Bill notes that s 118 substantially mirrors the previous provisions. Under s 570D evidence of any admission by the accused was not admissible 'unless the evidence is a videotape on which is a recording of the admission'. Videotape was defined as any videotape on which is recorded an interview. The term 'admission' in s 570D is the same as the definition in s 118(1). The term 'videotape' has been replaced in s 118 by the expression 'audiovisual recording' which is not defined. Thus the question whether the admission was made in an interview is no longer relevant. However, the definition of admission remains as one made by 'a suspect to a police officer'. The requirement must place some limitation on the scope of the exclusion. In its context, the meaning of 'to' is expressing motion or direction towards someone; that is the words or conduct was directed to a police officer.

53 It is apparent from the heading and content of pt 11 in general that its primary focus is on the recording of an interview between a suspect and police which is invariably conducted in private with the attendant risk of police verballing a suspect. On the other hand, whether or not a suspect made an admission 'to a police officer' involves questions of degree and that expression should be given its broadest legitimate scope consistent with the statutory language and purpose of the Act.

54 In this case the evidence of all persons present in the room was consistent, namely that the statements made by the appellant were directed at his cousin both physically and as a matter of intention; the appellant was explaining to his cousin why he was wanted by police. A statement made by a suspect to a third party in the presence of police would not in my view fall within the mischief which s 118 is intended to address. However, I will proceed on the assumption that the admission is not admissible because it was not recorded.

55 The definition of the expression 'reasonable excuse' is not in terms or effect exclusive. That is, there may be a reasonable excuse that does not fall within any of the paragraphs of the definition: *Nicholls* [3], [106], [156], [218], [342].

56 The trial judge held that the oral statement was made by the appellant when it was not practicable to make an audiovisual recording of it and thus there was a reasonable excuse for its absence. He accepted the evidence of Detective Leonhardt which was to the effect that there was no intention to speak to or interview the appellant but rather to take him into custody and that the main objective of police upon entering the house was to secure the premises and secure the people inside the premises in which case it was not practicable to run into the premises with video equipment running.

57 In this case the admission was made at a private home where the police secured entry for the purpose of locating and arresting the appellant for a very serious offence, with the possibility that the appellant may seek to avoid or resist arrest and with no intention of questioning the appellant. Those being the surrounding circumstances leading up to the unexpected admission, the trial judge was correct to conclude that it was not practicable to make an audiovisual recording of it.

58 The appellant did not at trial or in the appeal rely on s 45 of the Act which deals with recording the execution of a search warrant. It is unnecessary to address that issue. I would dismiss ground 1.

[**Buss J** agreed with **McLure P. Blaxell J** wrote a separate opinion also dismissing the appeal. On the interpretation of Criminal Investigation Act 2006 (WA) s 138(3), **Blaxell J** made these observations:

158 On a literal reading of s 138(3) the obligation on the officer in charge would be simply to inform the suspect of the rights of communication and not to afford the suspect those rights. However, in my view this literal construction cannot be correct because it would contradict the underlying legislative intent that arrested suspects be able to exercise the rights conferred by the Act. Accordingly, it is necessary to find an alternative construction, and in my opinion the key to a proper construction is to be found in what must be the underlying reason for the differentiation in the duties imposed on the officer in charge under s 138(3).

159 When the particular nature of each of the relevant rights is examined, it is clear that the officer in charge is required to 'afford' to the suspect only those rights which are completely within his or her power to fulfil. In respect of the two rights where there is a duty to 'inform' the officer alone cannot ensure that they are ultimately fulfilled.

160 In this regard, although the entitlement to a reasonable opportunity to communicate (or to attempt to communicate) exists from the time of arrest, that opportunity can only be provided if and when the suspect desires to exercise the right. Therefore, it is necessary that the suspect should wish to communicate (with a friend or relative, and/or with a legal practitioner) before any reasonable opportunity can be afforded.

161 It is quite sensible and logical that s 138 does not explicitly require the officer in charge to 'afford' those rights at a time when he or she is not necessarily in a position to do so. It is also logical that the officer must first provide information on the existence of the rights which otherwise might not be known to the suspect. Without that knowledge the suspect would not be in a position to exercise the rights.

162 Although s 138 is silent as to the duty of an officer when a suspect expresses the wish to exercise one of the rights of communication, the Act clearly requires that there be a reasonable opportunity for the suspect to do so. Given that s 139(3) provides that an arrested suspect should ordinarily be detained in the company of an officer, any reasonable opportunity to communicate can only occur with the cooperation of that officer (eg by the provision of a telephone and telephone book).

163 In my view, it is also significant that s 138(4) refers to a 'right to communicate or to attempt to communicate' as distinct from a 'reasonable opportunity' to do so. This conversion in the nature of the rights conferred by s 137(3)(c) and s 138(2)(c) occurs in the context of the circumstances in which an officer may 'refuse' an arrested suspect that right. Clearly such a refusal can only be in response to a request by an arrested suspect to be able to exercise the right.

164 In light of these considerations it is my opinion that when the Act (and particularly s 137, s 138 and s 139) is construed as a whole, an arrested suspect's right to communicate arises as soon as he or she expresses the wish to exercise that right. In the absence of any reasonable suspicion under s 138(4) the officer then detaining the arrested suspect is obliged to afford the suspect that right.]

26.82C

R v Swaffield

(1998) 192 CLR 159; 151 ALR 98
High Court of Australia

Toohey, Gaudron and **Gummow JJ:**

38 These appeals, which were heard together, concern the admissibility of evidence obtained by means of a conversation recorded without the knowledge, in the first case of the respondent and in the second case of the appellant. Since the convicted person is, in one case, the respondent and, in the other, the appellant, it makes for greater clarity to refer to them by name. Some reference to the facts in each case is necessary.

Swaffield

39 Swaffield was convicted in the District Court of Queensland of the three offences with which he had been charged. The first was of breaking and entering the workshop of Metal Recyclers (Qld) Pty Ltd and stealing various articles including cutting equipment. The second was of breaking and entering the premises of Leichhardt Rowing Club with intent to commit an indictable offence. The third was of wilfully and unlawfully setting fire to the Leichhardt Rowing Club. The cutting equipment, the subject of the first charge, was used in connection with the second offence.

40 Swaffield was convicted of these offences on 7 December 1995. He was initially charged with the offences on 7 September 1993. He had declined to be formally interviewed by the police. Blood and hair samples were then taken from him. A committal hearing was set for 13 November 1993 but on that day the police offered no evidence against him and he was discharged. At that time the only evidence against Swaffield was that a car similar to his had been seen in the vicinity of the Rowing Club on the night the premises were set alight.

41 In May 1994 the police began an undercover operation aimed at the detection of drug suppliers in the areas of Yeppoon and Rockhampton in Queensland. Swaffield was one of the operation's targets. In July 1994 a police officer concerned with the investigation of the arson offence passed on the brief of evidence to the 'controller' of Constable Marshall, who was an undercover officer in the drug detection operation. On 11 August 1994 Constable Marshall held a conversation with Swaffield, during which the former pretended that his brother-in-law 'down the coast' was in trouble for burning a car. In conversations between the two men Swaffield made admissions of his involvement in the fire at the Rowing Club.

42 In consequence of the admissions made by Swaffield, fresh charges were laid against him. He was duly committed for trial and his trial began on 5 December 1995. When the trial began counsel for Swaffield submitted that evidence of his conversations with Constable Marshall should not be admitted, on the ground that there had been a disregard of the Judges' Rules and that the unfairness this involved should lead to an exercise of the trial judge's discretion to exclude the evidence. Although reference is made in the transcript of proceedings to r 3 of the Judges' Rules, it was assumed in the Court of Appeal that r 2 was the relevant rule. The matter proceeded in this court on that footing.

43 Rule 2 reads:

> Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions, as the case may be.

44 The trial judge, in the exercise of his discretion, declined to exclude the conversations from evidence. Swaffield was convicted of the three offences; his appeal to the Court of Appeal was against the conviction for arson only. The court by majority (Fitzgerald P and Helman J, Pincus JA dissenting) allowed the appeal, quashed the conviction and entered a verdict of acquittal. The Crown has appealed to this court.

Pavic

45 On 15 December 1994 Andrew Astbury disappeared. On 18 December several police officers questioned Pavic and members of his family about the disappearance. Pavic was told that he did not have to speak with the police and also that if he had been in a fight with Astbury he ought to obtain legal advice and, depending on that advice, attend the police station to take part in a tape-recorded interview.

46 On 26 December 1994 the body of Andrew Astbury was found. On 3 January 1995 the police took Pavic into custody and conducted an interview with him in accordance with Pt 3 Div 1 Subdiv 30A of the Crimes Act 1958 (Vic) [Section 464A prescribes the procedure to be followed when a person is taken into custody for an offence. If a person suspected of having committed an offence is in custody, an investigating official may, within a reasonable time, question the person but must first inform the person that he or she does not have to say anything but that anything the person says may be given in evidence]. During that interview Pavic maintained his right not to answer any questions. At the end of the interview the police officers concerned told Pavic that they believed he had committed the offence of murder. However they did not charge him and he was released from custody.

47 On 9 January 1995 police officers took a statement from Lewis James Clancy, a close friend of the appellant. At the conclusion of the interview the investigating police officers believed they had enough evidence to charge Pavic with the murder of Andrew Astbury. However, they suggested to Clancy that he, on behalf of the police, speak with Pavic and that, for the purpose, he carry a recording device. Clancy agreed to the proposal and spoke to Pavic who made admissions of his involvement in the killing of Andrew Astbury.

48 In due course Pavic was committed for trial. In the Supreme Court of Victoria he pleaded not guilty to a charge of murder but guilty to manslaughter of the deceased. At the commencement of his trial, Pavic's counsel objected to evidence of the interview with Clancy on the ground that it would be unfair to Pavic to admit the evidence and submitted that the trial judge should exercise his discretion to exclude it. The trial judge declined so to exercise his discretion; the evidence played a substantial part in the case against Pavic. He was convicted of murder and his appeal to the Court of Criminal Appeal was dismissed. He has appealed to this court.

The issues

49 As mentioned earlier, the two appeals were heard together on the footing that they involved the same issues although the factual aspects were different. And, of course, one was a Crown appeal against a judgment upholding an appeal against the refusal to exercise the discretion. As will appear, the arguments originally presented to this court underwent development in response to questioning from the bench. It is, we think, helpful to look first at the arguments as originally presented and then to identify the footing on which each of the appeals was left for determination by the court.

50 In each of the appeals, what the accused had sought to have excluded was a confessional statement, that is, a statement acknowledging, or from which an acknowledgment might be drawn, that he was guilty of the offence charged. Four bases for the rejection of a statement by an accused person are to be discerned in decisions of this court. The first lies in the fundamental requirement of the common law that a confessional statement must be voluntary, that is, 'made in the exercise of a free choice to speak or be silent' [*R v Lee* (1950) 82 CLR 133 at 149. See also *MacPherson v R* (1981) 147 CLR 512 at 519; *Cleland v R* (1982) 151 CLR 1 at 5; *Collins v R* (1980) 31 ALR 257 at 307]. The will of the statement-maker must not have been overborne. The relevant principle was stated by Dixon J in *McDermott v R* [(1948) 76 CLR 501 at 511] in these terms:

> If [the] statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made.

It should be said immediately that in neither of the appeals was it contended that the confession was made involuntarily.

51 The second, third and fourth bases for the rejection of a statement made by an accused person proceed on the footing that the statement was made voluntarily. Each involves the exercise of a judicial discretion.

52 The second basis is that it would be unfair to the accused to admit the statement. The purpose of the discretion to exclude evidence for unfairness is to protect the rights and privileges of the accused person. The third basis focuses, not on unfairness to the accused, but on considerations of public policy which make it unacceptable to admit the statement into evidence, notwithstanding that the statement was made voluntarily and that its admission would work no particular unfairness to the accused. The purpose of the discretion which is brought to bear with that emphasis is the protection of the public interest. The fourth basis focuses on the probative value of the statement, there being a power, usually referred to as a discretion, to reject evidence the prejudicial impact of which is greater than its probative value. The purpose of that power or discretion is to guard against a miscarriage of justice.

Unfairness

53 The term 'unfairness' necessarily lacks precision; it involves an evaluation of circumstances. But one thing is clear:

> [T]he question is not whether the police have acted unfairly; the question is whether it would be unfair to the accused to use his statement against him … Unfairness, in this sense, is concerned with the accused's right to a fair trial, a right which may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement. [*Van der Meer v R* (1988) 62 ALJR 656 at 666; 82 ALR 10 at 26 per Wilson, Dawson and Toohey JJ]

54 Unfairness then relates to the right of an accused to a fair trial; in that situation the unfairness discretion overlaps with the power or discretion to reject evidence which is more

prejudicial than probative, each looking to the risk that an accused may be improperly convicted. While unreliability may be a touchstone of unfairness, it has been said not to be the sole touchstone. It may be, for instance, that no confession might have been made at all, had the police investigation been properly conducted [*Van der Meer v R* (1988) 62 ALJR 656 at 662; 82 ALR 10 at 20 per Mason CJ; *Duke v R* (1989) 180 CLR 508 at 513 per Brennan J]. And once considerations other than unreliability are introduced, the line between unfairness and policy may become blurred.

55 The appeal relating to Swaffield involved the Judges' Rules in Queensland. Their precise status is still a matter for debate but it is apparent that they are regarded as a yardstick against which issues of unfairness (and impropriety) may be measured [*Van der Meer v R* (1988) 62 ALJR 656 at 666; 82 ALR 10 at 26 per Wilson, Dawson and Toohey JJ].

56 It will be necessary to return to the unfairness discretion and to the Judges' Rules but, before doing so, it is helpful to say something more about the policy discretion and, also, about the power or discretion to exclude evidence which is more prejudicial than probative.

Policy discretion

57 The concept of a discretion to exclude confessional evidence, even where no unfairness to the accused has been demonstrated, was recognised in *R v Ireland* where Barwick CJ, with whom McTiernan, Windeyer, Owen and Walsh JJ agreed, said [(1970) 126 CLR 321 at 334–5]:

> Evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible … Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence … In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price.

58 Barwick CJ spoke in terms both of unlawfulness and unfairness. It is not certain whether the Chief Justice was giving additional scope to the unfairness discretion or was recognising an independent discretion to exclude evidence …

59 In *Bunning v Cross* this aspect was put beyond doubt when Stephen and Aickin JJ, with whom Barwick CJ agreed, spoke in terms of 'broader questions of high public policy' [(1978) 141 CLR 54 at 74. Strictly speaking, the case was concerned with the admission of a breathalyser test on a charge of driving under the influence of alcohol. But in *Cleland v R* (1982) 151 CLR 1 it was made clear that the principles in *Bunning v Cross* extended to confessional statements]. They did so in explanation of *Ireland* [(1970) 126 CLR 321] where evidence had been obtained in breach of a statutory provision relating to the photographing of a suspect. *Bunning v Cross* was seen in *Ridgeway v R* as supporting the exclusion of evidence of an offence, or an element of an offence, procured by unlawful or improper conduct on the part of law enforcement officers [(1995) 184 CLR 19, especially at 34, 36 and 37].

60 In *Foster v R* [(1993) 67 ALJR 550 at 554; 113 ALR 1 at 7], which was decided two years before *Ridgeway*, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ said that although in many cases the two discretions will overlap, their focus is different.

> In particular, when the question of unfairness to the accused is under consideration, the focus will tend to be on the effect of the unlawful conduct on the particular accused whereas, when the question of the requirements of public policy is under consideration, the focus will be on 'large matters of public policy'.

Their Honours added that in cases where both discretions are relied upon, 'it will commonly be convenient for the court to address first the question whether the evidence should be excluded on the ground that its reception and use in evidence would be unfair to the accused'.

…

62 In *Ridgeway* Mason CJ, Deane and Dawson JJ referred to the discretion to exclude evidence of an illegally procured offence as arguably not distinct and independent of the discretion to exclude illegally procured evidence, but as 'complementary aspects of a single discretion which encompasses them both' [(1995) 184 CLR 19 at 38].

The discretion to exclude evidence where prejudicial effect exceeds probative value

63 In *Cross on Evidence* [*Cross on Evidence*, 5th Australian ed (1996) at 294] the following statement appears under the heading 'Discretion to exclude relevant evidence in criminal proceedings':

> Evidence may be excluded where its prejudicial effect exceeds its probative value. This is commonly applied in relation to similar fact evidence, but can apply more generally.

…

64 A number of the authorities … deal with similar fact or propensity evidence. However, as a matter of principle there is no reason why the power or discretion to exclude evidence which is unduly prejudicial should not extend to a statement made by an accused person and to other evidence upon which it would be dangerous for a jury to act [See, for instance, *R v Kallis* [1994] 2 Qd R 88 where the Queensland Court of Appeal said that comments by police officers should have been excluded from a videotaped interview]. In the case of propensity evidence which is not of a kind that compels an inference of guilt, … evidence which is prejudicial rather than probative is simply inadmissible. In other situations it may be necessary to reject such evidence because 'no account ought to be taken of [it] … for any evidentiary purpose' [*Sinclair v R* (1946) 73 CLR 316 at 338]. And there may be yet other situations where it is necessary to reject evidence which is prejudicial rather than probative to avoid a risk of a miscarriage of justice. … In such cases it is not entirely accurate to speak in terms of a discretion. In *Pfennig v R* [94 (1995) 182 CLR 461 at 475–6] Mason CJ, Deane and Dawson JJ spoke of two relevant principles enunciated by Lord Herschell LC in *Makin v Attorney-General (NSW)* [[1894] AC 57 at 65], the second of which 'seemed to imply that propensity evidence was … inadmissible for some overriding policy reason, ie, that in many cases its prejudicial effect would outweigh its probative force'. And the discretion has sometimes been seen to involve considerations of fairness to the accused. Thus in *R v Wray* [[1971] SCR 272 at 293] Martland J, speaking for a majority of the Supreme Court of Canada, said:

> The allowance of admissible evidence relevant to the issue before the court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It

> is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly …

However, the fairness at issue in cases involving the exercise of a discretion to exclude unduly prejudicial evidence is the fairness of the trial, in the sense of a trial that does not involve a perceptible risk of a miscarriage of justice.

65 Since 'the unfairness discretion' is a recognised basis for excluding confessional statements and is dealt with in the authorities as a discrete discretion, the issue whether there is some additional basis for excluding such statements in terms of probative value versus prejudicial effect does not call for further exploration in the present context. Where confessional statements have been excluded in exercise of the unfairness discretion, it has not been after a weighing of probative value against prejudicial effect has been carried out …

General considerations

66 It has been said, rightly, that fairness is a vague concept. It has also been said that the application of the unfairness discretion is uncertain because courts have failed to define the policy behind the discretion or considerations relevant to it [Australian Law Reform Commission Report No 26, *Evidence*, 1985, vol 2, pp 208–10]. This, it is argued, makes satisfactory appellate review of the discretion difficult. The criticism has force though the very nature of the concept inhibits great precision. An approach to unfairness which focuses on whether reception of the evidence in question may have jeopardised the accused's right to a fair trial because the statement was obtained in circumstances affecting its reliability does admit of application by a trial judge and review on appeal. However, the unfairness discretion would achieve nothing beyond what is already required by the general law if it were concerned solely to ensure a fair trial.

67 The concept of unfairness has been expressed in the widest possible form in the Evidence Act 1995 (Cth) and the Evidence Act 1995 (NSW). Section 90 of both Acts reads:

> In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:
> (a) the evidence is adduced by the prosecution; and
> (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

68 Neither in s 90 nor anywhere else in either Act is there to be found a definition of unfairness. Part 3.11 — 'Discretions to Exclude Evidence' contains a number of provisions of a general nature empowering the court to refuse to admit evidence or to limit its use. In particular s 138(1) prohibits the admission of evidence obtained:

> (a) improperly or in contravention of an Australian law; or
> (b) in consequence of an impropriety or of a contravention of an Australian law;
>
> unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

This expresses in the widest terms the policy discretion developed by the common law. It is true that an approach, expressed in such terms, lacks certainty. But as the Law Reform Commission of Canada has said [See *Australian Law Reform Commission Report No 26, Evidence*, 1985, vol 1, p 534]:

> there is an undeniable advantage in granting judges discretionary power, since it keeps the courts continually in touch with current social attitudes and may lead to the eventual evolution of the rules as the courts adapt them to changing social realities.

69 It is appropriate now to see how the argument developed in the present appeals. When the court resumed after the first day's hearing, the Chief Justice asked counsel to consider whether the present rules in relation to the admissibility of confessions are satisfactory and whether it would be a better approach to think of admissibility as turning first on the question of voluntariness, next on exclusion based on considerations of reliability and finally on an overall discretion which might take account of all the circumstances of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to contemporary community standards.

70 Putting to one side the question of voluntariness, the approach which the court invited counsel to consider with respect to the common law in Australia is reflected in the sections of the Evidence Acts to which reference has been made, when those sections are taken in combination. The question which arises immediately is whether the adoption of such a broad principle is an appropriate evolution of the common law or whether its adoption is more truly a matter for legislative action. Subject to one matter, an analysis of recent cases, together with an understanding of the purposes served by the fairness and policy discretions and the rationale for the inadmissibility of non-voluntary confessions, support the view that the approach suggested by the Chief Justice in argument already inheres in the common law and should now be recognised as the approach to be adopted when questions arise as to the admission or rejection of confessional material. The qualification is that the decided cases also reveal that one aspect of the unfairness discretion is to protect against forensic disadvantages which might be occasioned by the admission of confessional statements improperly obtained.

The unfairness and policy discretions: further analysis

71 The seeds of a broader approach to the admissibility of confessional evidence may be found in *Duke v R* [(1989) 180 CLR 508]. That appeal was determined after *Bunning v Cross* but before *Foster*. In *Duke* Brennan J said [(1989) 180 CLR 508 at 513]:

> The unfairness against which an exercise of the discretion is intended to protect an accused may arise not only because the conduct of the preceding investigation has produced a confession which is unreliable but because no confession might have been made if the investigation had been properly conducted. If, by reason of the manner of the investigation, it is unfair to admit evidence of the confession, whether because the reliability of the confession has been made suspect or for any other reason, that evidence should be excluded.

His Honour then proceeded to refer to trickery, misrepresentation, unlawful detention and other factors as justifying rejection of evidence of a confession but emphasised that the fact

that an impropriety occurred did not carry the consequence that a voluntary confession must be excluded. He concluded [(1989) 180 CLR 508 at 513]:

> The effect of the impropriety in procuring the confession must be evaluated in all the circumstances of the case.

…

73 Reference has been made already to the judgment of the majority in *Foster*. Having referred to the focus of the two discretions, their Honours identified various considerations which weighed heavily in favour of the exclusion of the appellant's confessional statement [(1993) 67 ALJR 550 at 555–6; 113 ALR 1 at 8–10]. These were the police infringement of the appellant's rights by arresting him for the purpose of questioning, the fact that the unlawful arrest and detention were for the purpose of questioning him in an environment from which he had no opportunity to withdraw, and also the existence of a real question whether admissions made by the appellant were made in the exercise of a free choice to speak or be silent. The last of these considerations sounds more in voluntariness but it was taken into account in the exercise of the discretion to exclude the admissions.

74 One matter which emerges from the decided cases is that it is not always possible to treat voluntariness, reliability, unfairness to the accused and public policy considerations as discrete issues. The overlapping nature of the unfairness discretion and the policy discretion can be discerned in *Cleland v R* [(1982) 151 CLR 1]. See also *Foster v R* [(1993) 67 ALJR 550; 113 ALR 1]. It was held in that case that where a voluntary confession was procured by improper conduct on the part of law enforcement officers, the trial judge should consider whether the statement should be excluded either on the ground that it would be unfair to the accused to allow it to be admitted or because, on balance, relevant considerations of public policy require that it be excluded. That overlapping is also to be discerned in the rationale for the rejection of involuntary statements. It is said that they are inadmissible not because the law presumes them to be untrue, but because of the danger that they might be unreliable [see *Sinclair v R* (1946) 73 CLR 316 at 335 per Dixon J]. That rationale trenches on considerations of fairness to the accused. And if admissibility did not depend on voluntariness, policy considerations would justify the exclusion of confessional statements procured by violence and other abuses of power.

75 In *McDermott*, Dixon J spoke of voluntariness in terms of the 'free choice to speak' [(1948) 76 CLR 501 at 512] and expressed doubts 'whether in this country, a sufficiently wide operation has been given to the basal principle that to be admissible a confession must be voluntary, a principle the application of which is flexible and is not limited by any category of inducements that may prevail over a man's will' [(1948) 76 CLR 501 at 512]. And in *Cleland* Murphy J said:

> It may be a question of classification whether a confession induced by false representations or other trickery is voluntary.

His Honour referred to older decisions which treated trickery as negating voluntariness [*R v Johnston* (1864) 151 ICLR 60; *Attorney-General for NSW v Martin* (1909) 9 CLR 713].

76 The wider the operation given to the principle that, to be admissible, a confession must be voluntary, the less scope there is, in practice, for the exercise of the unfairness discretion.

Particularly is that so in relation to improprieties calculated to cause the making of an untrue admission. It may be expected that improprieties calculated to have that effect will often impact on the exercise of a free choice to speak if that notion is given its full effect. However, it will not necessarily be so in every case.

77 In *R v Lee*, the likelihood of an impropriety resulting in the making of an untrue admission was treated as 'relevant, though not necessarily decisive' [(1950) 82 CLR 133 at 153]. As the authorities stand, the likelihood of an unreliable confession does not mandate the exercise of the unfairness discretion to exclude that evidence. Nevertheless, it is hard to understand why, in such circumstances, the discretion would not be exercised in that way, particularly when regard is had to the consideration that the risk of an untrue admission is the rationale for the inadmissibility of a non-voluntary confessional statement.

78 Unreliability is an important aspect of the unfairness discretion but it is not exclusive. As mentioned earlier, the purpose of that discretion is the protection of the rights and privileges of the accused. Those rights include procedural rights. There may be occasions when, because of some impropriety, a confessional statement is made which, if admitted, would result in the accused being disadvantaged in the conduct of his defence. Thus, in *McDermott*, where the accused did not admit his guilt, but admitted making admissions of guilt to others, it was hypothesised by Williams J that it might have been unfair to admit his statement if the persons to whom the admissions were made were not called as witnesses. In *R v Amad* [[1962] VR 545], Smith J rejected admissions which were voluntary and which the accused accepted were true because the manner in which he was questioned led to apparent inconsistencies which might be used to impair his credit as a witness. And the significance of forensic disadvantage is to be seen in *Foster* where the inability of the accused to have his version of events corroborated was taken into account [(1993) 67 ALJR 550 at 554–5; 113 ALR 1 at 7. See also Cleland v R (1982) 151 CLR 1 at 25–6].

79 It was said by Gibbs CJ, Wilson and Dawson JJ in *Cleland* that it will only be in an exceptional case that a voluntary confession which it would not be unfair to the accused to admit could be rejected on the ground of public interest [(1982) 151 CLR 1 at 9, 17, 34–5. See also *Collins v R* (1980) 31 ALR 257 at 317]. That is too narrow an approach, particularly in the light of *Ridgeway*.

Conversations secretly recorded

…

83 The Canadian authorities are instructive in this regard though it is necessary to keep in mind the existence of the Canadian Charter of Rights and Freedoms and to identify the extent to which any authority turns on the language of the Charter.

84 In *R v Hebert* [[1990] 2 SCR 151] the Crown relied at trial upon statements made by the accused after he had consulted with counsel and had indicated that he did not wish to make a statement. He was then placed in a cell with an undercover police officer to whom he made statements implicating himself in the robbery with which he had been charged. The Supreme Court of Canada unanimously, though in more than one judgment, held that the statements should have been excluded.

85 McLachlin J delivered a judgment with which Dickson CJC, Lamer, La Forest, L'Heureux-Dubé, Gonthier and Cory JJ concurred. Her Ladyship observed that the principles of fundamental

justice are to be found in the basic tenets of the legal system though a fundamental principle of justice expressed in the Charter may be broader and more general than the particular rules which exemplify it [Any reference in these reasons to Canadian cases are to discussions of the common law, not dependent upon any provision of the Charter]. McLachlin J then said [[1990] 2 SCR 151 at 181]:

> The common law rules related to the right to silence suggest that the scope of the right in the pre-trial detention period must be based on the fundamental concept of the suspect's right to choose whether to speak to the authorities or remain silent.

After some reference to the Charter, McLachlin J continued [[1990] 2 SCR 151 at 182]:

> Even before the Charter, this court had taken a step away from the traditional 'threat-promise' formula by recognizing that the decision to speak to the police must be the product of an operating mind … for the repute and integrity of the judicial process has long been accepted in other democratic countries without apparent adverse consequences … The jurisprudence on the rights of detained persons can only benefit, in my view, from rejection of the narrow confessions formula and adoption of a rule which permits consideration of the accused's informed choice, as well as fairness to the accused and the repute of the administration of justice.

86 Dealing with the use of undercover agents, McLachlin J drew a distinction between observing a suspect and actively eliciting information in violation of the suspect's choice to remain silent. She said [[1990] 2 SCR 151 at 185]:

> When the police use subterfuge to interrogate an accused after he has advised them that he does not wish to speak to them, they are improperly eliciting information that they were unable to obtain by respecting the suspect's constitutional right to silence: the suspect's rights are breached because he has been deprived of his choice. However, in the absence of eliciting behaviour on the part of the police, there is no violation of the accused's right to choose whether or not to speak to the police. If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police.

87 In *R v Broyles* [[1991] 3 SCR 595] the Supreme Court of Canada was constituted by La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ. The judgment of the court was delivered by Iacobucci J. The accused was charged with murder; the evidence against him was largely circumstantial but it included a statement which the accused made to a friend after his arrest and after he had been cautioned that he was not required to say anything. The friend visited the accused in prison at the request of the police. The friend wore a recording device. The friend questioned the accused about the killing of the deceased.

88 The evidence of the statements made to the friend was excluded pursuant to a provision of the Charter. The court identified two questions which were necessary for decision but which did not have to be answered in *Hebert*. The first was whether the friend was an agent of the state. The second was whether the accused's statement had been elicited by the friend. The court held that the friend was an agent of the state during the conversation. The meeting was set up and facilitated by the police and, without the intervention of the authorities, there would have been no conversation. The court held further that the statement had been elicited

because parts of the conversation were in the nature of an interrogation, not just parts of a conversation which flowed naturally. It concluded that the admission of the evidence would render the trial unfair.

89 The Australian decisions generally have not expressed the relevant principles by reference to the informed choice spoken of in Canadian cases. At least in terms of voluntariness, they have tended to approach the matter in terms of an immunity from compulsion. The emphasis has been on whether duress has been brought to bear on the suspect, that is whether the will has been overborne in some way. That emphasis is well placed when voluntariness is at issue but it is too narrow when the exercise of discretion is involved.

90 In *Environment Protection Authority v Caltex Refining Co Pty Ltd* [(1993) 178 CLR 477 at 526] Deane, Dawson and Gaudron JJ referred to *Pyneboard Pty Ltd v Trade Practices Commission* [(1983) 152 CLR 328 at 335] where Mason ACJ, Wilson and Dawson JJ observed that it is not easy to assert confidently that the privilege against self-incrimination serves one particular policy or purpose. Deane, Dawson and Gaudron JJ then commented [(1993) 178 CLR 477 at 526]:

> It is generally recognized that it emerged as a reaction against procedures of the Courts of Star Chamber and High Commission, and in particular their use of the ex officio, or inquisitorial, oath. This was compulsorily administered so that a person might be examined and himself provide the accusation to be made against him.

Against this historical background, it can be seen why the courts have spoken in terms of compulsion to speak [*Rees v Kratzmann* (1965) 114 CLR 63 at 80].

91 However, the notion of compulsion is not an integral part of the fairness discretion and it plays no part in the policy discretion. In the light of recent decisions of this court, it is no great step to recognise, as the Canadian Supreme Court has done, an approach which looks to the accused's freedom to choose to speak to the police and the extent to which that freedom has been impugned. Where the freedom has been impugned the court has a discretion to reject the evidence. In deciding whether to exercise that discretion, which is a discretion to exclude not to admit, the court will look at all the circumstances. Those circumstances may point to unfairness to the accused if the confession is admitted. There may be no unfairness involved but the court may consider that, having regard to the means by which the confession was elicited, the evidence has been obtained at a price which is unacceptable having regard to prevailing community standards. This invests a broad discretion in the court but it does not prevent the development of rules to meet particular situations.

92 It is relevant to bear in mind the provisions of the Evidence Acts. Although, in general, the Commonwealth Act applies only in the external territories and in proceedings in federal courts and courts of the Australian Capital Territory [s 4, s 5 and s 6], it has been substantially re-enacted in New South Wales. It may well be re-enacted in other states. It may be thought undesirable to have two streams, as it were, one legislative and the other judicial, the latter simply echoing the former or perhaps deviating from it. On the other hand there is no comparable legislative provision in Queensland and Victoria, the two states with which the court is presently concerned. It is therefore appropriate to develop the common law in Australia in terms of a broad principle based on the right to choose whether or not to speak.

Conclusion: Swaffield

93 Nothing which Constable Marshall did in relation to his conversation with Swaffield can be said to have been illegal. In that respect there is a clear distinction with the situation in *Ridgeway*.

94 However, there is the broader question of whether what Constable Marshall did was in violation of Swaffield's right to choose whether or not to speak to the police. There is the added question whether there had been a breach of r 2 of the Judges' Rules and, if so, the consequence for the admissibility of the conversation. As for r 2, there can be no doubt that a police officer had 'made up his mind to charge a person with a crime'. He had been charged on 7 September 1993, just under a year before the conversation with Constable Marshall. So far as the Judges' Rules are concerned, the critical point is the absence of a caution.

95 Certainly no caution was administered by Constable Marshall before the conversation on 11 August 1994. However, as the Australian authorities stand, the absence of a caution triggers the exercise of a discretion to exclude what was said but does not require exclusion. That is clear from the decision of this Court in Stapleton v R [(1952) 86 CLR 358 at 375–6]. And in R v Azar [(1991) 56 A Crim R 414 at 420] after referring to *Stapleton*, Gleeson CJ said:

> There are numerous statements in the law reports to the effect that a confessional statement to a police officer is not inadmissible merely because no caution has been administered. It is hardly likely that those statements were intended to apply only in the case of an accused person who knows of his right to silence even without a caution.

It follows that unless *Stapleton* and a number of other decisions are overturned the breach of r 2 permitted but did not dictate exclusion of the conversation.

96 In the Court of Appeal Pincus JA, who dissented, asked what it was that made the absence of a caution so significant as to warrant interfering with the trial judge's exercise of discretion to admit the conversation. His Honour thought it could only be because the charge had earlier been dropped. He thought that the real significance of the dropped charge 'is that it establishes that the police not only suspected, but believed, that [Swaffield] was guilty'. We agree with Pincus JA that the distinction between suspecting on the one hand and believing or knowing on the other is not a satisfactory one in the present context.

97 What if a test is applied by reference to Swaffield's right to choose whether or not to speak to the police? The application of such a test turns, at least so far as the Canadian authorities are concerned, on the extent to which any admission was elicited. It is clear from *Hebert* that the Canadian Supreme Court regards the use of a subterfuge to obtain a statement as likely to be in violation of the choice whether or not to speak but even then would treat a quite unelicited admission as not calling for the exercise of the discretion to exclude.

98 In the circumstances of this case, the admissions were elicited by an undercover police officer, in clear breach of Swaffield's right to choose whether or not to speak. The Court of Appeal was right in its conclusion and this appeal should be dismissed.

Conclusion: Pavic

99 As in the case of *Swaffield*, nothing which the police did in relation to Pavic was illegal. Since Pavic was not in custody at the time he spoke with Clancy, s 464A of the Crimes Act

1958 (Vic) had no application. No reference was made to the Judges' Rules in the course of argument.

100 No caution was administered by Clancy, which is hardly surprising in the circumstances. The circumstances are close to those in *Broyles*, the Canadian decision. As in *Broyles*, the person with whom Pavic spoke must be regarded as an agent of the state. The meeting was not directly set up by the police but Clancy spoke with Pavic at the request of the police who equipped him with a recording device.

101 If *Broyles* is applied, the next question is whether the admissions by Pavic were elicited by Clancy or were made in the course of a conversation. Put another way, was there an interrogation by Clancy?

102 Pavic argued that he was misled by Clancy into making the admissions he did. The trial judge approached the exercise of his discretion on that footing and said:

> Whilst the role of the accused in the killing was volunteered by him to Clancy in a somewhat limited fashion, it cannot, in my view, be said to be the result of, or inextricably linked to, the expressed fear of Clancy that he may be charged with an offence.

103 In all the circumstances there is no sufficient reason to interfere with the trial judge's refusal to exclude the evidence of the conversation. This appeal should also be dismissed.

[**Kirby J** presented a similar analysis of the discretion to exclude evidence on grounds of unfairness but reached the conclusion that the confessional statement of Pavic as well as that of Swaffield had been elicited and should have been excluded. **Brennan CJ** agreed with the result reached by the majority but confined the unfairness discretion to cases of unreliability and excluded Swaffield's confessional statement on grounds of public policy.]

26.83C Tofilau v R

[2007] HCA 39; 231 CLR 396; 238 ALR 650
High Court of Australia

[There were four cases decided at the one time. All concerned the admissibility of 'scenario evidence', which was described in the following way by Callinan, Heydon and Crennan JJ at [219]:

> … In outline, scenario evidence is confessional evidence obtained in the following way. Undercover police officers pose as members of a gang. They solicit the cooperation of a person whom they think has committed a serious crime, although they do not believe that they are yet able to prove it. They encourage that person to take part in 'scenarios' involving what the person wrongly thinks is criminal conduct. Provided that the person informs the head of the gang of anything which might attract the adverse attention of the police, they offer the person two advantages. One is the opportunity of material gain by joining the gang. The other is the certai`nty that the head of the gang can influence supposedly corrupt police officers to procure immunity from prosecution for the serious crime.

…]

Gleeson CJ:

1 The appellants were suspected of having committed serious and violent crimes (murder). They were tricked by undercover police officers, posing as criminals, into confessing. They were tried and convicted. Their confessions were received in evidence. The technique of deception used by the police, and the details of the confessions, appear from the reasons of other members of the Court. The confessions, which were made in circumstances that supported rather than cast doubt upon their reliability, were obviously found by the trial juries to have been true. The issue in these appeals is whether the evidence of the confessions should have been excluded.

2 All four appellants rely upon the rule of the common law that evidence of a confession (the rule covers all admissions, but we are concerned here with admissions that amounted, or for practical purposes amounted, to confessions) may not be received against an accused person unless it is shown to be voluntary. In this context, as in other legal contexts, the word 'voluntary' may create uncertainty. There is, however, an aspect of the rule with a more specific focus. A confessional statement will be excluded from evidence as involuntary if it has been obtained from an accused either by fear of prejudice or hope of advantage, exercised or held out by a person in authority.[1] That particular and well-established form of involuntariness was described by Dixon J as 'the classical ground for the rejection of confessions and [that which] looms largest in a consideration of the subject'.[2] Even so, it does not cover the field.

3 In addition to the rule that requires a trial judge to exclude evidence of a confession that is not voluntary, there are discretionary principles according to which a trial judge may exclude evidence of a voluntary confession. Those principles have been stated in a number of decisions of this Court, and were summarised in *R v Swaffield*,[3] by Toohey, Gaudron and Gummow JJ, as covering three classes of case. The first is a case where it would be unfair to the accused to admit the statement. The relevant form of unfairness is related to the law's protection of the rights and privileges of the accused person. The second is a case where considerations of public policy, such as considerations that might be enlivened by improper police conduct, make it unacceptable to admit the statement. The third concerns the general power of a trial court to reject evidence on the ground that its prejudicial effect (that is to say, the danger of its misuse, not its inculpatory force) outweighs its probative value.

4 The first two of those discretions were of potential relevance to these cases. They were invoked by the appellants at trial in the Supreme Court of Victoria, and in the Victorian Court of Appeal. The ability to invoke considerations of unfairness, and public policy, in support of an argument for exclusion of confessional evidence in the exercise of a judicial discretion limits the need to go beyond established principle in seeking to characterise the conduct of a confessionalist as involuntary. If what is really meant is that, the confession having been induced by some form of deception, it would be unfair to the accused (in the sense stated above) to receive it in evidence, or contrary to public policy to allow the deception to bear fruit, then existing principle brings discretion into play. There is no occasion to seek to extend the concept of voluntariness beyond its accepted limits in order to accommodate considerations of fairness and public policy. On the other hand, it is understandable that an accused would seek to invoke a rule of mandatory exclusion rather than to rely only upon discretionary judgment. Furthermore, the approach taken by appellate courts to the review of discretionary decisions may make it more difficult for a convicted person to challenge an unfavourable ruling.[4] This consideration will be even more compelling in a second appellate

court, where an intermediate appellate court has reviewed, and affirmed, a trial judge's exercise of discretion. These forensic considerations were reflected in the course taken in argument in these appeals. Initially, all four appellants confined their arguments in this Court to the issue of voluntariness: both the narrower, more specific, aspect earlier identified, and the wider, less clearly defined aspect (referred to in argument, adapting an expression used by Dixon J in *McDermott v The King*,[5] as 'basal voluntariness'). Under pressure of argument, one appellant relied as well on the discretionary principles. Concentrating on the mandatory rule of exclusion avoided the difficulty of overcoming discretionary judgments which had already been affirmed after appellate review. Tactically, it may have suited the appellants not to become too closely involved in the extent to which their complaints could be dealt with on discretionary grounds. In this connection, it is interesting to note the course of argument and decision in the two matters decided in *Swaffield*. Those cases involved confessions obtained by subterfuge and deception. They were dealt with according to principles of discretionary exclusion. If some of the arguments advanced in the present appeals were correct, then *Swaffield* and its related appeal would seem to have been dealt with according to the wrong principle. On the approach of at least three of the present appellants, they should have been dealt with under the rubric of mandatory exclusion of involuntary confessions.

5 Two further preliminary matters should be mentioned. First, the common law rules with which we are presently concerned apply, not only to confessions of guilt, but to all admissions sought to be used in evidence against an accused person at trial. Sometimes, an admission may be made in the course of an assertion of innocence. It may be an admission of a fact which is not seriously in dispute, which of itself is not inconsistent with innocence, but which the prosecution could not otherwise prove. The admission may have been made to any manner of person, and in any kind of circumstance. It may have been made in response to a mistake, a misrepresentation (either deliberate or innocent), to the pressure of events or circumstances, or to mere inadvertence. It may have been made in circumstances where issues of legal rights or consequences, or considerations of choice either to speak or remain silent, never entered the mind of the maker. It would be clearly wrong to suggest that the only kinds of admission used in evidence at criminal trials are those made to police officers in a context of a conscious decision not to exercise a 'right to silence'. Admissions, which may turn out to be very damaging, are often made in circumstances where the maker of the admission is unconcerned with legalities, and may not even realise the significance that later will be attached to what is said. Secondly, the use by the police of deception in the hope of eliciting admissions is not new. The particular technique of deception adopted in the present cases seems to have been imported into Australia from Canada. Since these trials, it has been reported in the media. Presumably, unless Australians suspected of serious crime are unaware of what is contained in the newspapers, it has a limited life expectancy. It would, however, be erroneous to characterise these appeals as raising a completely novel problem demanding reconsideration of established legal principle. The use of undercover police operatives always involves deception. Such operatives are undercover precisely because they are trying to deceive somebody about something. The technique of deception used in *Deokinanan v The Queen*,[6] where the police put an accused person's friend in a prison cell with the accused in the hope of obtaining a confession, is common. These days, the friend would probably be equipped with a secret recording device. The Privy Council held that the confession was voluntary and admissible. All forms of covert surveillance, many of them authorised (subject to safeguards, such as a requirement for judicial approval) by statute,

involve a kind of deception. Interception and recording of telephone conversations often produces evidence of admissions tendered at a criminal trial, as well as circumstantial or direct evidence of criminal activity. The parties to those conversations speak in the erroneous belief that they are not being overheard. They have no opportunity to consult a lawyer, or to take advice on what they should or should not say. They are not given any warning that what they say may be used against them. They do not waive any right to silence. Yet, if a suspect, in an intercepted and secretly recorded conversation, makes an admission, that admission is ordinarily and rightly regarded as voluntary. At least, it is not regarded as involuntary simply because the person making the admission is the victim of a form of deception.

6 The concept of voluntariness, which is significant in many legal contexts, is protean. This was explained by Windeyer J in *Ryan v The Queen*[7] to be 'partly because of ambiguities in the word "voluntary" and its supposed synonyms, partly because of imprecise, but inveterate, distinctions which have long dominated men's ideas concerning the working of the human mind'. Even the use of terms such as 'mind' and 'will', or 'freedom of choice', may provoke scientific or philosophical protest. Generally speaking, however, the law, as a normative science which must evaluate human conduct for practical purposes, accepts certain working hypotheses, one of which is the existence of free will. It judges the conduct of people upon assumptions of personal autonomy that may be rejected by a psychiatrist or a philosopher.[8] Conscious of this problem, judges, when they speak of confessions as voluntary, or involuntary, often seek to explain what they mean. In *Cornelius v The King*,[9] Dixon, Evatt and McTiernan JJ gave as an example of an involuntary statement one that is given in consequence of a threat made, or a promise of advantage given, by a person in authority. In the preceding sentence, however, they stated a wider proposition: 'If [a statement] is made as a result of violence, intimidation, or of fear, it is not voluntary.' Similarly, some years later, in his judgment in *McDermott*, Dixon J referred both to the 'definite rule' excluding statements resulting from threats or inducements by persons in authority, and also to a wider concept. He said that to say that a statement has been voluntarily made means 'that it has been made in the exercise of [a person's] free choice'. He amplified this: 'If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary.'[10]

7 An example of the dangers involved in giving a broad and colloquial meaning to the concept of voluntariness is provided by cases dealing with the admissibility of statements made by people under a legal obligation to answer questions. The courts have rejected arguments that such statements, not being made in the exercise of a free choice to speak or remain silent, were involuntary. One such case was *R v Kempley*,[11] where the Court of Criminal Appeal of New South Wales held that admissions made under compulsory interrogation pursuant to certain regulations could be received in evidence in a later prosecution, and were not involuntary. The case went to this Court, where special leave to appeal was refused. Latham CJ said:[12]

> The reasons for excluding statements obtained from accused persons by inducements consisting in a threat or promise by a person in authority were that it was probable that statements so induced might be false, and further that it was improper for such persons to use their authority to bring about confessions by accused persons. But it could not be held by a court of law that compliance with a law requiring true answers and designed to elicit true answers should be assumed to be likely to produce false answers … Thus it could not

> be said that the calling of the attention of a person to a duty imposed upon him by law to answer truly was a threat or was improper in any sense.[13]

8 That reasoning is directed to the narrower, 'definite' rule, rather than the wider concept of voluntariness, but the outcome of the case is instructive. Latham CJ's identification of considerations of reliability as the primary, but not the sole, rationale for the exclusion of involuntary statements is consistent with history and authority. The addition of the reference to impropriety in the form of abuse of authority to extract confessions is interesting in the light of later High Court authority, such as *Bunning v Cross*[14] and *Swaffield*, concerning discretionary exclusion.

…

The 'definite' rule

10 Reference has been made above to the passage in his judgment in *McDermott* in which Dixon J referred to the general requirement of voluntariness for the admissibility of confessional statements and then added that it was 'also a definite rule' that a statement cannot be voluntary if it is preceded by an inducement held out by a person in authority. The context reveals that Dixon J used the word 'definite', not for emphasis, but as meaning precise or specific, in contrast to the general and less specific principle to which he had earlier referred.

11 The first argument of each of the appellants in the present case was based upon this definite rule. The confessions made by the appellants were procured by inducements held out to them. The question is whether the people who held out the inducements, police officers posing as criminals, were persons in authority. This question was considered recently by the Supreme Court of Canada, in a case indistinguishable from the present, *R v Grandinetti*,[16] and answered in the negative. The decision was unanimous. The reasons of the Court were delivered by Abella J. This Court, of course, is bound to form its own opinion on the matter, but the reasons of Abella J are persuasive.

12 A similar question had been considered previously by the Supreme Court of Canada. In *R v Hodgson*,[17] seven members of that Court gave the same rationale for the rule of exclusion as had been given in this Court by Latham CJ in *Kemp*ley; concerns about unreliability (false confessions) and the need to guard against improper state coercion. Citing *Hodgson*, Abella J said in *Grandinetti*:[18]

> The underlying rationale of the 'person in authority' analysis is to avoid the unfairness and unreliability of admitting statements made when the accused believes himself or herself to be under pressure from the uniquely coercive power of the state.

13 It was conceded in *Grandinetti* that undercover police officers are usually not persons in authority within the rule, because the critical element is the perception of the person making the statement. That concession also represents the law in Australia. The unusual feature of *Grandinetti*, and of the present cases, is that the undercover police officers, although posing as persons who were not persons in authority, represented that they had influence with other persons who could influence the investigation and prosecution of the relevant offence. The representations expressly or by implication indicated that those whom the undercover officers could influence were themselves corrupt. The belief of the maker of the confessional statement

was that he was being offered inducements, not by police officers, but by criminals who were in a position to influence certain corrupt police officers. The Supreme Court of Canada held, and I respectfully agree, that in such circumstances 'the state's coercive power is not engaged'.[19] The appellants did not believe the makers of the inducements to be persons in authority, or to be acting as agents of persons in authority. Their supposed capacity to exercise corrupt influence over others who were persons in authority does not alter their character as understood by the appellants. A representation (true or false) as to a capacity to influence corrupt officials could be made by anybody, but it would not constitute the maker of the representation a person in authority. The definite rule does not avail the appellants.

The wider principle

14 In view of the obvious possibility that this Court would reach the same conclusion as the Supreme Court of Canada in *Grandinetti*, the appellants next supported mandatory exclusion of their confessional statements by reference to the wider principle, which they called 'basal voluntariness'. This was a reference to a fundamental principle concerning voluntariness, of which the 'definite rule' considered above is a particular, although the most common, application.

…

16 The common law of evidence in Australia has treated the definite rule as a specification of a particular form of conduct, involving the application of a certain kind of coercive force external to a confessionalist, which it will not accept as a reason for voluntary action. At the same time, it has declined to limit itself by treating that as the only form of conduct that will destroy or overwhelm the freedom of choice which it considers necessary to make conduct voluntary. (Some Australian jurisdictions have enacted legislation which deals somewhat differently with the matter of admissions, but such legislation is not of present concern.)

17 The law treats as voluntary a great deal of conduct about which a person, speaking colloquially, may say that he or she had no choice. Since the original rationale for the principle of exclusion of involuntary statements was concern about the unreliability of statements made under coercion, that will sometimes be a useful guide in making a judgment about what kind of conduct will be taken to render a statement involuntary. It is, however, of no assistance to the appellants in this case, because the deception practised upon them was not such as was likely to elicit a false confession.

18 To the extent that abuse of the state's coercive authority is another part of the rationale for the exclusionary rule, there are two difficulties for the appellants. The first has already been mentioned in dealing with the definite rule: the appellants thought they were talking to criminals, not police officers. The second is that deception is a very common method of seeking to obtain confessions from people suspected of crime …

19 Since possible forms of deception are bounded only by human imagination, and human gullibility, it would be dangerous to assert that no form of deception could deprive conduct of its voluntary character. Most deception used in the hope of eliciting admissions, however, including the form used in the present case, is calculated to induce a person to choose to reveal information that otherwise would be concealed. The appellants were subjected to powerful psychological pressure, but it is not unusual for people to reveal old secrets under pressures that are no less compelling. The law attempts to distinguish between external pressures and pressures personal to the confessionalist.[23] That itself may be a distinction

based on pragmatic rather than scientific considerations. The effect of external forces and circumstances on an individual is likely to depend on characteristics personal to the individual. That which a person of one disposition may regard as unbearable pressure may be a matter of indifference to another. The physical or emotional characteristics of a person, or that person's background or circumstances, will always be material to the effect of externally imposed pressure. The burden of guilt may weigh heavily on one person but may be borne lightly by another.

…

Discretion

24 The discretionary arguments were strongly relied on by all appellants at trial and in the Court of Appeal. However, appellate review of judicial discretion, in accordance with the principles stated in *House v The King*,[26] is not at large. I agree with what is said on the subject in the reasons of Callinan, Heydon and Crennan JJ and have nothing to add.

Conclusion

25 The appeals should be dismissed.

Callinan, Heydon and **Crennan JJ:** …

[Their Honours dismissed the appeals with respect to voluntariness on grounds similar to those of Gleeson CJ. They also dealt with an argument in relation to one of the appeals that the confession should have been excluded on discretionary grounds.]

399 *Counsel's submissions in this Court*. Counsel for Clarke in this Court submitted that while it was conventional to analyse discretionary exclusion of confessions as involving two 'discretions' — to reject a confession the reception of which would be unfair[487] and to reject a confession that was illegally or improperly obtained on public policy grounds[488] — in truth there was but a single 'discretion'.[489] It is not necessary to resolve this question, since the outcome of the appeal will be the same whatever the answer…

…

410 Counsel for Clarke correctly accepted that so far as his arguments turned on exclusion because of illegal or improper means, the factors listed by Stephen and Aickin JJ in *Bunning v Cross*[496] were relevant. Two of these in particular are adverse to Clarke's submissions. One is the nature of the offence charged — here not only a murder, but a particularly vicious and horrifying murder. This was a factor which on occasion counsel, in his emphasis of the need for compliance with particular standards, submitted was irrelevant: but to accept that submission would be radically to change the law, as counsel admitted, and for the worse. The other is whether the police conduct affected the cogency of the evidence.[497] That Clarke said what the prosecution alleged he said is clear beyond doubt, for what he said was recorded, and he did not deny saying it. There is no reason to disagree with Kellam J's conclusion, after he had closely compared what Clarke said with the objective evidence, that the admissions were 'not inherently unreliable' and that 'it would be open in all the circumstances for a jury to consider that the manner in which the admissions are shown to have been made on the video-tapes is such that they are reliable'.[498] The Court of Appeal agreed with that conclusion[499] and no attack was made on it in this Court, beyond a throwaway assertion that the conduct 'may well have' affected the cogency of the evidence. That assertion must be rejected.

411 Three other relevant *Bunning v Cross* factors are whether any illegality was the result of an innocent mistake or a deliberate disregard of the law, whether it was easy to comply with the law, and what the specific intention of the legislation infringed was. These do not arise in terms because there was no illegality, as counsel for Clarke twice conceded, then denied, but then, correctly, twice conceded again. Counsel for Clarke however submitted that the conduct was improper. He submitted — correctly — that it was plainly deliberate. He also submitted that it would have been easy for the police to have behaved properly, by questioning Clarke in a conventional fashion. It is true that that would have been easy, but it is also true that conventional questioning had failed in the past.

412 Counsel for Clarke said that three further factors were relevant.[500] One was that the conduct was encouraged or tolerated by those in higher authority: plainly it was. Another was that the conduct was inconsistent with a right of Clarke's which was fundamental, namely the 'right to silence'. That submission must be rejected in view of the conclusions reached above that the admissions were voluntary and that Clarke saw himself as having a choice which he exercised for his own purposes.[501] That is, he had a right to silence but he chose not to exercise it. The final factor was whether the conduct would involve the court itself in giving, or appearing to give, effect to impropriety in a way that would be incompatible with the functions of a court, or which might damage the repute and integrity of the judicial process. Counsel for Clarke submitted that for police officers to promise to secure immunity from prosecution when in fact they intended to prosecute was an act of bad faith and corruption, which if permitted by this Court, would cause 'the very authority of the State … itself [to] be placed in jeopardy'. It was improper for the state to put moral or psychological pressure on individuals in a process of actively eliciting confessions — as improper as it is for the state to put physical pressure on them for that purpose.

413 The correctness of that submission must be evaluated against the following circumstances. The police had failed — and their failure was not said to be culpable — to collect sufficient evidence against Clarke to charge him. The crime being investigated was very serious.[502] It had remained unsolved for 20 years. The scenario technique was one which had been in use for a long time in Canada, and had been approved by the Canadian courts. It was not embarked on as an unthinking frolic by junior officers. It had been deliberately selected by the superiors of those involved in the light of Canadian experience. No alternative was available if the investigation was to continue. It was reasonable for the police to seek to employ this technique, new in Australia, in carrying out their important duty to investigate an old crime. The technique was employed in a discriminating way, with considerable care being taken to avoid illegality. No doubt psychological pressure was built up, but conventional police interrogation of the most proper kind naturally involves pressure. Counsel submitted that the process was 'designed to circumvent the [appellant's] right to silence'. Clarke was in fact an experienced criminal who understood that he did not have to answer anyone's questions. He had not claimed any right to silence when interviewed by non-undercover officers soon after the murder. He actively cooperated in the questioning by the undercover officers. The questioning took place in the course of a relationship which he entered freely, and did not exploit some pre-existing or collateral relationship. The interrogation elements in the conversations were patent, and consistent with the roles which he believed the undercover officers were occupying. He had not been charged, and there was no proper basis to charge him. There was no illegality and no breach of Police Standing Orders. Part III Div 1 Subdiv 30A of the Crimes Act did not apply. The failure of other investigative methods which made

it necessary to conduct the undercover operation also made it necessary for a process of active 'elicitation' to take place. The admissions eventually obtained formed a significant part of the prosecution case. The operatives stressed the need to tell the truth. The undercover officers did not prey upon any special characteristics of Clarke related to his gender, race, age, education or health. The means of elicitation were not so disproportionate to the problem confronting the police as to be inherently unfair or contrary to public policy.

414 If Kellam J's decision is to be viewed as discretionary, it cannot be said that he made any error of fact or law, took anything irrelevant into account or failed to take anything relevant into account; nor that the result was so unjust as to suggest some error not apparent on the face of his reasoning. If his discretion is not to be viewed as discretionary, it was correct for the reasons set out above. In either event the Court of Appeal was right not to interfere with it.

415 In view of the importance of the issue raised by the application for leave to amend, it is appropriate to grant that leave, but to reject the new ground of appeal.

A cautionary note

416 Nothing said above should be taken as a warrant for any undiscriminating reception of evidence gathered by police officers operating covertly. Plainly, as these appeals show, it is desirable that covert operations be undertaken from time to time, and they can be undertaken without damaging the integrity of the police force, or indeed of the system of criminal justice itself. Covert operations can however be risky. Sometimes the covert officers will, as a matter of necessity, be remote from close supervision and the discipline that it entails. Seduction of officers by criminals is not unknown. Covert officers can be placed in danger. Their response to that danger may cause them, however understandably, to act in a way that might otherwise be thought irregular. But none of those factors were present in the circumstances out of which these appeals arose. The trial judges in these cases were in all respects careful and discriminating in considering and admitting the relevant evidence.

[**Gummow** and **Hayne JJ** wrote a separate judgment dismissing the appeals. They confined the inadmissibility of basal involuntariness, which they described as a 'rule', to cases of compulsion. **Kirby J** wrote a dissenting judgment in which he took a broader view than the majority of the scope for exclusion on grounds of involuntariness.]

Footnotes

1. *Ibrahim v The* King [1914] AC 599 at 609.
2. *McDermott v The King* [1948] HCA 23; (1948) 76 CLR 501 at 511–12.
3. [1998] HCA 1; (1998) 192 CLR 159 at 189 [51]–[52].
4. *House v The King* [1936] HCA 40; (1936) 55 CLR 499 at 505.
5. [1948] HCA 23; (1948) 76 CLR 501 at 512.
6. [1969] 1 AC 20.
7. [1967] HCA 2; (1967) 121 CLR 205 at 244.
8. Cf *Azar* (1991) 56 A Crim R 414 at 418–19.
9. [1936] HCA 25; (1936) 55 CLR 235 at 245.
10. [1948] HCA 23; (1948) 76 CLR 501 at 511.
11. (1944) 44 SR (NSW) 416.
12. *Kempley v The King* (1944) 18 ALJ 118 at 122.
13. See also *R v Travers* (1957) 58 SR (NSW) 85; *R v Zion* [1986] VR 609.
14. [1978] HCA 22; (1978) 141 CLR 54.

...
16. [2005] 1 SCR 27.
17. [1998] 2 SCR 449.
18. [2005] 1 SCR 27 at 38 [35].
19. [2005] 1 SCR 27 at 42 [44].
...
23. *Collins v The Queen* (1980) 31 ALR 257 at 307 per Brennan J.
...
26. [1936] HCA 40; (1936) 55 CLR 499.
...
487. *R v Lee* [1950] HCA 25; (1950) 82 CLR 133.
488. *Cleland v The Queen* [1982] HCA 67; (1982) 151 CLR 1.
489. He cited *R v Swaffield* [1998] HCA 1; (1998) 192 CLR 159 at 202 [91] per Toohey, Gaudron and Gummow JJ.
...
496. (1978) 141 CLR 54 at 78–80. See also *R v Swaffield* (1998) 192 CLR 159 at 212–13 [135] per Kirby J.
497. If the matter is viewed as resting on unfairness rather than public policy, the likelihood or unlikelihood of the interrogation producing an untrue admission is equally relevant: *R v Lee* [1950] HCA 25; (1950) 82 CLR 133 at 153 per Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ.
498. *R v Clarke* [2004] VSC 11 at [64].
499. *R v Clarke* [2006] VSCA 43 at [128].
500. Relying on factors (v) to (vii) as stated by Kirby J in *R v Swaffield* [1998] HCA 1; (1998) 192 CLR 159 at 213 [135].
501. Above at [384]–[389].
502. See, in relation to the seriousness of the crime, *Cleland v The Queen* [1982] HCA 67; (1982) 151 CLR 1 at 17 per Murphy J.

Charges and Prosecutions

CHAPTER 27

INITIATION OF PROCEEDINGS

27.1 Criminal proceedings are resolved by courts at two levels. Almost every criminal charge is instituted at the first level of court, a Magistrates Court. Most criminal charges are tried in that court. The jurisdiction of Magistrates Courts is discussed in Chapter 28. When a Magistrates Court lacks jurisdiction to deal with an offence, it commits the accused for trial or sentence to the second level of court, a District Court or the Supreme Court.

Many regulatory and traffic offences do not proceed to court and are the subject of infringement notices. If the infringement notice is accepted and a fine paid, the matter is resolved.

27.2 In Magistrates Courts, most charges are laid by a police officer who may be represented by another police officer in the court proceedings. For many regulatory offences, the enabling statute may authorise a public official such as an inspector to institute proceedings.

In the District and Supreme Courts, proceedings are usually instituted and conducted by a lawyer from the office of the Director of Public Prosecutions (DPP): Director of Public Prosecutions Act 1984 (Qld); 1991 (WA); 1983 (Cth). The written charge at this higher level is known as an indictment.

27.3 Although the criminal process is broadly similar in Queensland and Western Australia, there are sufficient differences to justify separate treatment in this chapter.

Commonwealth criminal charges are prosecuted in state courts using the procedure applicable in that state: Judiciary Act 1903 (Cth) s 68.

Queensland

27.4 The law governing the initiation of criminal proceedings in Queensland is contained in the Justices Act 1886 (Qld) and the Criminal Code (Qld) (Code (Qld)).

27.5 'Complaint' is the term used to describe the written charge ordinarily required to initiate criminal proceedings in a Magistrates Court: Justices Act 1886 (Qld) s 42. 'Information' is another term sometimes used to describe a criminal charge, usually as a synonym for a complaint: Justices Act 1886 (Qld) s 4. Under the Code (Qld), however, the term 'information'

is also used with respect to private prosecutions in the Supreme Court: ss 686–695. The person who makes a complaint is called the 'complainant'. This will usually be a police officer or an authorised officer under a regulatory statute but can be a private person.

A separate written charge is not required where there has been an arrest without warrant; in that instance, particulars of the charge are simply entered on the bench charge sheet.

27.6 Prosecutions for simple offences are usually conducted by police officers who specialise in this task, although any person may prosecute a simple offence: Acts Interpretation Act 1954 (Qld) s 21. Traditionally, police prosecutors also handled committal hearings for indictable offences but there have recently been moves for the DPP to assume this responsibility.

When a private complaint is made respecting an indictable offence, a magistrate can dismiss the complaint if the complainant does not proceed to prosecution with due diligence or on the ground that the complaint is an abuse of process, or is frivolous or vexatious: Justices Act 1886 (Qld) ss 102A–102G.

27.7 When indictable offences are committed by a magistrate to the District or Supreme Court, a new charge called an 'indictment' is formulated to initiate proceedings at the higher level: Code (Qld) s 560.

Indictments are ordinarily presented by public officials only. Traditionally, indictments are presented in the name of 'The Queen' and in proceedings the prosecution is referred to as 'The Crown'. Indictments are presented by a Crown Law Officer (the Attorney-General or the Director of Public Prosecutions) or by a designated public prosecutor (either a Crown prosecutor or some other person appointed for the purpose): Code (Qld) s 560(2). The function is ordinarily performed by prosecutors in the office of the DPP. Nevertheless, special provision is also made for a private prosecution on indictment with leave of the Supreme Court: Code (Qld) s 686.

27.8 In the absence of some contrary provision, a complaint respecting a simple offence must be made within one year of the time when the matter arose: Justices Act 1886 (Qld) s 52.

There are no limitation periods for the commencement of proceedings for indictable offences. However, time periods are specified for the presentation of indictments following committal proceedings. Generally an indictment must be presented no later than six months after a person has been committed for trial: Code (Qld) s 590. If this is impracticable, the DPP or a Crown prosecutor may apply to the court for an extension. In the event that an indictment is not presented within the relevant time, the accused is entitled to be discharged. However, a discharge does not prevent further proceedings: *R v Jenkin* [1994] 1 Qd R 266 at 283. The purpose of the provision is to remove any constraints on the liberty of the accused rather than to remove liability to prosecution: *R v Ford* [2006] QCA 440 at [17].

Moreover, it may take longer for the trial to be held. In the case of an ex officio indictment, an accused who has not been brought to trial within a year following its presentation may apply to the court for authorisation to bring on the trial: Code (Qld) s 591.

Western Australia

27.9 The Criminal Procedure Act 2004 (WA) (Criminal Procedure Act (WA)) governs proceedings in both the Magistrates Court and the District and Supreme Courts.

27.10 A prosecution in a Magistrates Court commences when an authorised person or police officer lodges in the court a 'prosecution notice': Criminal Procedure Act (WA) s 24. An accused in custody is entitled to a copy of the prosecution notice as soon as practicable after it is signed: s 27. If an accused is not in custody, the prosecutor may apply to a JP for the issue of a summons or to a magistrate for the issue of an arrest warrant: s 28.

A prosecution for a simple offence must be commenced within 12 months unless a different time is specified in the Act creating the offence: s 21(2).

27.11 Proceedings on indictment are brought in the name of 'The State of Western Australia' and may be commenced at any time: s 21(1). Usually the prosecutor is the DPP or a person authorised to present indictments by the DPP, although the Attorney-General retains the right to bring proceedings.

FORM OF CHARGES

Queensland

27.12 Sections 565–772 of the Code (Qld) prescribe the form of indictments. Section 574 makes these provisions applicable to complaints.

27.13 It is not sufficient for the prosecution to allege that some offence has been committed somewhere at some time. The accused is entitled to a degree of specificity in the charge, so that it is possible to prepare a defence.

The basic rules respecting the content and proof of charges are that:

1. The charge must include those matters required to be proved but need not include anything else: Code (Qld) s 565(e);
2. All items in the charge must be proved whether or not they were required to be included.

Formal matters which can be incorrectly stated in a charge without leading to dismissal of proceedings are itemised in the Code (Qld) s 571(1). Generally, however, the prosecution must prove that the offence charged has been committed as particularised. It may be in the interests of the prosecution to frame the charge loosely so that alternative arguments can be pursued. Conversely, it can be in the interests of the defence to have the charge framed as tightly as possible, in order to maximise the opportunity for claiming that some part has not been proved. See, for example, the discussion at 20.4 on whether a particular mode of secondary participation needs to be charged.

27.14 Obviously, the charge must state the type of offence alleged to have been committed. It is sufficient for this purpose to use the words of the statute creating the offence (for example, 'murder', 'stealing'): Code (Qld) s 564(3); Justices Act 1886 (Qld) s 47(1). Approved forms have been issued by the courts, but it is not necessary to use these. The test is whether the charge sufficiently alleges the ingredients of the offence: *McGoldrick v R* (1994) 71 A Crim R 152.

The accused also needs to know something about the occasion and circumstances of the alleged offence: Code (Qld) s 564(1). This provision sets out a general requirement for an indictment to include such particulars of time, place, victim and property (where relevant) 'as may be necessary to inform the accused person of the nature of the charge'. With respect

to complaints, the Justices Act 1886 (Qld) s 46 simply provides that what is sufficient in an indictment is also sufficient in a complaint. There is no requirement for particulars to be precise, so that it may sometimes be sufficient to refer to a period of time in terms of 'on or about' or 'between' or to an area or location. The loose standard of the Codes can leave much to the assessment of the trial judge. Contrast, for example, *R v Stevens* [1998] QCA 271; [2000] 1 Qd R 445 at **27.51C**, where it was held that some imprecision did not mean there was insufficient particularisation, with *R v BBB* [2006] QCA 232, where lack of particulars was held to create ambiguity and unfairness.

27.15 An accused who feels disadvantaged by vagueness in a charge can apply to a court for an order directing further particulars to be provided: Code (Qld) s 573.

There is conflicting authority as to whether particulars constitute an amendment to the charge, requiring proof in the same way as the items in the charge itself. In *Lewis v R* [1994] 1 Qd R 613 at 624, Macrossan CJ said: 'Particulars when ordered and delivered will have a force and significance by virtue of the very fact that our criminal procedure provides for them … Obviously particulars must be read with the indictment in defining the terms of the charge and the case which the Crown has to prove.' However, in the more recent case of *Coleman v Kinbacher (Qld Police)* [2003] QCA 575 at [14], Chesterman J said: 'If the facts proved by the prosecution establish beyond reasonable doubt all the elements of an offence then a conviction must follow even though the Crown may have furnished particulars not all of which were made out.'

27.16 A charge alleging more than one offence will be void for duplicity. Each charge should refer to one offence only: Code (Qld) s 567; Justices Act 1886 (Qld) s 43. Otherwise, a guilty verdict would be ambiguous. Yet, it is permissible to have one charge combining several instances of property offences such as stealing or fraud, as long as the instances are of the same legal offence: Code (Qld) s 568. Moreover, the rule against duplicity does not stop the prosecution charging one offence that has several forms in which it may be committed, such as the offence of murder or assault, and then arguing for any of these forms in the alternative.

27.17 A trial can be conducted on one indictment only: *R v Abraham* [2010] QCA 225. However, particular charges may be joined together as separate counts within the indictment if they are connected in certain ways. They should then be itemised separately, so that separate verdicts can be given.

The connection may be that the charges arise from the same incident, or that they relate to a series of either similar offences or offences committed in pursuing a single purpose: Code (Qld) s 567(2); Justices Act 1886 (Qld) s 43(1)(b). These terms are not applied in a restrictive way: *Barnes v R* at **27.52C**. However, in *R v MAY* [2007] QCA 333, it was held that charges relating to sexual dealings with the appellant's daughter could not be joined with charges relating to possession of pornographic images of other children.

In the event that joinder of charges may cause prejudice or embarrassment to an accused, the court may order that they be tried separately: Code (Qld) s 597A.

27.18 Joinder is sometimes not only permitted but required. There is a common law principle against unreasonably splitting the prosecution case. Otherwise, the accused may not know when proceedings have finished and the defence might be prejudiced, or there might be inconsistent verdicts on essentially the same matter: see 29.7. In *Collins v R* [1996] 1 Qd R 631 at 637, it was said: '[T]he courts have laid down the general rule that matters which can be joined without prejudice to the accused ought generally to be.'

27.19 A number of persons can be charged with committing the same offence in one complaint or indictment: Code (Qld) s 568(11). Charges against several persons can also be combined when they are charged with different or separate offences arising from substantially the same or closely related facts: s 568(12).

Persons charged together will ordinarily be tried together but a court retains discretion to order separate trials: Code (Qld) s 597B. The principles applicable to separating trials were summarised by MacKenzie J in *R v Aboud* [2003] QCA 499 at [35]:

> When making a decision at trial, typically, cases where separate trials are allowed are ones where one case is significantly weaker than the other, where there is a real risk that the weaker prosecution case will be immeasurably stronger by reason of prejudicial material in the case of the other accused and where the degree of prejudice from evidence admissible only in the case of one accused to the case of the other is so great as to make it unfair to try the accused together.

27.20 An objection to a formal defect on the face of an indictment must be made at the outset, before the jury is sworn: Code (Qld) s 571(2). Otherwise, charges can sometimes be amended during the course of a trial: s 572. The amendment must not be material to the merits of the case and the accused's defence on the merits must not be prejudiced by the amendment. For example, an accused whose defence is a denial of culpability, but not of the alleged conduct, will not be prejudiced if the location of the conduct is misstated.

The conditions for amending a charge will be more and more difficult to satisfy as the trial progresses. In *Lewis* [1994] 1 Qd R 613 at 624, Macrossan CJ said:

> It is fundamental that the court will be concerned for the position of the accused who, under our established criminal procedures, is entitled to full and proper notice of the case which he will be called upon to meet. Amendments made late in a trial can obviously have significance for the defence greater than if ordered earlier.

27.21 If a trial has progressed too far for an amendment, the prosecution may be permitted to withdraw the charge and then begin again with a new charge. In the case of an indictment, the withdrawal is called a '*nolle prosequi*': Code (Qld) s 563. See, for example, *R v Taiters* [1997] 1 Qd R 333 at 4.46C.

This procedure is, however, subject to judicial review to prevent any abuse of process: *R v Jell* [1991] 1 Qd R 48; *R v Lorkin* (1995) 15 WAR 499. Where a *nolle prosequi* constitutes an abuse of process, the trial judge may properly refuse to accept it. In *Jell*, the prosecution sought to enter a *nolle prosequi* after its case had been completed, when the trial judge had indicated that there was no evidence on a vital point and was about to direct the jury to acquit. It was said that the *nolle prosequi* would be oppressive to the accused. In *Lorkin*, the prosecution sought to enter a *nolle prosequi* in order to get around the trial judge's refusal of a request for an adjournment. Again, it was held that the *nolle prosequi* could be refused because it was an abuse of process.

Western Australia

27.22 The rules for prosecution notices and indictments are the same and are set out in the Criminal Procedure Act (WA) Sch 1. An indictment must inform the accused of the alleged offence in enough detail to enable the accused to understand and defend the charge and must describe the offence with reasonable clarity, identify the written law creating the offence, the date or period of the offence and where it occurred: Sch 1 cl 5.

27.23 A prosecution notice or indictment may charge two or more offences as alternatives to one another provided they are expressly stated to be alternatives: Criminal Procedure Act (WA) Sch 1 cl 7(1)(2). One or more persons may be charged with two or more offences if the offences form part of a series of offences of the same or a similar character, are alleged to arise substantially out of the same or closely related acts or omissions, or are alleged to arise from a series of acts or omissions done or omitted to be done in prosecution of a common purpose: Sch 1 cl 7(3).

27.24 If an indictment alleges two or more charges or charges two or more accused, the charges must be tried together unless the court orders that the accused is likely to be prejudiced in the trial: Criminal Procedure Act (WA) Sch 1 cl 9; s 133. In deciding whether the accused will be prejudiced, the court must consider whether a direction to the jury will overcome the prejudice: s 133(5)(a).

Propensity and relationship evidence is admissible in some circumstances: Evidence Act (WA) s 31A; see also *Donaldson v Western Australia* [2005] WASCA 196; 31 WAR 122.

If an order is made granting or refusing an application for separate trials, the proceedings must be adjourned to give the affected party an opportunity to apply expeditiously for an appeal: Criminal Procedure Act (WA) s 133(7); Criminal Appeals Act 2004 (WA) s 26.

27.25 A court may order the amendment of an indictment at any time before or during trial to correct any variance between the charge and the evidence led in support of the charge: Criminal Procedure Act (WA) s 132(4). If the court is satisfied that the accused's defence is prejudiced by an amendment, the court must grant an adjournment of the trial or the particular charge: s 132(8). The court may refuse to amend the charge if the amendment is material to the merits of the charge, the accused's defence would be prejudiced and an adjournment would not overcome the prejudice: s 132(10).

27.26 An accused is not required to plead to an indictment until at least 21 days after it was lodged unless the court otherwise orders: Criminal Procedure Rules 2005 (WA) r 16(1).

If an accused is awaiting trial, the prosecutor or the accused may apply for an order setting a trial date: Criminal Procedure Act (WA) s 136. The prosecution may terminate a prosecution by filing a notice of discontinuance. The accused is then discharged but may be prosecuted again for the offence: s 87.

SELECTION OF CHARGES

27.27 Some offences overlap in the ground they cover; for example, unlawfully causing bodily harm (Codes (Qld) s 328/s 304(1) (WA)) and assault occasioning bodily harm: Codes s 339 (Qld)/s 317 (WA). Some offences stand in a vertical relationship, with one being an aggravated form of another; for example, assault occasioning bodily harm (s 339 (Qld)/s 317 (WA)) and common assault (s 335 (Qld)/s 313 (WA)), murder (s 305 (Qld)/s 279 (WA)) and manslaughter: s 310 (Qld)/s 280 (WA).

The selection of charges is ordinarily a matter for the prosecutor. Statutory directions are lacking and the courts will generally not interfere unless there is an abuse of process.

- In Queensland, there is one form of statutory fetter upon the exercise of prosecutorial discretion. Where one offence is an aggravated form of another and the prosecutor wishes to argue that the aggravating factor was present, the aggravated offence must be charged:

Code (Qld) s 564(2); Justices Act 1886 (Qld) s 47(4). If it is not charged, the aggravating factor cannot be raised in submissions by the prosecution seeking a more severe sentence.

- In Western Australia, aggravating factors can be taken into account for the purpose of sentencing but not so as to expose the offender to a higher statutory penalty. Where an aggravating factor increases penal liability, it must be charged: Sentencing Act 1995 (WA) s 7(3).

PROSECUTORIAL DISCRETION AND JUDICIAL REVIEW

Principles of judicial review

27.28 There is extensive scope for the exercise of prosecutorial discretion before trial and in the conduct of a trial. Decisions to be made include whether or not to prosecute, what to charge and how to frame the charge, when to commence proceedings, and whether or not to launch another prosecution in the event that the first attempt has been inconclusive. The courts have taken the view that these are essentially executive decisions that should not be subject to judicial review: *Barton v R* (1980) 147 CLR 75; 32 ALR 449; *Maxwell v R* [1995] HCA 62; (1996) 184 CLR 501; 135 ALR 1 (27.53C). In *Maxwell*, it was suggested that active review of prosecutorial decisions would compromise the impartiality of the judicial process.

27.29 Sometimes courts do intervene in decisions not to proceed against an accused.

It has always been accepted that the executive has discretion not to prosecute an offence. However, the discretion is subject to certain quasi-constitutional limitations arising from the prohibitions on suspending or dispensing with laws in the English Bill of Rights 1688. These are discussed at **27.32–27.34**.

The courts can also intervene when prosecutorial decisions lead to an abuse of process. The courts have claimed that, while they may have no direct concern with prosecutorial decisions as such, they can protect themselves against embarrassment arising from the consequences of bad prosecutions being pursued to trial. If the pursuit of a prosecution would amount to an abuse of the process of the court, then the court can intervene: *Barton v R* (1980) 147 CLR 75; 32 ALR 449; *Maxwell* (**27.53C**); *Jell* and *Lorkin* discussed at **27.21**.

27.30 Judicial intervention usually takes the form of a stay of proceedings.

- In Queensland, the power to stay proceedings arises at common law.
- In Western Australia, there is a statutory power to stay an indictment permanently if it is in the interests of justice to do so: Criminal Procedure Act 2004 (WA) s 90. A magistrate has a more limited power to stay a prosecution permanently if satisfied the charge is an abuse of the process of the court: s 76.

The power to order a stay on grounds of abuse of process has sometimes been expressed as an aspect of the need to ensure a fair trial. The protection of innocent persons through the right to a fair trial is discussed in **Chapter 28**. An abuse of process need not involve unfairness in the sense of an unacceptable risk of a wrongful conviction. In *Williams v Spautz* (1992) 174 CLR 509; 107 ALR 635 (**27.54C**), the High Court made it clear that the concept of abuse of process covers improper or oppressive prosecutions even where there would be no question

about the fairness of a resulting trial. It has even been suggested that a plea-bargaining agreement which is too favourable to the accused may be an abuse of process: see 27.48.

The decision not to prosecute

27.31 As a general principle, it is not in the public interest to pursue a prosecution, despite there being prima facie evidence of an offence, when there are no reasonable prospects of conviction. In addition, even when a conviction could be obtained, it has been accepted that the executive has discretion not to prosecute if this course is warranted by a review of the circumstances of the particular case. For example, a prosecution may not be warranted if there are mitigating circumstances to the offence or if the offender is ill or dying. Each DPP has published Prosecution Guidelines indicating the factors to be taken into account in deciding whether or not to prosecute.

27.32 The discretion not to prosecute is, however, subject to certain quasi-constitutional limitations respecting suspensions and dispensations. A *suspension* of a law is a decision by the executive not to enforce it at all. A *dispensation* is a decision by the executive not to enforce a law against a particular person or group. Either practice violates the constitutional separation of powers, with the executive abrogating to itself a matter on which the legislature has spoken. Suspending and dispensing with laws were declared illegal by the English Bill of Rights 1688 (1 Will & Mary, sess 2, c 2). The Bill of Rights is part of the body of English statute law which was received into Australian jurisdictions.

A dispensation was at issue in *D'Arrigo v R* [1994] 1 Qd R 603 and *Stead v R* [1994] 1 Qd R 665: see the discussion at 23.13–23.14. The Queensland Attorney-General had granted an indemnity against prosecution to a police agent who would be participating in offences in order to gather information about a car-stealing operation. This occurred before the introduction of a statutory regime for controlled operations. The court held that the indemnity amounted to an illegal dispensation.

27.33 Several consequences follow from the illegality of suspensions and dispensations. First, because a suspension or dispensation is invalid, it offers no protection against a criminal charge. A person who relies on a suspension or dispensation commits an offence and is liable to prosecution. In the circumstances of *D'Arrigo* and *Stead*, this meant that evidence relating to the car thefts had been illegally obtained by the police agent and was, therefore, liable to exclusion under the 'public policy' discretion: see the discussion in 23.12. Second, the official who issues a suspension or dispensation may be liable as a secondary party who has counselled or procured any resulting offence: *D'Arrigo*; see also Chapter 20 on the law of secondary participation. Third, it may be possible to obtain an order from a court mandating the prosecution of an offence: see the discussion in *Metropolitan Police Commissioner; Ex parte Blackburn* [1968] 2 QB 118; 1 All ER 763.

27.34 The ban on dispensations does not mean that a prosecution must always be launched when there is sufficient evidence of an offence. It is proper to make a decision that a prosecution would be unwarranted, based on a review of the circumstances of the particular case. A dispensation is not based on a review of an offence which has already been committed. It is a decision not to prosecute someone for an offence regardless of its circumstances, usually in the form of a promise not to prosecute for an offence to be committed in the future. As such, it is in conflict with the decision of Parliament to pass the Act creating the offence.

Improper purposes

27.35 The proper purpose of a prosecution is to obtain conviction and punishment: see the discussion of stays of proceedings in *Ridgeway v R* (1995) 184 CLR 19; 129 ALR 41 at 23.34C. Initiating criminal proceedings for a purpose for which they were not designed would constitute an abuse of process: see *Williams v Spautz* at 27.54C. A court might then be justified in staying proceedings, subject to the general principle that a permanent stay is to be granted only in exceptional circumstances: *Jago v District Court of New South Wales* (1989) 168 CLR 23; 87 ALR 577 at 22.29C.

In *Williams v Spautz*, a private prosecution had been commenced for criminal defamation and conspiracy, primarily to exert pressure for a favourable settlement in an employment dispute. The prosecution was stayed by the High Court. The court indicated that there can be an abuse of process arising from an improper purpose for prosecuting even if there are reasonable grounds for a prosecution. In other words, the impropriety lies in the subjective purpose of the prosecutor and not in the objective justifiability of the prosecution.

27.36 Proper and improper purposes are not always clearly separate. One problem is that conviction and punishment may be sought for vindictive reasons or for personal advantage rather than for any reasons of public interest: conviction and punishment are sought as a means to the achievement of some personal end. This does not necessarily make the prosecution an abuse of process. As long as the immediate purpose of the prosecution is to obtain conviction and punishment, any ultimate purpose is immaterial: *Williams v Spautz* at 27.54C. Another problem is that a prosecutor may have mixed immediate purposes, with the motivation to prosecute stemming from the prospect either of obtaining conviction and punishment or, alternatively, of securing some personal advantage. In this situation, the High Court has said that a test of 'predominant purpose' should apply: *Williams v Spautz* at 27.54C. Accordingly, there will be an abuse of process if the predominant purpose is to secure a personal advantage, even though the prospect of obtaining conviction and punishment provides additional or alternative motivation.

27.37 When, as in most cases, a prosecution is conducted through the office of the DPP, an issue arises as to who is the 'prosecutor' to whom an improper motive can be attributed. In dealing with a tort of malicious prosecution, the High Court noted in *A v NSW* [2007] HCA 10 at [3]; 230 CLR 500; 233 ALR 584:

> [D]ifferent factual considerations arise where in the administration of criminal justice the information is laid by a particular police officer who is in charge of the prosecution and responsible if it is held to be malicious, but it is, as a matter of police organisation, obvious that he must act upon the advice and often upon the instruction of his superior officers and the legal department, and, it may be added, where the prosecutor is acting upon information given to him by a member of the public. In that context, the concept of 'belief', as a fact relevant to the question whether a defendant had reasonable and probable cause to institute a prosecution, bears a different aspect.

The court noted at [42]:

> In the case of a private prosecution, it may be easier to prove that a prosecutor was acting for a purpose other than the purpose of carrying the law into effect than in a case of a prosecution instituted in a bureaucratic setting, where the prosecutor's decision is subject to layers of scrutiny and to potential review.

This suggests that there will be difficulties for an accused to establish that a prosecution instituted by a DPP is brought for an improper purpose. An ulterior motive on the part of a witness or police officer does not mean that the prosecutor has an ulterior motive: *Christianos and Sakanovic v DPP (WA)* (1993) 9 WAR 345.

27.38 Selective prosecutions are acceptable as long as they do not involve illegitimate discrimination. The proposition that only the immediate purpose is relevant may need to be qualified for cases of discrimination in prosecutorial decisions.

The propriety of some prosecutions for tax evasion has been challenged on the ground that the line between legitimate selectivity and illegitimate discrimination was crossed. The general propriety of selective prosecutions, with unavoidable elements of inconsistency and unfairness as between dishonest taxpayers, was upheld in an English case: *Inland Revenue Commission; Ex parte Mead* [1993] 1 All ER 772. In that case, however, it was also indicated that selective prosecutions would be reviewable if they discriminated on grounds of, for example, colour. Presumably, such discrimination would be an abuse even if the immediate purpose of prosecuting the offenders who were discriminated against was to have them convicted and punished.

In *Smiles v Federal Commissioner of Taxation* (1992) 37 FCR 538; 109 ALR 449, the complaint was that the accused had been selected for prosecution for a tax offence because he was a public figure and the prosecution was being pursued for publicity. The matter was left unresolved for procedural reasons. Presumably, publicity is a factor which may legitimately be taken into consideration. As long as a conviction is genuinely sought, there would be no abuse of process.

Oppression

27.39 A prosecution may amount to an abuse of process because it is unjustifiably oppressive. For example, delay in charging an offence or bringing it to trial might make it too difficult for the accused to mount a defence. A potential witness for the defence could have died or crucial evidence could have been lost or destroyed. A prosecution might then be oppressive and therefore an abuse of process: *Jago* (22.29C); *Walton v Gardiner* (1993) 177 CLR 378; 112 ALR 289 at 27.55C. In these particular instances oppression would arise from the risk of a wrongful conviction. However, such a risk is not essential for a finding of oppression.

27.40 A prosecution can be oppressive is if it is foredoomed to failure: *Walton v Gardiner* at 27.48C. The oppression consists of forcing the accused through the trauma of a trial when, because the prosecution is foredoomed, no public interest is served. It is on this ground that the High Court contemplated stays of proceedings in entrapment cases: *Ridgeway* at 23.40C. The High Court ruled in *Ridgeway* that the primary remedy for entrapment should be exclusion of the evidence rather than a stay of proceedings. It also indicated, however, that when evidence essential for a conviction has been excluded, it may sometimes be appropriate to stay any further proceedings because they would necessarily fail. Such an order was made in *Ridgeway* itself. See also *Smith, Ferguson, Forti, Grimshaw & Coburn* (1994) 181 CLR 338; 125 ALR 385.

27.41 A prosecution can be oppressive if it occurs after the accused has been led to reasonably believe that the matter will be taken no further. Statutory rules against double jeopardy provide the law's primary protection for reasonable expectations of finality in criminal proceedings:

Chapter 29. These rules, however, focus on the technical relationships between verdicts in different proceedings. For cases that fall outside the scope of strict double jeopardy, the remedy may be a stay of proceedings on grounds of abuse of process.

27.42 The grant of a stay was upheld in *Walton v Gardiner* at 27.55C. That case involved proceedings in a medical disciplinary tribunal many years after the failure of other disciplinary proceedings involving separate complaints but stemming from the same program of treatment. Criminal proceedings for manslaughter against another doctor involved in the program were stayed in *Gill v Director of Public Prosecutions* (1992) 64 A Crim R 82. Various reasons were given for the stay in *Gill*, including the difficulty of getting a fair trial after the passage of such a length of time. It was also said, at 98, that reviving the matter years after the earlier proceedings amounted to 'persecution':

> The Crown has allowed the matter to die, to go to sleep for years, but then resuscitated it. How long must a man wait to be able to say: 'Now it has ended'? How long must he suffer the anxiety? How long must his enjoyment of life be threatened by what may happen in his career, to his reputation, in the future?

See also the discussion of *R v Viers* [1983] 2 Qd R 1 at 29.21.

27.43 In *Salmat Document Solutions v R* [2006] WASC 65; 199 FLR 46, Ward, an employee of Salmat, had been acquitted in Victoria of an offence similar to the offence with which he and Salmat were charged in Western Australia. The evidence in the two cases was inextricably intertwined. The court held that, although there was no strict double jeopardy, to continue the proceedings in Western Australia would mean that Ward was deprived of the full force and effect of the Victorian acquittal. For this and other reasons the proceedings were permanently stayed.

27.44 Repeated prosecutions in order to obtain a verdict do not amount to an abuse of process unless there are exceptional circumstances. An acquittal is the end of the matter. There is no general barrier to a prosecution being repeated after an inconclusive result: for example, where a jury has failed to agree on a verdict or a conviction has been quashed on appeal. See, for example, *Donald* (1983) 34 SASR 10, where there had been four trials. The first was aborted; the second produced a conviction but it was quashed on appeal; the third resulted in a hung jury. The trial judge at the fourth trial refused to stay the proceedings and the appeal court upheld this ruling. Nevertheless, it was acknowledged that a stay of proceedings might become appropriate in an exceptional case, including a case where a succession of juries has failed to agree on a verdict. A stay can also be appropriate where destruction of evidence has undermined an accused's right to a fair trial: see *Salmat Document Solutions* at [122]–[150]. However, loss of data does not automatically result in a stay of proceedings: *R v Edwards* [2009] HCA 20; 255 ALR 399.

27.45 Just as launching a prosecution can sometimes be an abuse, so also it can sometimes be an abuse to discontinue a prosecution for tactical reasons, such as to prevent an acquittal and preserve the opportunity to proceed again at a later date. The procedure can be used to preserve future opportunities. However, if a trial has progressed so far that it would be oppressive to prevent it reaching a final conclusion, the judge may properly refuse to allow the prosecution to discontinue: *Jell* and *Lorkin* at 27.21.

PLEA NEGOTIATION

27.46 An accused will sometimes agree to plead guilty to an offence in return for some benefit from the prosecutor, such as:

- charges may be dropped;
- a lesser offence may be charged when there is evidence to support a more serious charge; or
- the prosecutor may agree to make certain submissions on sentence or at least not to oppose the defence submissions.

The prosecutor may agree to the course of action in order to save the time and resources that would be consumed by a disputed trial or because the accused agrees to testify against others.

The terms 'plea bargaining' or 'plea negotiation' are loosely used to describe the various types of agreement. A distinction can be drawn between 'charge bargaining' and 'sentence bargaining'. The former involves bargaining over the charge which the accused will face; the latter involves bargaining over the position the prosecutor will take with respect to the sentence.

27.47 Negotiating pleas is now commonplace, with certain conditions, and is recognised in the DPP's guidelines. Generally:

- the process must be initiated by the accused or defence counsel;
- the accused must not maintain innocence; and
- the 'bargain' must be appropriate in light of what is believed to have occurred.

The High Court has indicated that it is preferable for an agreement to be recorded in writing and for 'both prosecution and defence to have a copy before it is acted upon': *GAS & SJK v R* [2004] HCA 22 at [42]; 217 CLR 198; 206 ALR 116.

27.48 Charge bargains are largely immune from judicial review because of the doctrine that prosecutorial decisions are no concern of the courts: see 27.28; *Maxwell* at 27.53C. In *R v Brown* (1989) 17 NSWLR 472, a case decided before *Maxwell*, the New South Wales Court of Appeal suggested that gross undercharging could amount to an abuse of the process of the court and that a court might then be justified in refusing to proceed on the charge as presented.

27.49 Sentence bargains present more difficult problems because the primary responsibility for sentencing lies with the judge. The significance of sentence bargains was examined by the High Court in *Malvaso v R* (1989) 168 CLR 227; 89 ALR 34. The High Court insisted that the judge's sentencing discretion cannot be fettered by any agreement between the prosecution and the defence and, further, that such an agreement cannot restrict the Attorney-General in exercising any statutory rights of appeal against a sentence. Nevertheless, it was suggested that an appeal court could properly have regard to the terms of an agreement in deciding whether or not to allow an appeal against sentence. In other words, an appeal court might look unfavourably upon a prosecution appeal against a sentence which it had not opposed at trial. In *Tricklebank v R* [1994] 1 Qd R 330 at 338, it was said:

> [T]he prosecution is under a duty to assist the sentencing judge to avoid appealable errors; and … this court may properly refuse to intervene on behalf of the Attorney-General to correct

what is said to be an error in sentencing if it has been caused or contributed to by a failure of the prosecution to do what was needed to avert that error in the court below. The sentencing process cannot be expected to operate satisfactorily, in terms of either justice or efficiency, if arguments in support of adopting a particular sentencing option are not advanced at the hearing, but deferred until appeal.

27.50 One aspect of sentence bargaining does involve the courts. An accused whose sentence is reduced by a specific amount in return for future co-operation may be returned to court and resentenced in the event that the accused reneges on the deal: Penalties and Sentences Act 1992 (Qld) s 188(2); Sentencing Act 1995 (WA) s 37A; Crimes Act 1914 (Cth) s 21E.

27.51C **R v Stevens**
[1998] QCA 271; [2000] 1 Qd R 445
Queensland Court of Appeal

Mackenzie J:

1 The appellant appeals against convictions of two counts of indecent treatment of a girl under 12 years with a circumstance of aggravation, one count of incest and one count of attempted unlawful anal intercourse with circumstances of aggravation. He was found not guilty of the substantive offence of unlawful anal intercourse with circumstances of aggravation.

2 Each of the offences was alleged to have been committed on a date unknown between 19 November 1994 and 8 March 1995 which was the whole period when the family was residing at Grasstree Beach. The accused and his wife separated in March 1995 and did not subsequently cohabit. The complainant was 7 years of age during the period of the alleged offences.

3 At the commencement of the trial the Crown particularized count 1 as a touching of the vagina with three fingers pressing down in a way which the Crown Prosecutor said the girl would demonstrate. It was implicit in the exchange between the trial judge and counsel that while the girl alleged that there were frequent other occasions when the accused had treated her indecently by touching her private parts, the occasion alleged in count 1 was the only time when this particular action was performed. The Crown also particularized it as the first occasion upon which any indecent treatment of any kind had ever occurred.

4 Counts 2, 3 and 4 were all alleged to have been committed within a short space of time on one night. Count 2 was particularized as the appellant getting the complainant to put her hand on his penis. The offences of incest and unlawful anal intercourse were committed shortly afterwards. The acts in counts 2 to 4 were particularized as the only acts of those kinds alleged by the complainant.

5 Leave was granted to amend the appellant's grounds of appeal against conviction. The grounds argued were that a miscarriage of justice had occurred because the lack of particularity in counts 1, 2, 3 and 4 embarrassed the applicant in putting his defence …

6 Before dealing with the grounds of appeal it is desirable to summarise the evidence. The complainant's evidence-in-chief consisted largely of two records of interview taken from her by the police on 27 June 1997 and 9 November 1997. In the first record of interview she

said that the appellant had touched her on her private parts with three fingers while she was in her bed. Her sister, R, who turned 5 during the period alleged in the indictment, slept in the top bunk of double bunks in the same area of the house but, it was alleged, did not observe any of the events. The allegation was that almost every night the appellant pulled down the complainant's pants and touched her private parts. Despite being given the opportunity on the first occasion to speak in detail of the activities of her father she did not mention the events charged in counts 2, 3 and 4 until she was interviewed on the second occasion. She told the police that the appellant had forced her, under duress, to undress and made her handle his penis. Then he penetrated her vagina, kissed her, during the course of which he gave her what was described as a hickey or a love bite, and then pushed his penis into her anus. She gave evidence of discovering 'yellowy gooey stuff' on her stomach and nightdress after the event. During the course of this incident her sister remained asleep.

7 The complainant's mother gave evidence that she had seen a hickey on her daughter's neck at some unspecified time while the family lived at Grasstree Beach. She was given an explanation by the complainant that her younger sister had inflicted it. She also noticed at an unspecified time that the complainant was red between the legs and said that she had administered a rash powder to it. The mother gave evidence that the girl had a history of urinary tract infection and had a history of bed wetting. She also gave evidence that on a number of occasions she found the girl's panties rolled up in the bed clothes at the foot of the bed. She did not observe any stains on the bed linen, although she said she did not particularly inspect it.

8 The medical practitioner who examined the complainant, Dr Greenham, said that she found that the vagina was approximately 1.5 centimetres in diameter and that it gaped. There was only a thin remnant of hymeneal tissue around the inside. That was consistent with repeated penetrations by a blunt instrument, of which an erect penis might be an example. She also said that when she parted the buttocks of the complainant child the anus dilated which was consistent with penetration of the anus although it was less compelling evidence of interference than the evidence of the state of the girl's vagina.

9 The submission as to a fatal lack of particularity in respect of count 1 was put on the basis that all the girl could say was that it was the first occasion on which sexual interference had occurred, that on that occasion he had used three fingers and that it happened while she was residing at Grasstree Beach.

10 The period in which the offences allegedly occurred is narrower than that alleged in the indictment since the complainant said she recalled that the first offence did not occur during school holidays because she was just starting at a new school. There was evidence from the complainant's mother that the complainant started at that school at the commencement of the 1995 school year. The time frame in which the first offence occurred is therefore restricted to the period from the commencement of the school year until 8 March 1995 at the most. There was no challenge to the girl's evidence as to when the interference began, which is understandable since the accused gave evidence denying any improper conduct at all. The second, third and fourth offences were similarly placed within that time frame since the complainant gave evidence that those offences occurred on the evening of a school day.

11 The case is therefore one where the time frame is not as lengthy as is often the case in this kind of matter. It is however relevant to observe that the Crown Prosecutor's implication

that the girl would give evidence that the incident comprising count 1 was the only occasion when the particular method of interference had been used did not eventuate since the girl gave evidence that the numerous acts of indecent treatment involving touching her private parts were much the same. Nevertheless, the evidence was that on an occasion within the time frame referred to there was an act of interference involving the use of three fingers and that it was the first occasion upon which any such act had been committed. The trial judge stressed to the jury in very plain terms that they must concentrate upon that act and not convict unless each and every jury member was satisfied beyond reasonable doubt that that particular act had occurred.

…

Lack of particularity

13 There are two aspects of the need for particularity. One is the need to eliminate the risk of duplicity. The occasion on which the offence is alleged to have occurred must be sufficiently identified so that it may be differentiated by the jury as a specific event upon which they must focus. There must ultimately be adequate directions that the jury must be satisfied beyond reasonable doubt of guilt of that particular offence and no other and as to the use which may be made of evidence of other unparticularised acts of the same character in the process of reaching the verdict.

14 The second purpose of particulars is to give the accused person a sufficient indication of what is alleged against him on the occasion when he is said to have committed the offence …

Count 1

15 The act relied on was one of a series of alleged acts by the accused which involved him touching the private parts of the complainant with his fingers after pulling her panties down as she lay in bed late at night. It was alleged to have been committed at Grasstree Beach (as were all of the other unspecified acts) during a period which the indictment alleged to be a little under 4 months and which the evidence further confined to a period of about 6 weeks at the most. The Crown particularized the act relied on as the first of such acts.

16 Unlike many cases of this kind, the period of time during which it was alleged that indecent acts were performed was relatively brief. That, however, is not decisive. It simply reduces the risk of embarrassment to the accused in having to defend himself in relation to an indeterminate number of alleged offences occurring on unspecified dates and the unfairness inherent in requiring him to defend himself in respect of any occasion on which the offence may have been committed. Further, focusing on a specific but limited period of time may minimise the loss of opportunity for the accused to know how he may answer the charges and to raise specific and effective defences caused by the lack of specificity.

17 In support of the submission that the appellant was embarrassed in his defence by the lack of particularity, reliance was placed on observations of Dawson J on the subject in *S v R* [(1989) 168 CLR 266] at 275. Those remarks were made in the context of a case where the Crown had neither provided nor been required to provide particulars and the case had therefore gone to the jury on a basis that was duplex. Nonetheless the risk of embarrassment has been recognised in other circumstances particularly where the offence is not identified or identifiable by reference to any distinguishing fact, matter or event.

…

20 In *R v R* (CA No 445 of 1997) Dowsett J expressed in the following passage a general statement of what is necessary to achieve the minimum requirement of particularity:

> In general, as a minimum requirement, it is necessary that there be sufficient particularity in the allegations to demonstrate one identifiable transaction which meets the description of the offence charged, distinguishable from any other similar incidents suggested by the evidence. I cannot see how there can be a trial in the absence of that degree of particularity. Of course, this requirement does not exclude multiple charges of substantially similar events, provided the evidence demonstrates separate, identifiable transactions which can be related to counts in the indictment. I do not imply that this minimal standard will always be sufficient. The nature of the offences in question and the circumstances of the complainant will be relevant in determining the extent to which further particulars should be required. In cases of the present kind it will, for instance, often be difficult for a very young complainant to give particulars of dates although, as this case demonstrates, particulars of place may not be so difficult. A specified period may be sufficient, although the longer the period, the less satisfactory is the degree of particularity so offered. The age of the complainant at the time of the alleged offence and at the time of trial may affect any decision as to the adequacy of the particulars. I mean by this only that a court will be more easily convinced that the Crown cannot further particularize a count where the complainant is a young child than in other cases. However the ultimate question will be whether the particulars are reasonably sufficient for the purposes of the administration of justice and for the accused to make a proper defence. The less satisfactory the particulars, the more important will be an adequate direction as to the difficulties created for the accused in answering the charges and the need for care in scrutinizing the Crown case. As with so many other aspects of a criminal trial, the adequacy of particulars is very much a matter of judgement.

21 … The appellant particularly relied on more restrictive remarks by Fitzgerald P as follows:

> Particulars must allow an accused, who is presumed to be innocent, to identify the occasion to which a count relates. Details which assume guilt do not perform that function. It does not assist an accused person who denies guilt to be informed that a count relates to the first occasion when he or she allegedly committed an offence of the nature stated in the count; he or she denies that such an offence ever occurred. The position is unchanged by adding contentious circumstances, such as the room in which an alleged offence occurred and/or that it occurred during the day or at night when the accused cannot identify the occasion because the circumstances again assume the guilt which he or she denies. Further, circumstances might be so commonplace as to fail entirely to provide any useful, distinguising (sic) information.
>
> In my opinion, the adequacy of particulars cannot be divorced from the evidence which provides the context for the supposedly differentiating details.

22 For my part I doubt whether it is possible or helpful to attempt to lay down absolute rules in this area. Once the sufficiency of particulars falls to be decided in the context of the particular circumstances of the individual case, each case must be decided on its merits. Cases which are insufficiently particularised may have common characteristics. So may sufficiently particularised cases. However, in the end, it may be a matter of judgment and

impression whether a case falls on one side of the line or the other, given the wide variety of circumstances which may exist.

…

25 As Davies JA points out in *R*, where the question is whether, because of the absence of particularisation, some injustice has been done to the appellant whereby he has been prejudiced, it has to be considered with the benefit of hindsight as to what the appellant's case was at trial. In the present case the appellant gave evidence denying that he had committed any indecent acts on the complainant. His evidence was to the effect that his wife generally went to bed before he did and that he habitually stayed up until the early hours of the morning and sometimes throughout the night using his computer. There is nothing in his evidence to suggest that he may have been absent from the family home during any period of nighttime when the offences were alleged to have occurred. In the circumstances of the particular case it seems no more than a theoretical possibility that had a date been particularised he would have given evidence of alibi or evidence differing from a denial of all improper conduct.

26 In addition to that, the important matters to be taken into account in deciding whether the conviction on Count 1 should be set aside are the fact that the evidence confines the period in which the offence charged and the offences which were much the same as it to about six weeks, being the period of the 1995 school year while the family resided at Grasstree Beach, that all alleged offences occurred in the bedroom where the complainant and her younger sister slept, that they occurred in the nighttime after the girl had gone to sleep and was awoken, and that the offence in Count 1 could only be distinguished from the others by designating it as the first act in the sequence.

27 It is a question of judgment as to which side of the threshold the matter falls. In many situations, it will be apparent that particularising a count as the first or last in a series of indistinguishable events will not provide a sufficient indication to an accused person of the case he must meet, thereby embarrassing him in his defence. However, in the present case, the other factors referred to above provide a context which in my opinion was sufficient to allow the accused person to adequately make his defence. For that reason, the ground of appeal is not made out.

Counts 2, 3 and 4

28 The position with respect to these counts differs from the situation with respect to Count 1 in that they were all allegedly committed sequentially on the same evening. No question of duplicity arises since the evidence is that there was only one occasion when these kinds of acts occurred. On the evidence they occurred within a relatively brief time span on the same night at a specified place. For reasons previously given the likelihood of the accused giving different evidence from a denial of any impropriety even if the offence were better particularised was fanciful. The case was essentially one of word against word. The jury must have rejected the appellant's evidence to convict. There is no basis demonstrated for interfering with the convictions on the ground of insufficient particularisation.

…

[His Honour also dismissed other grounds of appeal. **Helman** and **McMurdo JJ** agreed with the reasons of **Mackenzie J**.]

27.52C

Barnes v R

[2001] WASCA 86
Western Australia Court of Criminal Appeal

Parker J: ...

2 The applicants for leave to appeal against conviction, Mrs Barnes and Mr Chamberlain, were jointly tried on an indictment in the District Court before Barlow DCJ and a jury. The trial was conducted between 11–28 November 1996. The indictment had charged six offences but verdicts of not guilty were returned by the jury in respect of counts 5 and 6 so that no issue arises on these applications with respect to those counts.

3 Counts 1–4 in the indictment were as follows:

Code Sec 530(a)	(1)	On or about 5 July 1990 at Boddington JOHN TERENCE CHAMBERLAIN corruptly gave JENNIFER MAY BARNES an agent of the SHIRE OF BODDINGTON a valuable consideration, namely, $4,000.00 on account of doing an act in relation to the affairs or business of the SHIRE OF BODDINGTON, namely, assisting him with the Boddington Swimming Pool Project.
Code Sec 529(a)	(2)	AND FURTHER that on or about 5 July 1990 at Boddington JENNIFER MAY BARNES being an agent of the SHIRE OF BODDINGTON corruptly received from JOHN TERENCE CHAMBERLAIN a valuable consideration, namely, $4,000.00 on account of doing an act in relation to the affairs or business of the SHIRE OF BODDINGTON, namely, assisting JOHN TERENCE CHAMBERLAIN with the Boddington Swimming Pool Project.
Code Sec 409	(3)	AND FURTHER that between 13 September 1990 and 22December 1990 at Perth JENNIFER MAY BARNES and JOHN TERENCE CHAMBERLAIN by falsely pretending to an employee of the MINISTRY OF SPORT & RECREATION that an account of JC HEALTH BUILDING SERVICES for the amount of $51,400 was for authorised variations to the construction of the Boddington Swimming Pool Complex induced the MINISTRY OF SPORT & RECREATION to deliver to the SHIRE OF BODDINGTON the sum of $17,163.00 in money with intent thereby then to defraud.
Code Sec 378(7)	(4)	AND FURTHER that on 19 December 1990 at Boddington JENNIFER MAY BARNES and JOHN TERENCE CHAMBERLAIN being a servant of the SHIRE OF BODDINGTON stole the sum of $51,490.00 in money, the property of the SHIRE OF BODDINGTON.

Counts 5 and 6 were similar to counts 1 and 2 although alleging an offence on or about 29 December 1990 concerning $3,175.

4 In accordance with the verdicts returned by the jury, Mr Chamberlain was convicted on count 1 of giving a secret commission, Mrs Barnes was convicted on count 2 of receiving that secret commission, and both applicants were convicted on count 3, false pretences, and count 4, stealing as a servant. With respect to counts 3 and 4 it was the Crown case that Mrs Barnes was the principal offender although Mr Chamberlain may have been a principal or an aider with respect to count 3.

…

7 The grounds of appeal of both applicants as amended by leave at the hearing are:

1. The trial Judge erred in law in failing to order separate trials …

Ground 1. Separate trial of offences

8 At the commencement of the trial counsel for the applicants sought an order pursuant to s 585 of the Criminal Code that the trial of counts 3 and 4 be had separately from the trial of counts 1, 2, 5 and 6. The trial Judge refused to order separate trials and delivered written reasons for his decision; *Barnes & Anor v The Queen*, unreported; District Ct of WA (Barlow DCJ); Library No 5141; 12 November 1996. The appellants now contend that the trial Judge erred in law in dismissing the application.

9 It is to be noted that the application made was for there to be two trials, each concerning both of the applicants, rather than one. It was not contended that there should be separate trials of the two applicants, or that each of the six counts should be the subject of a separate trial.

10 In essence, it is contended that, at least substantially, the evidence relating to counts 1 and 2 and counts 5 and 6 was not relevant to counts 3 and 4. Hence, it is submitted, that the trial of counts 3 and 4 should have been held separately from the trial of the other four counts. As I understand the submission this is advanced both on the basis that s 585 does not authorise the joinder of these counts in the indictment and prejudice from joinder. Further, as counts 1, 2, 5 and 6 allege contraventions of Chapter LV of the Criminal Code, s 543 has the effect of casting an onus on the applicants to show that any valuable consideration given or received was not given or received in contravention of Chapter LV, ie in this case, corruptly. The applicants did not have any onus to discharge with respect to counts 3 and 4. This consideration, it is submitted, should also have required the trial of counts 3 and 4 to be separate from the trial of the other counts as the operation of s 543 and the shift of the burden of proof might have obliged the applicants to give evidence in relation to counts 1, 2, 5 and 6 in which event they would be prejudiced by being denied effectively their right to silence in relation to counts 3 and 4. In this last respect, the applicants effectively renewed the submissions that were put at the commencement of the trial. It is to be noted, however, that in fact neither applicant gave evidence at the trial.

11 The notion of what comprises a series of offences of the same or a similar character in s 585 owes much in its derivation to Sch 1, r 3 of the Indictment Act 1915 (UK). The discussion of the notion in that context by Lord Pearson, Lords Hodgson, Donovan, Wilberforce and Diplock concurring, in *Ludlow v R* [1971] AC 29, in particular at 38–41, offers revealing insight into, and provides considerable assistance in applying, the notion. …

12 In *Ludlow*, Lord Pearson at 38 accepted from the decision in *R v Kray* [1969] 3 WLR 831 that two offences could constitute a series. Turning to the words 'of a similar character', Lord Pearson at 39–40 said:

… I think the proper conclusion to be drawn from the judgments as a whole is that both the law and the facts have been and should be taken into account in deciding whether offences are similar or dissimilar in character.

In my opinion, however, it is important to notice that there has to be a *series* of offences of a similar character. For this purpose there has to be some nexus between the offences. Counsel criticised the wording of passages in judgments appearing to say that there cannot be similarity of character without a nexus. But I think this criticism, if it has any validity, applies only to the wording, and not to the substance, because when regard is had to the requirement of a series of similar offences it is right to look for a nexus. Nexus is a feature of similarity which in all the circumstances of the case enables the offences to be described as a series. In the *Kray* case the Court of Appeal said, at p 836:

… offences cannot be regarded as of a similar character for the purposes of joinder unless some sufficient nexus exists between them. Such nexus is certainly established if the offences are so connected that evidence of one would be admissible on the trial of the other, but it is clear that the rule is not restricted to such cases.

…

Another point dealt with in the Court of Appeal's judgment in the *Kray* case is relevant for the present case also. They said [1969] 3 WLR 831, 836–837:

It is not desirable, in the view of this court, that rule 3 should be given an unduly restricted meaning, since any risk of injustice can be avoided by the exercise of the judge's discretion to sever the indictment. All that is necessary to satisfy the rule is that the offences should exhibit such similar features as to establish a prima facie case that they can properly and conveniently be tried together.

That last sentence is not a construction of the rule, but I think it is helpful practical advice for those applying the rule. The view that rule 3 should not be given an unduly restricted meaning derives support from authority: *Rex v Ailes* (1918) 13 Cr App R 173. When it is available it should be used …

13 As with s 585 of the Criminal Code, the Indictments Act 1915 also provides for the trial Judge to be able to order separate trials of offences properly joined in the one indictment. Lord Pearson, at 40–41 of *Ludlow*, gave consideration to the exercise of that discretion by the trial Judge in that case … At 40–42 Lord Pearson went on to cite with approval a passage in the judgment of Lord Goddard CJ in *Rex v Sims* [1946] KB 531 at 536 where the Lord Chief Justice said:

We do not think that the mere fact that evidence is admissible on one count and inadmissible on another is by itself a ground for separate trials: because often the matter can be made clear in the summing-up without prejudice to the accused. In such a case as the present, however, it is asking too much to expect any jury when considering one charge to disregard the evidence on the others, and if such evidence is inadmissible, the prejudice created by it would be improper and would be too great for any direction to overcome.

14 Somewhat similar views were expressed by Brennan J in *Sutton v R* (1984) 152 CLR 528 at 541–2:

When two or more counts constituting a series of offences of a similar character are joined in the same information, a real risk of prejudice to an accused person may arise from the

adverse effect which evidence of his implication in one of the offences charged in the indictment is likely to have upon the jury's mind in deciding whether he is guilty of another of those offences. Where that evidence is not admissible towards proof of his guilt of the other offence, some step must be taken to protect the accused person against the risk of impermissible prejudice. Sometimes a direction to the jury is sufficient to guard against such a risk; sometimes it is not. Where a direction to the jury is not sufficient to guard against such a risk, an application for separate trials should generally be granted.

15 As was observed by Brennan J at 541 the facts to be taken into account by the trial Judge in determining whether charges are properly joined in an indictment are the facts alleged by the Crown. As his Honour noted it is immaterial that those facts are disputed by the defence. In the present case there was a connection alleged by the Crown between counts 3 and 4 on the one hand and counts 5 and 6 on the other, in that it was the Crown's case that following and by virtue of receipt of money by Mr Chamberlain as a consequence of the transactions the subject of counts 3 and 4, Mr Chamberlain paid to Mrs Barnes and she received the further secret commission the subject of counts 5 and 6. It was the case, however, that for the most part the evidence relating to counts 3 and 4 would not have been directly relevant on the separate trial of counts 5 and 6, or vice versa. Nor was this a case where the principles applicable to similar fact or propensity would justify the admission of the evidence relating to counts 1 and 2, or 3 and 4, or 5 and 6, on the separate trial of either of the other two pairs of those offences. The issue for the purposes of joinder was, therefore, whether the offences charged formed or were part of a series of offences of a similar character within the sense of that notion in s 585 as discussed in the authorities.

16 During the period covered by the indictment Mrs Barnes was the Assistant Shire Clerk, and at the times material to counts 3 and 4 the Acting Shire Clerk, of the Shire of Boddington. She and Mr Chamberlain were personal friends. Mr Chamberlain had acted first as a consultant to the Shire as it developed plans for and decided to construct a swimming pool in Boddington and then as the contractor to construct that pool after he was awarded the contract by the Shire Council in June 1990.

17 As was well known to all parties the Ministry of Sport and Recreation of the State of Western Australia had agreed to meet one third of the cost incurred by the Shire in the construction of the pool.

18 The Crown case was that without the knowledge or permission of the Shire and corruptly Mrs Barnes had taken advantage of her position as Acting or Assistant Shire Clerk to assist Mr Chamberlain in relation to the pool contract.

19 In particular it was the Crown case that Mrs Barnes had introduced Mr Chamberlain to the Shire Council as someone able to advise on building the pool, had put forward a plan by which Mr Chamberlain was to be consulted re the pool project, and had prepared documents relating to the pool project for Mr Chamberlain.

20 Counts 1 and 2, and 5 and 6, concerned two occasions where in the Crown's case Mr Chamberlain, having been paid money by the Shire for his work on the swimming pool project, then corruptly paid Mrs Barnes $4,000 on or about 5 July 1990, and $3,175 on or about 29 December 1990, for the assistance she had provided.

21 Counts 3 and 4 concerned an account which Mr Chamberlain submitted under his business name to the Shire detailing purported variations under the contract so as apparently to justify

the payment to him of an additional sum of $51,400. It was the Crown case that there was no entitlement under the contract for additional payment for any of the items the subject of this account and further that payment of the $51,400 or any similar sum to Mr Chamberlain had not been authorised by the Council. It was the Crown case that even though Mrs Barnes knew that Mr Chamberlain's account was not for genuine variations and that payment had not been authorised, she then completed a Shire cheque which had been signed in blank by two Councillors, making it payable to Mr Chamberlain for $51,490 and signed it herself. That cheque was paid to Mr Chamberlain and banked by him in his firm's account. This was the subject of count 4 which alleged the theft of that $51,490. (The evidence offers no explanation of the $90 payment above the amount of the account.) With respect to count 3 it was the Crown case that by her conduct Mrs Barnes effectively represented to the Ministry that the account for $51,400 was for authorised variations to the swimming pool and so induced the Ministry to pay $17,163 to the Shire (it will be noted that $17,163, which was the amount paid, is actually a third of $51,490 the amount of the Shire cheque paid to Mr Chamberlain). It was the Crown case that Mr Chamberlain benefited from this $17,163 and then paid Mrs Barnes the money charged in counts 5 and 6 …

22 Thus it can be seen that the six counts joined in the indictment are each offences which are similar in nature in the sense discussed in the authorities. They each allege dishonesty. The circumstances in which the offences charged were alleged to have being committed were such that each of the counts involved conduct by the two applicants, in connection with the swimming pool project, over a period of some six months, and for the purpose of one or other of the applicants benefiting financially by fraudulent or corrupt means, from or through the Shire. In my view, in these circumstances the offences joined in the indictment clearly constituted a series of a similar character for the purposes of s 585.

23 The trial Judge correctly directed himself as to the applicable legal principles and properly reached the conclusion that the joinder in the indictment was authorised.

24 His Honour then went on to consider whether a separate trial of counts 3 and 4 should be ordered as sought by the applicants. In this respect he directed himself in accordance with the passage cited earlier in these reasons from the decision of Brennan J in *Sutton v R*. He concluded, however, that in this case the applicants could be adequately protected from the risk of impermissible prejudice by appropriate direction to the jury so that he refused to order the separate trial of counts 3 and 4.

25 As was pointed out by this Court in *Phillips v The Queen* (supra) at 5:

> … the question of propriety of joinder is procedural. Error in this regard will not constitute a ground for quashing a conviction unless it is seen that as a result of the joint trial following improper joinder, a miscarriage of justice has occurred.

These words necessarily embrace both joinder in the indictment and a decision not to order separate trials as the determinative issue is whether a joint trial has caused a miscarriage of justice.

26 In a detailed and comprehensive charge the trial Judge stressed to the jury that there were in effect eight entirely separate trials so that they should approach the consideration of their verdicts on that basis. Further, his Honour not only directed the jury with care as to the need to consider each charge against each of the applicants separately, with appropriate

directions against having regard to a verdict of guilty on one count or against one applicant when considering other counts or the other applicant, but in dealing with each count he meticulously spelt out what the Crown must establish to prove its case. He did this with respect to each applicant and each count separately. He reminded the jury several times of the need to consider each charge and each applicant separately….

27 In all the circumstances I am not persuaded that, by virtue of his Honour's decision not to order the separate trial, there is reason to think that he erred in the exercise of his discretion or that there has been a miscarriage of justice.

[**Parker J** then considered other grounds before dismissing the appeal. **Wallwork** and **Wheeler JJ** agreed with **Parker J**.]

27.53C

Maxwell v R

[1995] HCA 62; (1996) 184 CLR 501; 135 ALR 1
High Court of Australia

Gaudron and **Gummow JJ**: Brian William Maxwell ('the appellant') was indicted before McInerney J in the Supreme Court of New South Wales on a charge that, on 24 August 1992, he murdered his wife, Marilyn Patricia Maxwell. He pleaded not guilty of murder but guilty of manslaughter.

The appellant's plea was accepted by the prosecutor in satisfaction of the indictment on the basis that he, the appellant, was entitled to rely on the defence of diminished responsibility under s 23A of the Crimes Act 1900 (NSW) ('the Act') …

The prosecutor's authority to accept the plea is to be found in s 394A of the Act. That section provides:

> Where a prisoner is arraigned on an indictment for any offence and can lawfully be convicted on such indictment of some other offence not charged in such indictment, he may plead not guilty of the offence charged in the indictment, but guilty of such other offence, and the Crown may elect to accept such plea of guilty or may require the trial to proceed upon the charge upon which the prisoner is arraigned.

Upon his acceptance of the plea, the prosecutor informed McInerney J that it was not in dispute that the appellant intentionally shot his wife. Evidence was tendered by the prosecutor as to the circumstances of the shooting and the events which led to it. He also tendered a report from Dr Shand, a consulting psychiatrist, together with an addendum to that report in which Dr Shand expressed the view that the appellant 'suffered from depression with suicidal and likely homicidal ideation for a considerable time prior to 24/8/92' and that he was entitled to rely on the defence of diminished responsibility …

…

At the conclusion of the evidence, McInerney J announced that he would consider the matter and remanded the appellant in custody for sentence. When it was next listed, his Honour indicated that he was troubled by some aspects of the case, including that the psychiatrists had not referred to some matters which he regarded as important and that the facts on which they relied had not been established before him. One matter which he

regarded as important was the date of the appellant's receipt of the letter informing him of the need for his son's operation. On one view of the evidence, the letter might have been received some six or seven weeks before the shooting.

His Honour also expressed the view that notwithstanding the plea, it was for the court, as the tribunal of fact, and not for the psychiatrists, to determine whether there was substantial impairment of responsibility for the purposes of s 23A of the Act. He added that if he was not entitled to reject the plea, he required 'proof by the accused on the balance of probabilities of those matters he intends to rely on'. Thereafter, his Honour adjourned the matter to enable submissions to be made on the question whether, in the circumstances, he was entitled to reject the plea of guilty.

Submissions were put to his Honour on 10 December 1993, by which time Dr Shand had discovered certain documents that he had not previously read. On the basis of the material in those documents, Dr Shand prepared a further report expressing the view that the appellant 'was not suffering from a significant degree of psychiatric disorder, sufficient to diminish his responsibility, for killing his wife'. The prosecutor submitted that his Honour could and should reject the plea. Counsel for the appellant submitted that the appellant had already been convicted of manslaughter and, thus, could not be required to stand trial for murder. Alternatively, it was argued by the appellant's counsel that rejection of the plea would amount to the usurpation of the prosecutorial function. McInerney J upheld the submissions of the prosecutor and rejected the plea of guilty of manslaughter on the basis that, if he were to proceed to sentence without regard to Dr Shand's changed opinion, 'it would make (his) sentencing options intolerable and certainly not in the interests of the administration of justice'.

The prosecutor did not at any stage seek leave to withdraw his acceptance of the plea and McInerney J declined to express any view as to his ability to do so. This notwithstanding, his Honour referred the following questions for the consideration of the Court of Criminal Appeal:

1. Can the prosecution withdraw the acceptance of a plea after a plea has been accepted?
2. Has a trial Judge, when a plea has been accepted by the Crown in full satisfaction of an indictment, any power to reject the plea?

The matter was heard in the Court of Appeal by way of an ap`peal by the appellant who sought, inter alia, a negative answer to the questions posed by McInerney J. The Court of Criminal Appeal answered both questions in the affirmative, holding in relation to the second question that it was 'unacceptable … that a judge can be forced to sentence an offender on a factual basis which the judge cannot conscientiously accept'.[88] The appellant now appeals to this court.

…

May a court reject a plea which has been accepted under s 394A of the Act?

…

… [B]efore turning to any consideration of principle, it is convenient to note that, although the question has been framed in terms of the rejection of a plea under s 394A, the real question is whether, notwithstanding a prosecutor's acceptance of a plea under that section, a court may either require an accused person to stand trial on the more serious offence charged in the indictment or, if the prosecutor declines to offer evidence, refuse to act on the plea. Framed in that way, the question largely answers itself.

There can be no doubt as to the power of the Attorney-General and the Director of Public Prosecutions[119] to enter a *nolle prosequi* or of a prosecutor to refuse to offer evidence with respect to an offence charged. It follows from the existence of those powers that a court cannot require there to be a trial on a more serious charge than that to which a plea has been accepted under s 394A of the Act if, in the exercise of their respective powers, the Attorney-General, the Director of Public Prosecutions or a prosecutor declines to proceed. And, in our view, it follows from the nature of those powers that, only in limited circumstances, can a court reject such a plea. And that is so even if, as here, the prosecutor invites or acquiesces in its rejection.

The power of the Attorney-General and of the Director of Public Prosecutions to enter a *nolle prosequi* and that of a prosecutor to decline to offer evidence are aspects of what is commonly referred to as 'the prosecutorial discretion'.[120] In earlier times, the discretion was seen as part of the prerogative of the Crown and, thus, as unreviewable by the courts.[121] That approach may not pay sufficient regard to the statutory office of Director of Public Prosecutions which now exists in all states and territories and in the Commonwealth. Similarly, it may pay insufficient regard to the fact that some discretions are conferred by statute,[122] such as that conferred on a prosecutor by s 394A of the Act.

It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute,[123] to enter a *nolle prosequi*,[124] to proceed ex officio,[125] whether or not to present evidence[126] and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted.[127] The integrity of the judicial process — particularly, its independence and impartiality and the public perception thereof — would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.[128]

...

The second qualification is that, of necessity, a court always retains power to prevent abuse of its process, including its criminal process.[129] It is conceivable that, in some circumstances, it might be an abuse of process for a court to proceed on a plea accepted by a prosecutor under s 394A of the Act.[130] Should a question arise in that regard, it will also be separate and distinct from the question whether the plea should be rejected.

It follows from the nature of a criminal trial, in which the prosecution bears the onus of proving guilt beyond reasonable doubt, that it cannot be an abuse of process to proceed on a lesser charge, whether by acceptance of a plea under s 394A of the Act or otherwise, merely because there is evidence which, if accepted, would sustain a conviction for a more serious offence. Similarly, it cannot be an abuse of process to proceed on a manslaughter charge if there is evidence which, if accepted, would support a finding of diminished responsibility in accordance with s 23A of the Act.

The psychiatric evidence in this case was far from satisfactory. Even so it was capable of supporting a finding of diminished responsibility under s 23A of the Act. And there was no suggestion that it was open to McInerney J to reject the appellant's plea on the basis that it was equivocal or that there was some reason to doubt that he was guilty of the offence of manslaughter. Accordingly there was no basis for his Honour's rejection of the plea. In particular, it was not open to his Honour to reject the plea because he was not satisfied that the appellant's responsibility for the shooting of his wife was substantially impaired — a course which necessarily involved an impermissible review of the prosecutor's decision under s 394A of the Act.

Moreover, it was not open to McInerney J to reject the appellant's plea of guilty to manslaughter on the grounds suggested by the Court of Criminal Appeal, namely that it required him to sentence the appellant on a basis which he could not conscientiously accept. That, too, involves a review of the prosecutor's decision. Moreover, courts are required to sentence on the basis of jury verdicts with which they may or may not agree and, abuse of process aside, there is no reason in law or logic why it cannot be done in a case where the prosecutor has accepted a plea to a lesser charge as permitted by s 394A of the Act.

May a prosecutor withdraw acceptance of a plea to a lesser charge once accepted under s 394A of the Act?

There is nothing in s 394A of the Act to suggest that acceptance of a plea cannot be withdrawn. And subject to two minor qualifications, there is no legal principle which requires that that be so. The first qualification is that there may be circumstances in which it is no longer possible for there to be a fair trial of the charge in the indictment as, for example, if witnesses are no longer available. That consideration requires that acceptance should be withdrawn only by leave of the court. The second qualification involves other and broader considerations of fairness. For example, there may have been admissions which would not have been made had it been thought that the matter might proceed to trial. Those broader considerations require that it be open to a court to refuse leave to a prosecutor to withdraw his or her acceptance of a plea under s 394A of the Act, unless there are good and substantial reasons for allowing that course.

Conclusion

The questions which were framed by McInerney J and considered by the Court of Appeal in that court's reasons for dismissing the appellant's appeal should be answered as follows:

Question 1: Yes, with the leave of the court;
Question 2: Yes, but, abuse of process aside, not if it involves a review of the prosecutor's decision under s 394A of the Act.

It should be ordered that the decision of McInerney J rejecting the appellant's plea of guilty be set aside and that the matter be remitted to him for hearing and determination in accordance with these reasons.

Footnotes

88. *R v Maxwell* (1994) 34 NSWLR 606 at 612.
119. Director of Public Prosecutions Act 1986 (NSW), s 7(2)(b).
120. See *Barton v R* (1980) 147 CLR 75 at 91, 94 per Gibbs and Mason JJ; *McCready* (1985) 20 A Crim R 32; *R v Von Einem (No 1)* (1991) 55 SASR 199; *Chow v DPP* (1992) 28 NSWLR 593 at 604–5 per Kirby P.
121. See Wheeler, 'Judicial Review of Prerogative Power in Australia: Issues and Prospects', (1992) 14 *Sydney Law Review* 432.
122. See *Newby v Moodie* (1988) 83 ALR 523. See also *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 217, 220 per Mason J.
123. See *Connelly v DPP* [1964] AC 1254 at 1277; *R v Humphrys* [1977] AC 1 at 46; *Barton v R* (1980) 147 CLR 75 at 94–5, 110.
124. See *R v Allen* (1862) 1 B & S 850 [121 ER 929]; *Barton v R* (1980) 147 CLR 75 at 90–91.
125. See *Barton v R* (1980) 147 CLR 75 at 92–3, 104, 107, 109.
126. See, for example, *R v Apostilides* (1984) 154 CLR 563 at 575.

127. See *McCready* (1985) 20 A Crim R 32 at 39; *Chow v DPP* (1992) 28 NSWLR 593 at 604–5.
128. *Barton v R* (1980) 147 CLR 75 at 94–5; *Jago v District Court* (NSW) (1989) 168 CLR 23 at 38–9, 54 per Brennan J, 77–8 per Gaudron J; *Williams v Spautz* (1992) 174 CLR 509 at 548 per Deane J; *Ridgeway v R* (1995) 69 ALJR 484 at 515 per Gaudron J; 129 ALR 41 at 82.
129. *Barton v R* (1980) 147 CLR 75 at 95–6, 104, 107, 109, 116; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 25, 56, 74–5; *Williams v Spautz* (1992) 174 CLR 509 at 518–19; *Walton v Gardiner* (1993) 177 CLR 378 at 393–6; *Ridgeway v R* (1995) 69 ALJR 484 at 506 per Toohey J, 515 per Gaudron J; 129 ALR 41 at 71, 82–3; *Metropolitan Bank v Pooley* (1885) 10 App Cas 210 at 214, 220–1; *R v Humphrys* [1977] AC 1 at 46, 53–5, cf at 26.
130. See *R v Brown* (1989) 17 NSWLR 472 at 479 where it was said that it is possible 'to envisage theoretical possibilities that could involve an abuse of process by prosecuting authorities about which an accused has no complaint to make, and which might indeed involve connivance on the part of the accused'.

27.54C Williams v Spautz

(1992) 174 CLR 509; 107 ALR 635
High Court of Australia

Mason CJ, Dawson, Toohey and **McHugh JJ:**

…

The facts and the proceedings

From 1973 to 1980, Dr Spautz was a senior lecturer in the Department of Commerce at the University of Newcastle. In 1977, Professor Williams was appointed to the Chair of Commerce at the University. By the end of 1978 and throughout 1979, Dr Spautz was in serious conflict with Professor Williams; he alleged plagiarism in the Professor's doctoral thesis, disputed the Professor's appointment to an administrative post within the Department and threatened litigation. Towards the end of 1979, the dispute reached the University Council and a committee, chaired by Professor Michael Carter, was appointed to report on and attempt to resolve the dispute. Upon the recommendation of the committee, the University Council directed Dr Spautz to stop his one-man campaign against Professor Williams; it also advised Dr Spautz that disobedience of the direction would be regarded as misconduct within the meaning of the relevant University by-law. Subsequently, a further committee, chaired by the Deputy Chancellor, Mr Justice Kirby, was appointed to investigate the conduct of Dr Spautz and, in particular, to report whether he had disobeyed the Council direction. Following the report of this committee, which made no recommendations but found in favour of Professor Williams on a number of issues, the Council resolved on 20 May 1980 to dismiss Dr Spautz, effective as from 23 May, unless he resigned prior to that time. Dr Spautz did not resign and thus his dismissal took effect.

…

In this appeal we are concerned only with particular informations laid against Professor Williams, Mr Morris and Mr Gibbs. On 13 July 1984, Dr Spautz laid an information against Professor Williams charging 'several counts' of unspecified criminal defamation on and after 1 November 1978. On 26 September 1984, Dr Spautz laid an information against Mr Morris charging a conspiracy with Mr Justice Kirby and other members of the university seriously

to injure the respondent without justification and by illegal means. On 18 March 1985, Dr Spautz laid an information against Mr Gibbs charging criminal defamation and a conspiracy with Mr Justice Kirby, Professor Dutton and Mr Oliver criminally to defame. Other criminal and civil actions were instituted by the respondent against the appellants but those actions are not of present relevance.

Each of the appellants commenced separate proceedings seeking, inter alia, declarations that the prosecutions were an abuse of the process of the court. Together with related actions, these proceedings came before Smart J who, in final orders made 17 June 1988, granted the declarations sought and stayed the prosecutions permanently. Dr Spautz appealed against these orders. The Court of Appeal (Priestley and Meagher JJA; Mahoney JA dissenting) allowed the appeal and set aside the declarations and orders made by Smart J [*Spautz v Gibbs* (1990) 21 NSWLR 230]. The appellants now appeal to this court against that decision …

…

The trial judge's findings of fact and the conclusions reached by the Court of Appeal

After examining in detail the conduct of Dr Spautz during his self-proclaimed campaign for justice, Smart J made this finding of fact:

> The predominant purpose of Dr Spautz in instituting *and maintaining* the criminal proceedings, the subject of the present applications, against Profs Gibbs and Williams and Mr Morris was to exert pressure upon the University of Newcastle to reinstate him and/or to agree to a favourable settlement of his wrongful dismissal case. (Emphasis added)

As Priestley JA noted in the Court of Appeal, there was ample material before the trial judge from which he could draw that conclusion. In particular, there was a mass of documentation comprising newsletters, pamphlets and memoranda which the respondent had written and distributed to members of the university, media outlets, politicians and legal advisers to his opponents in the litigation. This material contained warnings about proposed legal proceedings, demands for reinstatement, discussions of Dr Spautz' purpose and motive and, what is more important, threats. In the opinion of the trial judge, the material plainly showed that, from the outset, Dr Spautz intended to exert pressure on the persons with power to decide the issues affecting him not to proceed in a manner unfavourable to him if they wished to avoid being sued. In this way he sought to bring pressure to bear so that the university would settle his wrongful dismissal action on terms, including reinstatement, favourable to himself …

The trial judge also found that Dr Spautz had other purposes in instituting the various criminal proceedings and that most of those purposes were improper. One such purpose was the collection of material for research which Dr Spautz claimed to be conducting into corrupt practices in Australian institutions. Another purpose was vindication of Dr Spautz' reputation. Although the trial judge referred in one passage in his judgment to vindication of reputation as not being a proper purpose for a person to have in instituting or maintaining proceedings for criminal defamation, later his Honour said that this purpose, though interwoven with the dominant purpose of securing reinstatement, did not detract from the finding that securing reinstatement was the dominant and improper purpose.

…

His Honour then concluded that the fundamental purposes of a criminal defamation prosecution are to punish the defamer and to protect the community and that the dominant purpose of the prosecutor must be to bring the offender to justice. As the respondent's

predominant purpose in bringing the prosecutions, namely, to secure his reinstatement, was improper and ulterior, the trial judge declared each of the relevant proceedings an abuse of process and ordered them stayed permanently.

In the Court of Appeal, Priestley JA concluded that the trial judge erred in his formulation of the principles governing abuse of process and in his view of the circumstances in which a stay of proceedings would be ordered. His Honour, though conceding that proceedings instituted for an improper purpose were in a sense an abuse of process, considered that no permanent stay should be granted in the absence of some improper *act* in the prosecution of the process. Moreover, after examining the judgments of this court in *Jago v District Court (NSW)* [(1989) 168 CLR 23] Priestley JA considered that the governing principle was that supervising courts should restrict use of their power to control abuse of process to those cases in which exercise of the power is the only way of ensuring that an accused person is not deprived of a fair trial by reason of such abuse. His Honour concluded, on the materials, that the appellants would not have been deprived of a fair trial.

...

The jurisdiction to grant a permanent stay for abuse of process

The jurisdiction to grant a stay of a criminal prosecution has a dual purpose, namely, 'to prevent an abuse of process or the prosecution of a criminal proceeding ... which will result in a trial which is unfair' [*Barton* (1980) 147 CLR at 95–6; *Jago* (1989) 168 CLR at 46; 323–4; see also *R v Derby Crown Court; Ex parte Brooks* (1984) 80 Cr App R 164 at 168–9]. This does not mean that the prosecution of proceedings in such a way as to make them an instrument of oppression which will result in an unfair trial stands outside the concept of abuse of process. That term has been applied on various occasions to describe the situation just mentioned as well as the more traditional case where the prosecution is brought for an improper purpose.

However, in the light of the particular object sought to be achieved by an exercise of the jurisdiction in each class of case, it is important to distinguish between them. If a permanent stay is sought to prevent the accused from being subjected to an unfair trial, it is only natural that the court should refrain from granting a stay unless it is satisfied that an unfair trial will ensue unless the prosecution is stayed. In other words, the court must be satisfied that there are no other available means, such as directions to be given by the trial judge, of bringing about a fair trial. *Jago* was such a case. Consequently, the judgments in that case gave emphasis to the necessity that the court should satisfy itself upon this point before granting the relief sought [*Jago* (1989) 168 CLR at 34, 48–9, 54, 56–8, 72–3, 75].

If, however, a stay is sought to stop a prosecution which has been instituted and maintained for an improper purpose, it by no means follows that it is necessary, before granting a stay, for the court to satisfy itself in such a case that an unfair trial will ensue unless the prosecution is stopped. There are some policy considerations which support the view that the court should so satisfy itself. It is of fundamental importance that, unless the interests of justice demand it, courts should exercise, rather than refrain from exercising, their jurisdiction, especially their jurisdiction to try persons charged with criminal offences, and that persons charged with such offences should not obtain an immunity from prosecution. It is equally important that freedom of access to the courts should be preserved and that litigation of the principal proceeding, whether it be criminal or civil, should not become a vehicle for abuse of process issues on an application for a stay, unless once again the interests of justice demand it. In the United

States, great weight has been given to these factors [see *Rosemont Enterprises Inc v Random House Inc* (1966) 261 F Supp 691 at 696–7].

These factors have considerable force. There is a risk that the exercise of the jurisdiction to grant a stay may encourage some defendants to seek a stay on flimsy grounds for tactical reasons. But that risk and the other policy considerations already mentioned are not so substantial as to outweigh countervailing policy considerations and deter the courts from exercising the jurisdiction in appropriate circumstances.

...

It follows that the Court of Appeal was mistaken in treating the present case — which rested on abuse of process in the sense of proceedings instituted and maintained for an improper purpose — as if it were governed by the considerations which were influential, even decisive, in *Jago*. There, the complaint was that delay and prejudice, whether it be called abuse of process or not, precluded a fair trial. No element of improper purpose was involved. So it was relevant, indeed necessary, to determine whether a fair trial could be held. That is not the position here when, even if the trial be fair, the proceedings have been brought for an improper purpose and therefore amount to an abuse of process.

Is it essential to the exercise of the jurisdiction that the proceedings have been instituted not only for an improper purpose but also without reasonable grounds?

... In our view the power must extend to the prevention of an abuse of process resulting in oppression, even if the moving party has a prima facie case or must be assumed to have a prima facie case. Take, for example, a situation in which the moving party commences criminal proceedings. He or she can establish a prima facie case against the defendant but has no intention of prosecuting the proceedings to a conclusion because he or she wishes to use them only as a means of extorting a pecuniary benefit from the defendant. It would be extraordinary if the court lacked the power to prevent the abuse of process in these circumstances.

...

The boundaries of abuse of process

... To say that a purpose of a litigant in bringing proceedings which is not within the scope of the proceedings constitutes, without more, an abuse of process might unduly expand the concept. The purpose of a litigant may be to bring the proceedings to a successful conclusion so as to take advantage of an entitlement or benefit which the law gives the litigant in that event.

Thus, to take an example mentioned in argument, an alderman prosecutes another alderman who is a political opponent for failure to disclose a relevant pecuniary interest when voting to approve a contract, intending to secure the opponent's conviction so that he or she will then be disqualified from office as an alderman by reason of that conviction, pursuant to local government legislation regulating the holding of such offices. The ultimate purpose of bringing about disqualification is not within the scope of the criminal process instituted by the prosecutor. But the immediate purpose of the prosecutor is within that scope. And the existence of the ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the proceedings terminate in the prosecutor's favour.

It is otherwise when the purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed [*Re Majory* [1955] Ch 600 at 623–4] or some collateral advantage beyond what the

law offers [*Goldsmith v Sperrings Ltd* [1977] 1 WLR at 498–9; [1977] 2 All ER at 581–2; see also *Varawa* (1911) 13 CLR at 91] …

Is it essential to the exercise of the jurisdiction that there should be an improper act as well as an improper purpose?

…

Neither the authorities in Australia nor those in England insist on the need for an improper act as an essential ingredient in the concept of abuse of process. However, the authorities do speak of the 'use' of process for a purpose which stamps it as an abuse [See, eg, *Varawa* (1911) 13 CLR at 55; *Metall & Rohstoff v Donaldson Inc* [1990] 1 QB at 469]. That is not surprising because an improper act may, in appropriate circumstances, afford evidence of improper purpose and abuse of process …

…

Predominant purpose

It has been suggested that the criterion for abuse of process is whether the improper purpose is the *sole* purpose of the moving party. … However, in more recent times it has been said, in our view correctly, that the *predominant* purpose is the criterion …

It is, of course, well established that the onus of satisfying the court that there is an abuse of process lies upon the party alleging it. The onus is 'a heavy one', to use the words of Scarman LJ in *Goldsmith v Sperrings Ltd* at 498; 582 and the power to grant a permanent stay is one to be exercised only in the most exceptional circumstances [*Jago* (1989) 168 CLR at 34; 314–5]; see also *Sang* at 455; 306–7.

The object of a criminal action for defamation

Although the primary purpose of the criminal action for defamation was to punish a defamer by peaceful process of law, thereby discouraging resort to violence and preventing disorder, it was recognized that the action served a purpose in vindicating the reputation of the injured party.

…

Nevertheless, the fundamental purpose of criminal action for defamation, as with other criminal proceedings, is to decide whether the accused has engaged in conduct which amounts to an offence and is deserving of punishment [*Jago* (1989) 168 CLR at 47; 324–5]. Consequently, we do not regard the primary judge's finding that vindication of his reputation was a subsidiary motive of Dr Spautz as detracting from the overall finding that his predominant purpose was improper in that he sought to use the threat of proceedings and the maintenance of them as a means of securing his reinstatement.

Conclusion

Although the primary judge did not express his findings in terms that the use of the proceedings was for an improper purpose, the findings are so expressed as to make it clear that Dr Spautz threatened to use the proceedings for an improper purpose and that his commencement and maintenance of the proceedings were, in pursuance of that purpose, undertaken predominantly to that end. There was therefore a relevant use of the proceedings for an improper purpose.

For the foregoing reasons we would allow the appeal.

[**Brennan, Deane** and **Gaudron JJ**, in separate judgments, dissented and would have dismissed the appeal.]

27.55C

Walton v Gardiner

(1993) 177 CLR 378; 112 ALR 289
High Court of Australia

Mason CJ, Deane and **Dawson JJ**: These three appeals were heard together. They arise out of the tragic, and now notorious, occurrences at a Sydney psychiatric hospital known as the Chelmsford Private Hospital ('Chelmsford' or 'the Hospital') and give rise to common questions. Each appeal is from the judgment of the New South Wales Court of Appeal [*Gill v Walton* (1991) 25 NSWLR 190] (Gleeson CJ and Kirby P; Mahoney JA dissenting) staying disciplinary proceedings, against the relevant respondent, in the Medical Tribunal established by s 32M of the Medical Practitioners Act 1938 (NSW) ('the Act'). In each case, the proceedings in the Medical Tribunal ('the tribunal') had been instituted in 1991 by the referral of complaints made by the present appellant, Ms Walton, as a delegate of the Secretary of the New South Wales Department of Health. It is convenient to use the phrase 'the department' to refer indifferently to Ms Walton, to the present New South Wales Department of Health and to its predecessors.

In the disciplinary proceedings, the respondents are charged with professional misconduct under s 27(1)(a) of the Act by reason of occurrences at the hospital during periods respectively commencing in 1973, 1970 and 1972 and ending in 1978. Two of the respondents, Dr Herron and Dr Gill, are registered medical practitioners. The other respondent, Dr Gardiner, was a registered medical practitioner at the time of the alleged misconduct. … [T]he substance of what is alleged against each respondent in the tribunal proceedings is that, during the relevant period, he administered to a large number of patients in the hospital a form of psychiatric treatment known as 'deep sleep therapy' together with associated electro-convulsive therapy. It is alleged that deep sleep therapy 'involved significant risks', was 'unjustifiably dangerous' and was of 'no medical worth'. The associated electro-convulsive therapy is alleged to have been 'unjustifiably dangerous'. There is no suggestion that any of the respondents has administered deep sleep therapy, or been guilty of any professional misconduct, since 1979.

During the period between 1970 and 1978, the leading exponent in New South Wales of deep sleep therapy was a Dr Harry Bailey. He was the medical practitioner principally involved in its administration at the hospital. The three respondents were, in one way or another, all associates of Dr Bailey. Whatever may have been the position prior to 1967, the effect of subsequent allegations and occurrences, including deaths, was that the treatment of psychiatric patients at the hospital under the regime established by Dr Bailey had been completely discredited by 1985 when Dr Bailey, facing criminal charges, took his own life. The long history of those allegations and occurrences is set out in some detail in the reported judgment of McHugh JA in an earlier and related case — *Herron v McGregor* [(1986) 6 NSWLR 246 at 248–50, 255–6, 258–9, 260–5, 267–71)] — in the Court of Appeal. It suffices, for present purposes, to identify certain major events in that history. We do so, in the following four paragraphs, in words largely taken from the judgment of Gleeson CJ in the Court of Appeal in the present case.

Even before 1978, there had been considerable concern in various quarters, including the Department, about the treatment of psychiatric patients at the hospital. The matter became of political interest. In October 1978, the Attorney-General wrote to the Minister for Health raising concerns about the treatment of patients at Chelmsford. Officers of the department visited the hospital. In November 1978, the Minister for Health informed the Attorney-General that a full investigation would be carried out in due course. In October 1979, in response to a

letter from a branch of a political party calling for a full inquiry into practices at the hospital, the Minister for Health advised that the department was aware of the problems associated with psychiatric care and that the department, the Attorney-General's department and the police had been involved in matters pertaining to the hospital.

A patient named Ms Podio died, and a coronial inquiry was held. In March 1982, the Coroner found prima facie cases of negligence against Dr Herron, Dr Bailey and Dr Gardiner and referred the matter to the Attorney-General. In the meantime, there had been civil litigation instituted against Dr Herron by a former patient, a Mr Hart. That action was commenced in 1976, and, after a hearing lasting 64 days, concluded in 1980 in a verdict in favour of Mr Hart. The proceedings attracted substantial publicity.

In 1982, a member of the public, Ms Eastgate, made two complaints under the Act against Dr Herron. One of those complaints related to the treatment of Mr Hart in 1973; the other related to the treatment of Ms Podio in 1977. In 1983, Mr Hart also made a complaint against Dr Herron under the Act. The complaint related to the treatment of Mr Hart in 1973. Then, in 1985 and 1986, the Assistant Secretary of the department, Mr McGregor, laid a number of complaints under the Act. Three of those complaints were against Dr Herron. They related to the treatment of three patients: Mr Hart in 1973, a Ms Francis in 1976 and Ms Podio in 1977. Two complaints were against Dr Gill. They related to the treatment of Ms Podio in 1977 and a Mr Adams in 1977. A final complaint was against Dr Gardiner. It related to the treatment of Ms Podio.

All of those earlier complaints were directed to the treatment of particular patients. However, they were accompanied by wider allegations about the inappropriateness of the kind of treatment being given at the hospital, about the use of deep sleep therapy and electro-convulsive therapy in conjunction with it, and about the circumstances accompanying such treatment at Chelmsford. In March 1986, after an investigating committee [set up under the now repealed s 27A of the Act] had found prima facie cases of misconduct, the complaints were referred to the tribunal. In what follows, we shall refer to the proceedings before the tribunal in relation to those complaints as 'the earlier proceedings' and to the proceedings involved in the present case, namely those instituted in the tribunal by the department's 1991 complaints, as 'the current proceedings'.

Herron v McGregor

In 1986, each of Dr Herron and Dr Gill applied to the New South Wales Court of Appeal for an order staying the earlier proceedings on the complaints against him. The Court of Appeal ordered that there be a permanent stay of those proceedings. Mr McGregor (ie the department) was ordered to pay Dr Herron's and Dr Gill's costs. The ground upon which the Court of Appeal ordered a stay was that, by reason of the prolonged delay after relevant facts had become known, the institution and continuation of the proceedings were an abuse of the right to lodge a complaint [see, (1986) 6 NSWLR at 258, 260, 266, 267, 268, 269, 271] … *Herron v McGregor* is of importance for present purposes for at least two reasons. First, the fact that the order staying the earlier proceedings in the tribunal against Dr Herron and Dr Gill had been made in 1986 was, of itself, seen by all members of the Court of Appeal in the present case as an important consideration supporting the making of an order staying the current proceedings. Second, the judgment of McHugh JA contains a number of findings of fact about the delay in instituting the earlier proceedings and about actual prejudice (to Dr Herron and Dr Gill) caused by that delay. They include findings that the department's delay in lodging complaints against Dr Herron and Dr Gill was 'appalling' and 'inexcusable' and that, for a number of identified

reasons, a consequence of that delay was that Dr Herron and Dr Gill would be significantly prejudiced in defending the earlier proceedings against them in the tribunal.

After the Court of Appeal's decision in *Herron v McGregor*, the tribunal itself stayed the earlier proceedings against Dr Gardiner. It has not been suggested that Dr Gardiner's case for a stay of the present proceedings is a weaker one than that of Dr Herron or Dr Gill by reason of the fact that the earlier proceedings against him were stayed by the tribunal, and not by the Court of Appeal. Indeed, Dr Gardiner's case for a stay of the present proceedings is a stronger one than that of Dr Herron and Dr Gill in at least one respect. That is that the material before the court discloses that, in the years which have passed since the earlier proceedings were permanently stayed, Dr Gardiner, who is now more than seventy years old, has ceased to practise medicine and has become a seriously ill man.

The Royal Commission

The 1986 orders staying the earlier proceedings did not quell growing public pressure for a full investigation of past occurrences at the hospital. The New South Wales Government established a Royal Commission into Deep Sleep Therapy, commonly known as the 'Chelmsford Royal Commission'. The Royal Commissioner heard evidence over 288 days between October 1988 and July 1990 and subsequently delivered a lengthy report which made some disturbing findings bearing upon the propriety of the conduct of the medical practitioners, including the respondents, who had been involved in the administration of deep sleep therapy at the hospital.

...

After the Royal Commissioner's Report had been delivered and studied, Ms Walton, acting on behalf of the department, initiated the current proceedings against the respondents in the tribunal.

The decision of the Court of Appeal

The members of the Court of Appeal all recognized the close relationship between the department's complaints in the earlier proceedings which had been stayed by, or as a consequence of, the orders made in *Herron v McGregor* and the department's complaints in the current proceedings. The earlier complaints had focused upon the treatment of a few named individuals whereas the new complaints were, in terms, directed more to general allegations of malpractice. Indeed, as Gleeson CJ observed [(1991) 25 NSWLR at 196], it seems that, in the framing of the new complaints, a conscious effort was made to distinguish them, as far as that could possibly be done, from the previous complaints. Nonetheless, as his Honour pointed out [ibid at 196–7]:

> ... an examination of the particulars accompanying the complaints shows that there was criticism of a system that was in operation at Chelmsford, and not merely a particular form of treatment limited to a small number of patients. In disciplinary proceedings against professional persons it is common for allegations of malpractice to be pursued by reference to the facts concerning the way in which the professional person in question has dealt with certain named patients or clients. That is usually both a fairer and a more efficient means of dealing with such allegations. It will sometimes be the case, however, that the evidentiary background will show a general course of practice of which the cases in question are particular instances.
>
> ...

> In summary, the new complaints are not the very complaints that were previously stayed, but they arise out of the same pattern of professional conduct as gave rise to the earlier complaints, and there is a substantial degree of overlapping between the issues to which the new complaints give rise and the issues that would have arisen under the previous complaints.

No attempt has been made in the current proceedings to reopen or dispute the Court of Appeal's findings in *Herron v McGregor* that the delay of the department in instituting the earlier proceedings was 'appalling' and 'inexcusable' and that that delay had caused actual prejudice to Dr Herron and Dr Gill in defending the earlier proceedings against them. The members of the Court of Appeal in the present case proceeded on the basis of those findings. Their Honours all recognized that the delay of the department had been aggravated by the years that had expired since 1986. They accepted that a consequence of that aggravated delay was that each of the present respondents would inevitably be seriously prejudiced in relation to his defence of the current proceedings against him. Notwithstanding that prejudice, however, their Honours either found [ibid, per Gleeson CJ at 200; per Mahoney JA at 220–1] or assumed [ibid, per Kirby P at 205–6] that it would be possible for the tribunal, by taking appropriate steps during the proceedings, to afford the respondents a fair hearing.

As will be seen, the members of the Court of Appeal resolved the question whether the proceedings in the tribunal should be permanently stayed by reference to a weighing process in which account was taken of considerations of fairness to the respondents and of more general considerations of public interest. In that weighing process, their Honours all took account of the policy [ibid, per Mahoney JA, at 216] — or notions — of fairness which informs the principle against double jeopardy.

...

Grounds for a stay of proceedings

It was submitted on behalf of the department that, even if it be accepted that the Court of Appeal possesses supervisory jurisdiction to order a stay of proceedings in the tribunal on the ground of abuse of process, that jurisdiction is confined to cases where the court is satisfied either that any hearing before the tribunal would necessarily be unfair or that the proceedings in the tribunal have been brought for an improper purpose. As has been mentioned, the members of the Court of Appeal either found or assumed that it would be possible for the tribunal, by taking appropriate steps during the proceedings, to afford the respondents a fair hearing. It is not suggested that the department instituted the current proceedings in the tribunal for an improper purpose. In these circumstances, so the department submits, it was not open to the Court of Appeal to order that the proceedings in the tribunal be stayed.

...

The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness. Thus, it has long been established that, regardless of the propriety of the purpose of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail [see, eg, *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210 at 220–1; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128–30]. Again,

proceedings within the jurisdiction of a court will be unjustifiably oppressive and vexatious of an objecting defendant, and will constitute an abuse of process, if that court is, in all the circumstances of the particular case, a clearly inappropriate forum to entertain them. [See, generally, *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; 97 ALR 124.] Yet again, proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings. [See, eg, *Reichel v Magrath* (1889) 14 App Cas 665 at 668; *Connelly v DPP* [1964] AC 1254 at 1361–2.] …

It follows that the department's argument that the Court of Appeal exceeded its jurisdiction to stay proceedings in the tribunal must be rejected.

Double jeopardy

The department also argued that the Court of Appeal was in error in treating the principle against double jeopardy as relevant to the circumstances of the present case. In part, this argument was based on a submission that the Court of Appeal fell into error in failing to appreciate the difference in substance between the complaints involved in the earlier proceedings in the tribunal and the complaints involved in the current proceedings. That submission was not made good …

…

Once it is recognized that the question whether the current proceedings should be permanently stayed falls to be resolved by reference to a weighing process in which account has to be taken of considerations of fairness to the respondents, it is apparent that the members of the Court of Appeal were fully justified in paying regard to the notions of fairness to an accused person which underlie the common law principle against double jeopardy. Notwithstanding the department's argument to the contrary, the substance of the complaints against the respondents in the current proceedings corresponded, to a very large extent, with the substance of the complaints against them in the proceedings which had been permanently stayed by, or as a consequence of, the orders made in *Herron v McGregor* in 1986. The earlier jeopardy of loss of the right to practise and of pecuniary penalty to which the respondents had been subjected in the proceedings based on particular allegations involving the use of deep sleep therapy and associated electro-convulsive therapy on particular patients at Chelmsford prior to 1979, were renewed in the proceedings based on more generalized and wider, but essentially similar, complaints. It is true that the absence of an earlier hearing on the merits and the variations between personal complainants and the details of the complaints mean that, even if a strict rule against double jeopardy is applicable to proceedings in the tribunal, the current proceedings would not fall within it. The sense of injustice which inspires the doctrine against double jeopardy was, however, plainly present in large measure. It was, as Mahoney JA pointed out [ibid] 'an important factor to be weighed in the balance'.

Conclusion

It follows from what has been said above that the department has failed to identify any error of principle or fact affecting the Court of Appeal's decision that the current proceedings in the tribunal should be permanently stayed. As has been said, that decision was the result of a weighing process involving a subjective balancing of the various factors and considerations supporting or militating against a conclusion that a continuation of the proceedings in the tribunal would be so unfairly and unjustifiably oppressive of the respondents as to constitute

an abuse of the tribunal's process. As the different conclusions reached by Gleeson CJ and Kirby P on the one hand and Mahoney JA on the other indicate, the comparative weight to be given to particular considerations and factors in that weighing process and the ultimate outcome of it involved a substantial element of individual judgment. In our view, the conclusion reached by the majority of the Court of Appeal was clearly open in all the circumstances of this quite exceptional case. That being so, and in the absence of identified error of law or fact, it is no part of the function of this court to repeat that weighing process for the purpose of determining whether it would reach the same conclusion as that reached by the majority of the Court of Appeal. [See, generally, *Norbis v Norbis* (1986) 161 CLR 513 at 518–9; 65 ALR 12; *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387 at 415.] Indeed, no submission to the contrary was advanced on behalf of the Department.

The appeals should be dismissed.

[**Brennan** and **Toohey JJ** dissented.]

Committals and Trials

CHAPTER 28

JURISDICTION OF COURTS; JURIES

28.1 A magistrate tries all questions of fact and law without a jury. If an offence is beyond the magistrate's jurisdiction, the magistrate makes an order that it be tried on indictment in the District or Supreme Court.

Most serious offences are prosecuted in the District Court. Some offences including murder are prosecuted in the Supreme Court.

Trials in the District Court and Supreme Court are usually conducted before a judge and jury. In both Queensland and Western Australia, application can be made for a trial by judge alone: see 28.4. However, for Commonwealth offences tried on indictment, trial by jury is mandated by the Constitution s 80.

28.2 The Supreme Court has unlimited jurisdiction over all indictable offences. The District Court has extensive but limited jurisdiction over indictable offences, the limitation being related to the maximum penalty for an offence:

- In Queensland, a prosecutor has discretion to select the court in which to present an indictment using guidelines in the Criminal Code (Qld) (Code (Qld)) s 560(4). The jurisdiction of the District Court does not normally extend to offences punishable by more than 14 years' imprisonment but there is a long list of exceptions: District Court Act 1967 (Qld) s 61.
- In Western Australia, the jurisdiction of the District Court extends to all offences except those for which the maximum penalty is life imprisonment: District Court Act 1969 (WA) s 42.

Magistrates Courts have jurisdiction in respect of simple offences: Code (Qld) s 3; Magistrates Courts Act 2004 (WA) s 11.

28.3 Although indictable offences are generally within the jurisdiction of the Supreme or District Courts, many indictable offences are able to be tried summarily, that is, before a magistrate, on the election of an accused or prosecutor depending on the circumstances: Code (Qld) ss 552A–552BB; Criminal Code (WA) (Code (WA)) s 5; Criminal Procedure Act 2004 (WA) (Criminal Procedure Act (WA)) s 40. The maximum penalty on summary conviction is less than the penalty after conviction on indictment.

28.4 Application may be made for a trial by judge alone in the District Court or Superior Court. In Queensland, the order for a trial by judge alone is called a '*no jury order*': Code (Qld) s 614(1),

Application may be made by the accused or by the prosecutor with consent of the accused: Code (Qld) ss 614(1), 615(2); Criminal Procedure Act (WA) s 118(1), (4).

An order is discretionary. The judge is to be satisfied that an order is in the interests of justice: Code (Qld) s 615(1); Criminal Procedure Act (WA) s 118(4). Specifically mentioned factors are the complexity of the trial, the risk of interference with the jury and (under the Queensland Code) the extent of pre-trial publicity: Code (Qld) s 615 (4); Criminal Procedure Act (WA) s 118 (5). Conversely, it is expressly stated that an order may be refused where the charge involves objective community standards such as 'reasonableness, negligence, indecency, obscenity or dangerousness': Code (Qld) s 615(5); Criminal Procedure Act (WA) s 118(6).

There has been some difference of judicial opinion over the methodology to be adopted when an application is made for trial by judge alone. Some judges have taken the view that the discretion is unfettered by any implicit preference for either mode of trial: see *The State of Western Australia v Martinez* [2006] WASC 25; (2006) 159 A Crim R 380 at 389; *Arthurs v The State of Western Australia* [2007] WASC 182 at [71]. Other judges have endorsed the premise that trials should generally be by judge and jury, so that an applicant for a judge alone trial needs to show why the case is exceptional: see *TVM v The State of Western Australia* [2007] WASC 299; 180 A Crim R 183 at [13], [20]–[21]; *R v Fardon* [2010] QCA 317 at [81].

28.5 Reasons for a verdict are not given by juries. They are, however, required when a judge alone decides the case. The judge must state the principles of law that have been applied and the findings of fact on which he or she has relied: Code (Qld) s 615C(3); Criminal Procedure Act (WA) s 120(2): *R v Fleming* [1998] HCA 68; 197 CLR 250; 158 ALR 379.

Juries

28.6 Juries in criminal cases comprise 12 persons: Jury Act 1995 (Qld) s 33; Juries Act 1957 (WA) s 18. Jurors are randomly selected from a panel by the drawing of cards: Jury Act (Qld) s 41; Juries Act (WA) s 36. Reserve jurors may be chosen to minimise the possibility of a trial aborting due to illness of a juror:

- In Queensland, a maximum of three reserve jurors may be selected and are discharged when the jury retires to consider its verdict: Jury Act (Qld) s 34.
- Western Australia allows up to six reserve jurors. Immediately prior to the retirement of the jury, 11 jurors are balloted to form the jury with the foreperson: Juries Act (WA) s 18. The foreperson is elected by the jury before the ballot.

The prosecution and the defence can each make some peremptory challenges to prospective jurors, in addition to any challenges for cause. The number of peremptory challenges permitted to both the prosecution and the defence is eight in Queensland and three in Western Australia: Jury Act (Qld) s 42; Juries Act (WA) s 38. The prosecution is entitled to multiples of three challenges depending on the number of accused persons. Any challenge must be made before the words of the oath or affirmation begin to be recited: Jury Act (Qld) s 44; Criminal Procedure Act (WA) s 102.

28.7 The rules on jury verdicts differ between jurisdictions:

- In Queensland, verdicts of a majority of 11/12 or 10/11 jurors can generally be accepted after there has been at least eight hours deliberation: Jury Act (Qld) s 59A. Unanimous verdicts are, however, required for murder and some other offences with mandatory life sentences: s 59.
- In Western Australia, verdicts of a majority of 10 jurors can generally be accepted after there has been at least three hours deliberation although unanimous verdicts are required for murder: Criminal Procedure Act (WA) s 114. Furthermore, at any time before a jury gives its verdict a judge may discharge a juror if necessary provided that 10 jurors remain. The verdict of 10 or more has the same effect as if all were present: s 115.
- Unanimous verdicts are required for Commonwealth offences. The High Court has held that the requirement for trial by jury in the Constitution s 80 extends to a requirement for a unanimous verdict: *Cheatle v R* (1993) 177 CLR 541; 116 ALR 1.

28.8 A jury unable to agree on a verdict is commonly known as a 'hung jury'. In the event of a jury's failure to agree, it is discharged and the trial ends. It is then open to the prosecution to proceed to trial again.

A model direction for a jury which has difficulty in reaching a verdict was set out by the High Court of Australia in *Black v R* (1993) 179 CLR 44 at 51; 118 ALR 209 at 215:

> I have been told that you have not been able to reach a verdict so far. I have the power to discharge you from giving a verdict but I should only do so if I am satisfied that there is no likelihood of genuine agreement being reached after further deliberation. Judges are usually reluctant to discharge a jury because experience has shown that juries can often agree if given more time to consider and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence.

'Dual' or 'either way' offences

28.9 Jury trials are expensive. There is a cost in time and money for each juror. In addition, the trial can take longer as time is needed to present and explain the details of the case to untrained persons. Modern times have seen increasingly urgent attempts to reduce the role of juries. One manifestation of this trend is the creation of an alternative mode of trial by judge alone. Another manifestation is the development and expansion of 'dual' or 'either way' offences. These are indictable offences that, under some circumstances, may be tried summarily by a magistrate with reduced penalties on conviction. This partly reflects the risks attendant in the simpler procedure in Magistrates Courts.

28.10 In Queensland, there is a scheme for indictable offences triable summarily with a general maximum penalty of three years' imprisonment or 100 penalty units: Code (Qld) s 552H.

There are three types of dual offence — offences for which the prosecution elects the mode of trial, offences for which the defendant makes the election, and offences which must be tried summarily unless the magistrate decides otherwise.

- Offences for which the prosecutor can elect the mode of procedure are specified in s 552A. These include most assaults where no bodily harm is caused and the assault is not of a sexual nature: s 552A(1)(b) and the reference to s 340 in s 552A(1)(a).

- Offences where the accused can elect include certain offences of a sexual nature where the offender has pleaded guilty, certain assaults (including assault causing bodily harm), and dangerous driving.
- Offences which ordinarily must be tried summarily include most non-violent property offences relating to property valued below $30,000..

The magistrate may also decide that a dual offence in any category should not be dealt with summarily: s 552D(1).

28.11 In Western Australia, various offences specify not only a standard penalty but also a separate 'summary conviction penalty'. Provisions referring to 'summary conviction penalty' are governed by the Code (WA) s 5. A charge must be tried summarily unless the magistrate, on an application by either the prosecutor or the defendant, decides that it should be tried on indictment: s 5(2). In deciding how the case is to be tried, the magistrate must take account of a number of factors including the seriousness of the offence and the interests of justice: s 5(3). If a magistrate who has convicted a defendant after a guilty plea considers that the available penalties are inadequate, the defendant can be committed to a superior court for sentencing: s 5(9).

28.12 Although Commonwealth offences are generally subject to the jurisdictional schemes of the states in which they occur, the Commonwealth has enacted its own scheme for dual offences: Crimes Act 1914 (Cth) ss 4J–4JA.

28.13 Once an election has been made, the general principle is that it cannot be retracted: *Cockram; Ex parte DPP (WA)* (1998) 19 WAR 79. A magistrate may, at any stage, abstain from dealing with a charge of a dual offence if satisfied that the maximum punishment on summary conviction would be inadequate: Codes s 552D(1) (Qld)/s 5(3)(a) (WA).

COMMITTAL PROCEEDINGS

28.14 Queensland and Western Australia have different procedures for committing a case for trial on indictment in the District or Supreme Court.

Queensland

28.15 In Queensland, when an indictable offence is eventually to be tried in a superior court, initial proceedings may be conducted by a magistrate. These proceedings are called a 'committal hearing'. The formal purpose of a committal hearing is to review the prosecution's evidence in order to assess whether it is sufficient to justify committing the accused for trial: Justices Act 1886 (Qld) ss 104, 108. The process protects the accused and also saves the criminal justice system the expense of a trial which is foredoomed to failure. The committal hearing is established as standard procedure. There is no statutory option for the accused to elect to bypass it.

28.16 A committal hearing before a magistrate involves an inquiry as to whether there is sufficient evidence for the prosecution to justify proceeding to trial on an indictment. If the evidence at a committal hearing is not sufficient to proceed further, the accused is 'discharged': Justices Act 1886 (Qld) ss 104(2), 108(1). If the evidence does justify proceeding to trial, the

accused is given an opportunity to plead guilty or not guilty: s 104(2). If the plea is guilty, the accused will be committed for sentencing in a superior court: s 113. If the accused pleads not guilty or offers no plea, there will be a committal for trial: s 108(1).

The magistrate can commit an accused for trial for an offence different from that which was originally charged. The relevant statutory provisions refer to discharging an accused when the evidence is not sufficient to justify proceeding to trial for *any* offence and to committing an accused when there is sufficient evidence to justify proceeding to trial for *an* offence: s 108(1).

28.17 Evidence sufficient to put the accused to trial is some evidence on, or providing a basis for an inference about, each of the elements of the offence for which the accused will be committed. There need not be evidence which proves the case, but there must be evidence which discharges the prosecution's evidentiary burden (see **Chapter 2**) and would, therefore, justify putting the case to a jury at a trial. The examination of witnesses is conducted in the standard manner, with opportunity for cross-examination by counsel for the accused. There is, however, provision for written statements to be admitted with mutual consent: Justices Act 1886 (Qld) s 110A. The defendant can also call witnesses but is under no obligation to do so: s 104(4).

The committal hearing can serve the important secondary functions of permitting discovery of the case for the prosecution and affording an opportunity to test the strength of the prosecution's witnesses. The credibility of the prosecution's witnesses is not, however, a matter for the magistrate to consider in deciding whether or not to commit for trial. Credibility is ultimately a matter for the jury to assess at trial.

28.18 The prosecution is ordinarily expected to present its full case at the committal hearing and not to hold anything back: *R v Basha* (1989) 39 A Crim R 337. There may be special circumstances in which it is proper to refrain from calling a witness who will be used at trial. For example, in *Basha*, one witness was an undercover police officer who was still undercover at the time of the committal proceedings. In such cases, the courts will not intervene unless the presentation of the additional evidence at trial would cause unfairness to the accused. The same principle applies when new evidence becomes available to the prosecution during the period between the committal or preliminary hearing and the trial: *Drozd v R* (1993) 67 A Crim R 112. The trial judge may hear the evidence in advance by a voir dire. This is known as a 'Basha enquiry'. As there are no committal hearings in Western Australia, replaced by continuous disclosure, a Basha enquiry is probably not permitted.

28.19 The prosecution may dispense with committal proceedings (or override a discharge) and proceed directly to trial in a superior court by way of an '*ex officio* indictment': Code (Qld) s 561.

Proceeding by way of an *ex officio* indictment can be useful for an accused who wishes to bypass the committal process. With the co-operation of the prosecution, the case can go straight to trial.

The principle of fairness to the accused governs the use of *ex officio* indictments to bypass committal hearings. In *Barton v R* (1980) 147 CLR 75; 32 ALR 449, *ex officio* indictments were presented in relation to two charges. One of the charges had been subject to almost the whole of a committal proceeding before the *ex officio* indictment intervened. The High Court was prepared to allow that charge to go to trial. There had, however, been no committal proceedings at all on the other charge. With respect to that charge, the High Court held that there could be a stay of trial proceedings until committal proceedings were held.

Western Australia

28.20 Western Australia has introduced a form of committal that dispenses with an examination of the sufficiency of evidence. The new regime was summarised in *Re Grinter; Ex parte Hall* [2004] WASCA 79 at [192]; (2004) 28 WAR 427:

> Parliament has replaced the preliminary hearing, where a judicial officer was required to make a decision whether or not to commit for trial, with a new regime. The [Magistrates Court] monitors compliance with prosecution disclosure. The Director of Public Prosecutions makes all the prosecution decisions. The transfer of power over prosecution decisions before trial is complete. The role of the grand jury and the committing magistrate has been entirely replaced by the functions of the Director of Public Prosecutions and a statutory duty of disclosure. Nothing remains of the committal process but its echo in the use of the word 'committal' in the Justices Act.

As soon as practicable after the initial appearance in court, the court must ensure that the accused has been served with the prosecution notice and has had time to consider it and seek legal advice about it. The court must ensure that the accused understands the charge and the purpose of the proceedings and that the accused has been served with the initial disclosure material: Criminal Procedure Act (WA) s 39.

Having been given an opportunity to do so, if an accused pleads guilty to an indictable offence, the magistrate commits the accused for sentence to the relevant court: Criminal Procedure Act (WA) s 41. This is known as a fast track sentence. The benefit for an accused is the possibility of a reduced sentence in return for an early plea of guilty: see Chapter 31; Sentencing Act 1995 (WA) s 8(2).

If an accused pleads not guilty, proceedings are adjourned until the prosecutor makes a full disclosure of the case against the accused including all confessional material and evidential material: Criminal Procedure Act (WA) s 42. An accused may consent to a committal without full disclosure: s 43.

Once the prosecutor has complied with the disclosure requirements, the accused is required to plead to the charge and is committed for trial or sentence to the relevant court: Criminal Procedure Act (WA) s 44. The magistrate does not examine the evidential and other material and makes no assessment of the strength of the case.

28.21 These procedures do not apply to Commonwealth prosecutions because the relevant provisions of the Criminal Procedure Act (WA) are not picked up by the Judiciary Act 1903 (Cth) ss 68, 69: *Re Grinter*. Furthermore, in *Re Grinter*, Malcolm CJ held that the 'committal mention' procedure under the Justices Act 1902 (WA) (now replaced by the Criminal Procedure Act (WA)) was constitutionally invalid. However, the other judges, Steytler and McKechnie JJ, expressly refrained from deciding this issue.

28.22 An indictment may be presented in a superior court even though a person has not been charged with the offence in a court of summary jurisdiction or committed for trial: Criminal Procedure Act (WA) s 83(6).

PROCEEDINGS BEFORE TRIAL

28.23 Before a superior court trial commences, pre-trial directions or rulings may be given by the court: Code (Qld) s 590AA; Criminal Procedure Act (WA) s 98. This

procedure can be used, for example, to address issues about the admissibility of evidence or the joinder of charges or accused. Either party can seek a direction or ruling. The procedure can be initiated by the judge. The aim of a pre-trial hearing is to conduct the subsequent trial before a jury more efficiently, by reducing the time the jury may be excluded from the court while a judge hears evidence or submissions concerning matters of law. The judge may exercise some case management powers: Code (Qld) s 590AA(2)(m); Criminal Procedure Act (WA) s 137.

PROCEEDINGS AT TRIAL

Queensland

28.24 The order of proceedings at a criminal trial on indictment is set out in the Code (Qld) ss 590–631A. The basic order of proceedings in Magistrates Courts is similar to that in superior courts. The Justices Act 1886 (Qld) s 148 provides that trial procedure in these courts is to be 'in accordance as nearly as may be' with that of the Supreme Court. Trials in Magistrates Courts are simpler because of the absence of juries. Moreover, proceedings for simple offences can take place in the absence of the defendant in a Magistrates Court whereas the defendant must ordinarily be present throughout a trial on indictment: compare Justices Act 1886 (Qld) ss 142–142A with the Code (Qld) s 617.

28.25 Proceedings at a trial on indictment begin with the accused being called upon to plead guilty or not guilty: Code (Qld) s 594. In the event of a guilty plea, the proceedings will switch from trial to sentencing. This switch may also occur during the course of a trial, if the accused later indicates a wish to change the plea to guilty: s 631A.

When an accused has pleaded not guilty, a jury is selected and sworn: ss 604, 607, 610, 614–615.

Before any evidence is presented, prosecuting counsel is entitled to address the jury to explain the nature of the case against the accused: s 619(1). The evidence for the prosecution is then presented and may be cross-examined by the defence.

The accused is then asked if evidence will be presented for the defence: s 618. If the answer is negative, prosecuting counsel is entitled to address the jury again in order to sum up the evidence for the prosecution: s 619(2). Counsel for the defence may then reply.

If evidence is to be given for the defence, defence counsel may make an opening statement: s 619(3). The evidence is then presented, with prosecuting counsel having the right to cross-examination. Following presentation of the evidence for the defence, defence counsel may sum up for the jury: s 619(3). Counsel for the prosecution then has a right of reply: s 619(4). This generally means that counsel for the prosecution speaks last if the defence has presented evidence whereas counsel for the defence speaks last if the only evidence presented is that of the prosecution. Where, however, a Crown Law Officer is appearing, the prosecution always has a right of reply: s 619(6).

Following the closing speeches by counsel, the judge sums up the case for the jury: s 620(1). The judge reviews the evidence and directs the jury on the applicable law and on the issues of fact which must be decided. The directions on the law should be tailored to the issues in the particular case rather than being a general disquisition. In reviewing the evidence, the judge can make observations on its strength (s 620(1)) but must make clear that the decisions on matters of fact lie with the jury: see 28.44.

Western Australia

28.26 In Western Australia, proceedings in Magistrates Courts and superior courts are similar.

The prosecutor may make an opening address about the prosecution case. At the accused's election, the accused is entitled to make an opening address about the defence case, either immediately after the prosecutor's opening address and before any evidence is called, or if the accused intends to give or adduce evidence, immediately after the close of the prosecution case: Criminal Procedure Act (WA) s 143.

The prosecution then calls its witnesses who may be cross-examined by the defence. If the accused gives or adduces evidence, the defence witnesses may be cross-examined by the prosecutor. At the conclusion of all the evidence, the prosecutor is entitled to give a closing address, followed by a closing address from the defence: s 145.

If the case is a jury trial, the judge must then instruct the jury on the law applicable to its case and may make any observations about the evidence that the judge thinks necessary in the interests of justice: s 112, discussed in *Pezzino v State of Western Australia* [2006] WASCA 131. It must be made clear that the decisions on matters of fact lie with the jury: see 28.44.

NO CASE TO ANSWER

28.27 The case for the prosecution must discharge the evidentiary burden with respect to all elements of the offence unless there is some provision relieving the prosecution of some part of this burden: see Chapter 2 on evidentiary burdens. At the end of the evidence for the prosecution, the defence might submit that the evidentiary burden on some matter has not been discharged and that there is, therefore, no case to answer. If this submission is successful the accused will be acquitted without being called upon to present any evidence in defence.

- In Queensland, if the judge accepts this 'no case' submission, the judge will direct the jury to return a verdict of not guilty.
- In Western Australia, the judge, not the jury, acquits the accused: Criminal Procedure Act (WA) s 108.

If the submission fails, the defence may still elect not to call any evidence and argue that the evidence for the prosecution does not satisfy the burden of proof. This is because the prosecution can discharge the evidentiary burden (that is, the burden to adduce some evidence) and yet fail to provide sufficiently strong evidence to prove the case: see 2.8–2.10.

28.28 In deciding whether the prosecution has discharged its evidentiary burden, the issue is whether there is evidence capable of supporting a conviction in the sense that, if it is accepted by the jury, the offence would be established. The judge does not weigh the strength of this evidence and must allow a weak case to go to the jury. In *Doney* (1990) 171 CLR 207 at [17]; 96 ALR 539, it was said:

> [I]f there is evidence (*even if tenuous or inherently weak or vague*) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty,

the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty. [emphasis added]

It is even immaterial that the judge believes that the Court of Appeal, on an appeal against conviction, would hold that a guilty verdict was not reasonably open to the jury: *R v Ferguson* [2008] QCA 227; 186 A Crim R 483, [60]–[61].

The merits of this tolerant approach were questioned by some of the judges of the High Court in *Antoun v R* [2006] HCA 2; (2006) 224 ALR 51, Callinan J at [86] note 74, Heydon J at [91].

28.29 In directing the jury on the defences to be considered, the judge will have to decide whether any evidentiary burden carried by the accused has been discharged. Only those defences for which the evidentiary burden has been discharged should be put to the jury. However, a judge should be generous in deciding what is in issue. See, for example, *Buttigieg v R* (1993) 69 A Crim R 21 at 36: 'if there is any possibility that the issue might be left to the jury, it is best that the trial judge should let it go'. In *Heijne v The State of Western Australia* [2010] WASCA 86, it was said at [40]:

If there is any evidence which raises the possibility of such defences, the prosecution carries the burden of proving beyond reasonable doubt that the defences are excluded. If, on the view of the evidence most favourable to the accused, there is material on which the jury, acting reasonably, might fail to be satisfied beyond reasonable doubt that the defence has been excluded, it is the duty of the trial judge to put the issue to the jury, irrespective of the position adopted by defence counsel. If in doubt, the trial judge should leave the defence to the jury, although it should not be left to the jury if its application would be purely speculative, in the sense that it would lack foundation in the evidence …

DISCLOSURE

28.30 The extent to which the parties to criminal proceedings must disclose their case in advance to the other side is now subject to statute in both Queensland and Western Australia. The rules in the two states are similar.

Different considerations apply to prosecution and defence disclosure due to the burden of proof and an accused's right to silence.

28.31 There are two aspects to prosecution disclosure. The first is uncontentious; the second is not. The first aspect is an ongoing requirement for the prosecution to disclose the evidence directly bearing on the case which it intends to put before the court or is otherwise obviously relevant. A trial cannot be fair unless an accused has a reasonable opportunity to know the case against him or her in advance and prepare a response. An accused must know not only the particulars of the charge but the evidence to be led in support of it. There may be occasions when the prosecution is justified in delaying the disclosure of evidence, for example if a witness may be put in danger, but generally all material should be disclosed in good time. The consequence of a breach of the prosecution disclosure requirements may be a stay of the indictment.

The second aspect relates to material that has been gathered by investigators but does not appear to be particularly relevant. The issue is: to what extent should the prosecution be required

to disclose this material? On the one hand, it is argued that the fruits of an investigation should be available to all parties in the public interest. On the other hand, it is argued that the defence must show a legitimate forensic purpose before a court will order that the material is disclosed to an accused: *Western Australia v Christie* [2005] WASC 214; (2005) 30 WAR 514 at 28.54C.

28.32 An accused's obligation to disclose evidence is limited and follows the common law. An accused is required to disclose the nature and details of any expert evidence that is intended to be adduced. Usually, this will be evidence of an accused's mental condition for which he or she bears a persuasive burden in any event: see Chapter 17. An accused is also required to adduce evidence of an alibi proposed to be relied upon. The consequence of an accused's breach of disclosure requirements may be an adjournment or abandonment of the trial while the alibi is investigated or contrary expert evidence is obtained.

Queensland

28.33 Queensland has imposed extensive disclosure requirements on the prosecution at all levels of courts: Code (Qld) ss 590AB–590AX. Disclosure obligation directions may be obtained to enforce the statutory requirements: ss 590D–590G.

The prosecution has an ongoing obligation to make 'full and early' disclosure of:

(a) all evidence on which it 'proposes to rely' in the proceedings; and

(b) all things in its possession that would 'tend to help' the case for the accused: s 590AB(2).

For this purpose, things in the 'possession of the prosecution' include things of which either the arresting officer or the prosecutor is aware and is, or would be, able to locate without unreasonable effort: s 590AE(3)(b). The obligation, therefore, extends to the police as well as to prosecutors and to things which could have been in their possession as well as things which they actually possess.

Specific provisions deal with copies of informational items. Disclosure is mandatory for some items including copies of the accused's criminal history, of any statement by the accused, of statements of proposed witnesses and of reports of any tests or forensic procedures relevant to the case: s 590AH. On request, disclosure is also required of copies of the criminal histories of proposed witnesses: s 590AJ.

28.34 Various exceptions are specified. A general exception is made for things 'the disclosure of which would be unlawful or contrary to public interest': s 590AB(2)(b). The exception respecting the public interest is subject to more detailed regulation in s 590AQ, with examples such as where disclosure would prejudice the investigation of another offence or prejudice the usefulness of surveillance methods. Limits are also placed on the disclosure of 'sensitive evidence' such as copies of photographs, where disclosure would interfere with the privacy of the subjects: ss 590AF, 590AO. Witness contact details are ordinarily not required to be disclosed unless they are 'materially relevant as part of the proceeding': s 590AP. For material relevance, the example is given of the address of a proposed witness on a charge of breaking and entering, where the witness was an occupant of the place where the offence was alleged to have occurred.

In addition to these express exceptions, a court may waive any requirement if satisfied that there is good reason and that a miscarriage of justice will not result: s 590AU.

28.35 In the event that the prosecution does not comply with its obligations, the court may intervene by making a 'disclosure direction': s 590AV. A direction may be made on the court's own initiative or on application by the accused.

Failure to comply with statutory obligations does not affect the validity of a proceeding: s 590AC(2). Proceedings are, however, likely to be adjourned until compliance is forthcoming. Moreover, breach of obligations respecting disclosure could be a ground of appeal against a conviction.

28.36 An accused must, as soon as practicable, give the other parties to the trial written notice of the name of an expert witness, and any finding or opinion he or she proposes to adduce; and, as soon as practicable before the trial date, give the other parties to the proceeding a copy of the expert report on which the finding or opinion is based: Code (Qld) s 590B.

An alibi is evidence tending to show that by reason of the presence of the accused person at a particular place or in a particular area at a particular time the accused person was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission: s 590A(7). An accused must give sufficient details of an alibi to allow investigation: s 590A.

Western Australia

28.37 In Western Australia, the prosecution disclosure obligation begins after the first appearance in a Magistrates Court and becomes more extensive if the matter proceeds to trial or is committed to a superior court. The disclosure obligation is continuous.

Matters to be disclosed include confessional material, statements of witnesses, and evidentiary material, defined as including statements of witnesses, documents and exhibits that may assist the accused's defence: Criminal Procedure Act (WA) s 42. A certificate of compliance must be filed. The consequences of non-disclosure may be the adjournment or abandonment of the trial and adverse comment by the judge or the other party: s 97.

On application by a prosecutor without notice to the accused, a court may make an order dispensing with a disclosure requirement if satisfied that there is good reason to do so, and no miscarriage of justice will result: s 138.

28.38 Not less than 14 days before the date fixed for trial, an accused must give written notice of the name of an expert witness, and any finding or opinion he or she proposes to adduce; and, as soon as practicable before the trial date, a copy of the expert report on which the finding or opinion is based: Criminal Procedure Act (WA) s 96; Criminal Procedure Rules (WA) r 21.

Alibi evidence, in respect of an accused charged with an offence, means any evidence that tends to show that the accused was not present when the offence is alleged to have been committed, or when an act or omission material to the offence is alleged to have occurred. This differs from the definition in Queensland in that it does not focus on where the accused was, but where the accused was not: *State of Western Australia v Noble* [2006] WASC 79. An accused must give sufficient details to allow investigation: s 96.

THE RIGHT TO A FAIR TRIAL

28.39 The courts' concern with the right to a fair trial was discussed in Chapter 22: see 22.22–22.23. Any trial carries a risk of producing the wrong result — either the acquittal of a guilty person or the conviction of an innocent person. From the standpoint of the accused, a fair trial must minimise the risk of a wrongful conviction. An accused's right to a fair trial incorporates a right to appropriate protections against this risk.

Principles of fairness underlie many of the traditional features of criminal trials such as the rules on the burden of proof and the rules on jury verdicts. The High Court has also emphasised that conceptions of fairness can change, so that the content of the right to a fair trial is subject to further development: see *McKinney v R* (1991) 171 CLR 468 at 478; 98 ALR 577; *Dietrich v R* (1992) 177 CLR 292; 109 ALR 385 at 28.58C. In modern times, a number of matters have attracted the attention of the courts. These include the importance of the accused having prior notice of the prosecution's case and disclosure of any material which could be relevant to the defence (see *Barton* (1980) 147 CLR 75; 32 ALR 449), matters which are now subject to statute: 28.30–28.38. They also include:

1. the potential for trial delay to damage the capacity to make a defence;
2. the importance of the jury not being distracted from paying attention to all the evidence;
3. the importance of prosecutorial and judicial impartiality;
4. the potential for prejudicial publicity to sway jurors; and
5. the need for legal representation.

Trial delay

28.40 The passage of time before trial could disadvantage either the prosecution or the accused if, for example, a potential witness has died or evidence has been lost or destroyed. Where the accused has suffered disadvantage, the right to a fair trial may be undermined. Australia does not recognise any general right to be tried within a reasonable time: *Jago v District Court of New South Wales* (1989) 168 CLR 23; 87 ALR 577 at 22.29C. However, when trial delay causes evidentiary prejudice, the court can order a stay of proceedings: *Jago*. An instance where this occurred was *Gill v DPP* (1992) 64 A Crim R 82, discussed at 27.34. See also *Walton v Gardiner* (1993) 177 CLR 378; 112 ALR 289 at 27.55C.

Attention to the evidence

28.41 In *Cesan v The Queen* [2008] HCA 52; 236 CLR 358; 250 ALR 192, the High Court of Australia quashed convictions in a case where the trial judge had been asleep during significant parts of the trial. A number of respects in which this may have undermined the right to a fair trial were canvassed by French CJ. However, the other judges focused on evidence that the judge's behaviour had repeatedly distracted the jury from paying attention when evidence was presented.

Prosecutorial and judicial impartiality

28.42 A trial is an adversarial process. Nevertheless, the role of the prosecutor has traditionally been conceived as being to seek the truth rather than to seek a conviction. The

prosecutor is under a duty to act fairly: *Livermore v R* [2006] NSWCCA 334; 67 NSWLR 659 (28.55C); in particular, see the list of improper forms of conduct at [31]. The list includes emotive or intemperate language that might prejudice the jury against the accused or a witness favourable to the accused. The court in *Livermore* took particular objection to the prosecutor repeatedly referring to a witness as 'an idiot'. In *Libke v R* [2007] HCA 30; 230 CLR 559; 235 ALR 517 although the conviction was upheld by a majority, all members of the High Court condemned sarcastic comments made by the prosecutor in cross-examining the accused. Particular objection was taken at [41] and [82] to the prosecutor inappropriately aligning himself with the prosecution's case by expressing a personal opinion of the accused's evidence.

28.43 A judge must also display impartiality. In *Antoun v R* [2006] HCA 2; (2006) 224 ALR 51, the High Court quashed a conviction when the trial judge had peremptorily dismissed a submission that there was 'no case' to answer before hearing what counsel had to say on the matter.

28.44 It was noted earlier at 28.25 and 28.26 that, in reviewing the evidence before it is considered by the jury, the judge can make observations on its strength but that it must be made clear that the decisions on matters of fact lie with the jury. In *R v O'Donnell* (1917) 12 Cr App R 219 at 221, Reading LCJ said: '… a judge, when directing a jury, is clearly entitled to express his opinion on the facts of the case, *provided that* he leaves the issues of fact to the jury to determine.' [emphasis added]

28.45 A judge must also avoid potentially prejudicial comments in summing up. A notorious example of a prejudicial summing-up was eventually condemned in *R v Bentley (Deceased)* [1998] EWCA Crim 2516; (2001) 1 Cr App R 307. The English Court of Appeal there quashed the conviction of a youth alleged to have been an accomplice to the murder of a police officer, where the evidence for the prosecution included statements by other police officers about what had been said at the scene of the murder. The Court of Appeal objected to several passages in the summing-up by Goddard LCJ, including this one:

> There is one thing I am sure I can say with the assent of all you twelve gentlemen, that the police officers that night, and those three officers in particular, showed the highest gallantry and resolution; they were conspicuously brave. Are you going to say they are conspicuous liars? — Because if their evidence is untrue that Bentley called out 'Let him have it, Chris!', those three officers are doing their best to swear away the life of that boy. If it is true, it is, of course, the most deadly piece of evidence against him. Do you believe that those three officers have come into the box and sworn what is deliberately untrue — those three officers who on that night showed a devotion to duty for which they are entitled to the thanks of the community?

Unfortunately, although the conviction was quashed, the accused had been hanged half-a-century earlier.

Prejudicial publicity

28.46 There is a public interest in the reporting of crime and criminal investigations. Yet publicity about a case, either before or during a trial, can include information or expressions of opinion which would not be admissible in evidence. This could prejudice jurors, diverting them from the need to consider only the evidence adduced at the trial itself. For example, the

media might report the criminal record of a suspect or an accused. This information would be inadmissible at the trial but might sway jurors in their assessment of the evidence.

28.47 The standard response to the problem of prejudicial publicity is for the trial judge to warn the jury to set aside any preconceptions about the case: *Dupas v The Queen* [2010] HCA 20; 241 CLR 237; 267 ALR 1 at **28.56C**.

What is required by way of warning will depend on the extent and nature of the publicity. In *R v Long; Ex parte A-G (Qld)* [2003] QCA 77; 138 A Crim R 103 (**28.57C**), there had been extensive media publicity about the accused before he was arrested. The reports included details of his criminal history and anti-social conduct, coupled with damning opinions from his former de facto partner. In the Queensland Court of Appeal, the media reporting was described as a 'frenzy of defamation' and it was said that it would be 'difficult … to conceive of publicity more prejudicial'. The trial began 20 months after a publication which was the subject of particular complaint. A permanent stay of proceedings was sought but denied by the trial judge. Instead, the judge sought to counter the publicity by way of three sets of warnings: at the start of the trial and at the beginning and end of the summing-up. The Court of Appeal approved of this course of action.

28.48 The proceedings can also be adjourned to a later date or shifted to a different venue.

In *R v Sheikh* [2004] NSWCCA 38 (decision now removed), the accused had been charged with a number of other men in relation to a series of offences of sexual violence which had attracted high publicity. Sheikh's alleged involvement was less extensive than that of some of his co-accused. He was granted a separate trial in order to reduce the risk of prejudice arising from his association with the others and the evidence to be led against them: *R v Chami & Sheikh* [2002] NSWCCA 136; 128 A Crim R 428. However, his trial began when, amid a blaze of publicity, the jury in the trial of the others was considering its verdicts. Sheikh's counsel sought a delay in his trial but the judge denied the application. On appeal, his conviction was quashed on the ground that failure to adjourn the proceedings had undermined his right to a fair trial and may have caused a miscarriage of justice.

28.49 In Queensland, the Jury Act (Qld) s 47 provides for a judge to authorise the questioning of jurors in the jury selection process. It has been suggested that this provision can be used to explore issues of prejudice: *R v Ferguson* [2008] QCA 227; 186 A Crim R 483 at [56].

28.50 As a last resort, there could even be a permanent stay of proceedings though this would require extreme circumstances. See the discussion in *Dupas* at **28.56C**.

R v Glennon (1992) 173 CLR 592; 106 ALR 177 involved one of the potentially most damaging forms of adverse publicity — disclosure in the mass media that the accused had a prior conviction for an offence similar to that which was the subject of the charge. Proceedings for contempt against the journalist who was responsible may have kept the publicity fresh in the minds of the public. The accused's application for a stay of proceedings was refused. The trial then proceeded and the accused was convicted. His appeal against the conviction was eventually dismissed by the High Court, but only by a 4:3 majority. One of the factors which weighed in the minds of the majority was the time span of several years between the original publicity and the trial. This was said to have made 'a vital difference'. Presumably, therefore, the accused would have been entitled to some remedy if the trial had begun shortly after the publicity. Even though a permanent stay of proceedings might not have been warranted, there could have been a temporary stay to allow for a decline in public attention.

Legal representation

28.51 In order to ensure a fair trial, the accused may need to be represented by counsel. There are two reasons for this:

1. the accused may not have sufficient legal knowledge and skills for an effective defence; and
2. the accused may not be in a position to make dispassionate decisions about how best to conduct the case for the defence: *Dietrich* at 28.58C.

An accused is entitled to representation by counsel: Code (Qld) s 616; Criminal Procedure Act 2004 (WA) s 172. This statutory right is not a right to have counsel provided at public expense. Australian common law does not recognise any general right to have counsel provided: *Dietrich* at 28.58C. The risks inherent in this situation, especially with restricted funds for legal aid, have become a matter of increasing judicial concern. The response of the courts has been similar to their response to the problem of improper or oppressive prosecutions: see Chapter 27. While denying that the courts have any direct power to correct the problem, it has been said that a judge can protect the right to a fair trial by adjourning or staying proceedings against an unrepresented accused: *Dietrich*.

28.52 In *Dietrich* (28.58C), the High Court held that, where an indigent accused is charged with a serious offence and is unrepresented through no fault on her or his part, the proceedings should ordinarily be adjourned or stayed until representation becomes available. Several restrictive conditions are built into this principle:

1. It applies only to 'serious' offences. These were not defined in *Dietrich*, although Deane J suggested that they excluded 'proceedings before a magistrate or judge, without a jury, for a non-serious offence [eg where there is no real threat of deprivation of personal liberty …]'. Trials by magistrates are generally simpler and less traumatic for defendants as well as carrying lesser risk of a severe sentence. See *Khalifeh v District Court Judge Job* (1996) 85 A Crim R 68, where the New South Wales Court of Appeal held that a summary offence, carrying maximum penalties of a $4000 fine and imprisonment for one year, was not sufficiently serious to invoke the need for legal representation.
2. The courts will intervene only to protect accused persons who are indigent. Persons who can finance their own legal representation are expected to do so unless the state grants them legal aid.
3. The lack of representation must not be due to the fault of the accused person. A person who makes no effort to secure legal aid cannot rely on the *Dietrich* principle. This does not mean, however, that any degree of fault will automatically exclude a stay. The overall reasonableness of the accused's conduct must be considered and unwise decisions at some stages may not be fatal to the accused's claim. See, for example, *R v Kennedy* (1997) 94 A Crim R 341, where the accused had consumed all his financial resources at the committal stage instead of saving any for the trial. Despite this, it was held that he could not be required to appear without representation.

28.53 The question of whether trial fairness demands any particular level or quality of representation was examined in *Attorney-General (NSW) v Milat* (1995) 37 NSWLR 370. The New South Wales Court of Criminal Appeal appeared to accept that cases might occur in which the representation available to an accused would be manifestly inadequate, in which

event the accused would be regarded as effectively unrepresented. Beyond that, however, the court was not willing to contemplate reviewing the level or quality of representation available to an accused. The accused in *Milat* was receiving legal aid but was dissatisfied with its amount. It was held that the *Dietrich* principle did not assist him. See also *R v Gudgeon* [1995] QCA 506; (1995) 133 ALR 379, where the Queensland Court of Appeal rejected an argument that the accused needed senior rather than junior counsel. Decisions such as *Milat* and *Gudgeon* also bear upon the issue of indigence. An accused who can afford some level of competent representation, but not the preferred level, is not indigent within the meaning of the *Dietrich* principle.

28.54C **Western Australia v Christie**
[2005] WASC 214; (2005) 30 WAR 514
Western Australia Supreme Court

McKechnie J:

1 There is an indictment pending in the Supreme Court charging the accused with murder following a successful appeal: *Christie v The Queen* [2005] WASCA 55.

2 The accused has issued two witness summonses directed to the Commissioner of Police on 25 July 2004 and 11 August 2004 seeking:

- evidence of covert surveillance conducted on the Accused by undercover officers or agents of the police in the form of notes or statements and telephone intercept and other taped material.
- a report of a Senior Constable Kerr on the profile of the likely killer of Susan Christie.

3 The accused also seeks orders permitting inspection.

4 The Commissioner opposes the production of some of the material until a legitimate forensic purpose is identified and also raises a claim of public interest immunity. The State objects to the production of the material on the ground of relevance.

Principles at Common Law

5 The principles regarding disclosure in criminal cases in common law jurisdictions have evolved over the last 40 years until they can be reasonably regarded as settled. The application of the principles to particular circumstances requires the exercise of judgment and discretion.

6 In Western Australia the provisions of the *Criminal Procedure Act 2004* have also clarified what was once an area of debate and difficulty.

The Prosecution's Duty of Disclosure

7 Nearly 30 years ago in *Maddison v Goldrick* (1976) 1 NSWLR 651 Samuels JA (Street CJ and Moffitt P agreeing) said at 668:

> But, over recent years, the endeavours of law reformers, in most cases supported by the judges, have been directed to disposing of the last vestiges of trial by ambush, and to enabling each side to start the contest with the greatest possible knowledge of what is going to be alleged against him. It is true that these endeavours proceed upon a basis of mutuality which does not so far exist in criminal procedure, because of the proscription

upon any procedural rule which might require a defendant to provide evidence against himself.

8 What was then foreshadowed has now largely come to pass. The clear intention of the *Criminal Procedure Act 2004*, *inter alia*, is to require full disclosure by the prosecution: s 35, s 44, s 45, s 95. The disclosure is of confessional material and evidential material as defined: s 42. The obligation to disclose is a continuing obligation.

9 The right to a fair trial is the central pillar of our criminal justice system: *Jago v District Court of New South Wales* (1989) 168 CLR 23. The right has manifested in rules of law and of practice designed to regulate the course of the trial: *Dietrich v The Queen* (1992) 177 CLR 292 at 299. In *R v Brown (Winston)* (1994) 1 WLR 1599 Steyn LJ (Owen and Ian Kennedy JJ agreeing) said at 1606:

> … in our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial.

10 In *Carter v Hayes SM* (1994) 61 SASR 451 King CJ (with whom Bollen and Mullighan JJ agreed) said at 456:

> The summons to produce evidentiary material is the means by which a party procures the material to be brought to the Court. Access by the defence to the material is quite another issue. …
>
> Disclosure by those conducting a prosecution of material in the possession or power of the prosecution which would tend to assist the defence case, is an important ingredient of a fair trial, (*Clarkson v Director of Public Prosecutions* [1990] VR 745 at 755), and is an aspect of the prosecution's duty to ensure that the 'Crown case is presented with fairness to the accused': *Richardson v The Queen* (1974) 131 CLR 116 at 119; *R v Apostilides* (1984) 154 CLR 563. Moreover the Court has power to order the production to the defence of material in the prosecution's possession or power if the interests of justice so require: *R v Clarke* (1930) 22 Cr App R 58; *Mahadeo v The King* [1936] 2 All ER 813; *R v Hall* (1958) 43 Cr App R 29; *R v Xinaris* [1955] Crim LR 437; *R v Charlton* [1972] VR 758. …
>
> When documents or other evidentiary material are produced to the court in response to a summons, it is necessary for the court to decide whether the defence is to be given access. The words of Hunt J in *R v Saleam* (at 18) provide guidance as to how the decision should be made:
>
> > Before granting access when such an objection has been taken, the judge should usually inspect the documents (or those which the Crown may suggest are sufficiently representative) for himself, as it is unfortunately not unknown for the objection taken to be misconceived: see also the remarks of Brennan J in *Alister's* case (at 455–456). If no public interest immunity or other privilege is claimed (and upheld), and if a legitimate forensic purpose for their production has been demonstrated, the judge should not withhold access to the documents simply on the basis that in his view that purpose would not be satisfied in that particular case because he can see nothing in the documents which will in fact assist the accused in his defence. Provided that a legitimate forensic purpose has been demonstrated, it should be for the accused (or, in appropriate cases, for his

legal advisers only) to satisfy himself on that score after his own inspection of the documents.

Inspection of statements of witnesses for the prosecution should be allowed virtually as a matter of course: *Maddison v Goldrick*. Moreover the defence is prima facie entitled to inspect any document which may give it the opportunity to pursue a proper and fruitful course in cross-examination: *Maddison v Goldrick*, per Samuels JA (at 667–668); *R v Saleam* (at 19).

…

'On the Cards'

…

17 The expression 'on the cards' found its way into Australian jurisprudence in a case dealing with prosecution disclosure, that of *Alister v The Queen* (1984) 154 CLR 404 per Gibbs CJ at 414:

> Just as in the balancing process the scales must swing in favour of discovery if the documents are necessary to support the defence of an accused person whose liberty is at stake in a criminal trial (see *Sankey v Whitlam* (1978) 142 CLR at 42, 62) so, in considering whether to inspect documents for the purpose of deciding whether they should be disclosed, the court must attach special weight to the fact that the documents may support the defence of an accused person in criminal proceedings. Although a mere 'fishing' expedition can never be allowed, it may be enough that it appears to be 'on the cards' that the documents will materially assist the defence.

18 A majority in *Alister*, Gibbs CJ, Murphy and Brennan JJ, suggested that a more liberal approach was appropriate when the proceedings were criminal in nature. Wilson and Dawson JJ specifically dissented on this point.

19 In *Ran v The Queen* (1996) 16 WAR 447 Franklyn and Wallwork JJ applied the 'on the cards' test. Franklyn J, after a further review of authorities beyond *Alister*, said at 454:

> What is clear, however, from all of the authorities, and I refer particularly to *Alister*, is that a 'fishing expedition' is not a legitimate forensic purpose. That being so, it follows, in my view, that the application for access must demonstrate to the satisfaction of the judge the likelihood that the documents which do, or might, exist will contain material which will materially assist the defence by enabling it (in the present case) to conduct a proper, fruitful course in cross-examination and/or, in the appropriate case, by the adduction of evidence.

20 Scott J formulated the test somewhat differently at 456:

> The test is sometimes expressed as being that there must be evidence to suggest that it is 'on the cards' that the documents can, or are likely to, materially assist the defence: see *Alister v The Queen*. In my opinion, the better test is that there should be evidence that the documents concerned are likely to be relevant for some legitimate forensic purpose before access to the documents is permitted.

21 In *Connell v The Queen (No 6)* (1994) 12 WAR 133 the Court set out the applicable law at page 203:

It is not in dispute that the applicable law is to be found in *National Employers' Mutual General Association Ltd v Waind* [1978] 1 NSWLR 372 at 381, 383–385 and in *Alister v The Queen* (1984) 154 CLR 404 at 412–415, 431, 456–457. In *National Employers*', Moffit P [sic] said (at 385) in the exercise of the power to permit inspection of a document, the judge must determine whether it appears relevant in the sense that it relates to the subject matter of the proceedings. He continued, that once the judge is of the opinion that the document contains information of apparent relevance to the issues, inspection will normally be allowed 'notwithstanding that the document is not admissible as it stands, and notwithstanding that the party seeking inspection has not given any undertaking to tender it, or use it in cross-examination'. *Alister*'s case makes clear that the test of relevance must include consideration of the possibility that the document may support the defence of an accused person in criminal proceedings (at 414) per Gibbs J. It 'may be enough that it appears to be "on the cards" that the documents will materially assist the defence'. It is not right to refuse disclosure simply because there were no grounds for thinking that the document could assist the accused (at 414–415).

22 As I read the authorities to which I have made reference, and the Criminal Procedure Act, there is to be discerned a general intention that in order to ensure a fair trial, the State has an obligation to ensure that the fruits of an investigation are in general terms made available to the defence. There seems to remain, however, two qualifications to that broad-ranging and general duty. The first qualification is that, at least in matters which are not specifically enumerated within the Criminal Procedure Act as evidentiary material or confessional material, there is an onus on the defence to show some legitimate forensic purpose in the disclosure of the material; that is, a reasonable possibility that production will materially assist the defence. The second qualification is that even if there is shown to be a legitimate forensic purpose, the material may nevertheless be prevented from disclosure on the grounds of a public interest immunity. Such an immunity, of course, requires a balance to be made as to the differing community interests, on the one hand, in ensuring a fair trial and, on the other hand, in preventing disclosure of certain police techniques and methods, of a covert nature, which, if they became generally known, would impact upon the ability of the Police Service to control crime.

23 In exercising judgment in a particular case, it should be recognised that the Court has within its power the ability to limit disclosure to certain persons, including legal practitioners. This power may on occasions inform the judgment to be made on the competing claims of the public interest immunity. Legal practitioners are officers of the Court and owe a duty to respect not only the confidences of their clients but also any confidences the Court may impose.

24 I now turn to the terms of the witness summonses.

The Profiler's Report

25 The legitimate forensic purpose advanced by the defence is as follows:

- The case against the accused was entirely circumstantial. There were many other suspects for the death of Susan Christie.
- The police running sheet reveals that, during the course of the investigation into the disappearance of Susan Christie, the police prepared a profile on the probable killer.
- It is submitted that the defence has a legitimate forensic purpose in having access to the profile on the basis that it is likely to assist him to identify the person responsible for Mrs Christie's death or disappearance and thus help to exonerate him.

26 In answer, the State submits that the purpose of a criminal trial is to determine whether the prosecution can prove the charges against the accused beyond reasonable doubt. Should the jury not be so satisfied, it will be no part of their task to deliver a finding as to what they suspect happened, or who else — if indeed they suspect anyone else — might have been involved. The report is not admissible and cannot be used in cross-examination. If, for argument's sake, the report concludes that the killer has a personality consistent with the Accused, the State cannot tender the report or cross-examine the accused on its contents. The report has no relevance.

27 The State's submission cannot be accepted in its entirety. Although the only question for the jury is whether the State has proved the accused's guilt, an accused is entitled to make a case raising, at the least, a reasonable doubt that some other person may have committed the offence. As described in the submissions by the Commissioner of Police at 18:

> It is submitted that as the profiling report comprises speculation, opinion and conjecture by a police constable of the possible profile of the offender responsible for Mrs Christie's death or disappearance, the report is not likely to provide any new line of inquiry and will not assist the defence team to identify the person responsible for Mrs Christie's death or disappearance. Accordingly, it is submitted that the request is a mere fishing expedition.

28 The report seems to have been prepared by a constable. No relevant qualifications for the report writer are advanced. There is nothing put forward by the defence that gives rise to a reasonable possibility that the report might materially assist it. I do not consider a legitimate forensic purpose has been disclosed. The report is no more than one person's opinion and could not lead to any legitimate area of inquiry. By its description, it is a profile, not an identification of a person. If profiles could actually identify a person, they may be useful. There is nothing to suggest that this profile does more than express an opinion of one person about the characteristics of a possible killer. I dismiss this summons.

Statements and Other Material Concerning Surveillance Upon the Accused

29 The Commissioner of Police has identified the following documents in his possession or control answering the descriptions in the witness summons:

a. 103 audiotapes recorded from a device used at the accused's residence pursuant to a warrant obtained under the Surveillance Devices Act 1998 between 8 February 2002 and 13 March 2002 ('the audiotapes');
b. running sheets from the surveillance of the accused by operatives from the Western Australia Police ('WAPOL') Covert Operations Unit on 14 December 2001 and various dates between 24 December 2001 and 7 August 2002 ('the running sheets');
c. audio recordings of conversations between Rory Christie and another person at 2 locations other than the residence obtained as part of surveillance of Rory Christie by members of the WAPOL during 2002 ('the audio recordings');
…
e. video footage and 2 photographs of the accused taken on 14 December 2001 …

30 The State's case at the first trial (and the contention it will advance on the retrial) was that the accused's conduct demonstrated that he was 'surveillance-aware' and that he was showing signs of anxiety or nervousness.

31 In its submissions the State opposes the production of this material as irrelevant. It says that after the Ford Festiva was forensically examined on 12 December and returned on 13 December the accused behaved in a surveillance-aware fashion on 14 December. It was at this time, and shortly after, that he made preparations for what the State puts forward as evidence of flight. The State argues that the accused's behaviour between February and August 2002 is not relevant to his behaviour on 14 December 2001.

32 The accused submits:

- The Defence seeks to rebut the State's assertion and show that the Accused's conduct prior to his arrest displayed no such evidence of anxiety or nervousness by which a consciousness of guilt could be inferred.
- Unless all evidence of covert surveillance conducted upon the Accused is disclosed to the Defence, there is a danger that the complete picture of his behaviour prior to his arrest will not emerge. This has the potential to result in a miscarriage of justice should the jury accept the State's assertions his conduct in the absence of other evidence to suggest that his conduct was unremarkable.
- Such covert surveillance material would tend to confirm or deny the State's assertions that his behaviour prior to his arrest was indicative of a consciousness of guilt.

33 In my opinion, the accused has established a legitimate forensic purpose. Whether the material ultimately becomes, or is able to become, evidence is not the issue. The material may give rise to a legitimate line of inquiry.

34 The Commissioner also takes issue with the contention of the accused and submits that the audiotapes would not be evidence that tends to throw doubt over the accused's guilt. That may or may not be. That, however, is not the test.

35 The Commissioner objects to producing copies of all 103 audiotapes on the basis that to do so would be oppressively expensive. He submits that effectively this would require WAPOL to pay for each of the 103 tapes to be copied. I do not think this is so. The tapes can be produced to the Court and arrangements made by the accused to listen to them. If the accused wishes to pay for copies for his convenience, then that is a matter to be negotiated with the Commissioner of Police. A witness summons can only require the production of documents to the Court. Under the Criminal Procedure Act the Court has power to make orders dealing with the costs that a witness may incur in responding to a summons. I do not see the power as extending to a power to make orders requiring a witness to produce copies of materials.

Running Sheets

36 In conformity with my ruling on the audiotapes, I consider that running sheets which detail surveillance on the accused between February and August 2002 do have a legitimate forensic purpose.

Covert Audio Recordings at Other Locations

37 For the same reasons I consider that the accused has established a legitimate forensic purpose in respect of these materials.

Tapes and Transcripts of Conversations Between the Accused and Kelli Budrikis

38 Ms Budrikis is a significant witness in the prosecution case. The conversations are between her and the accused. I consider there is a legitimate forensic purpose in disclosing those conversations on the same basis and subject to the same conditions as I have referred to.

Crime Stoppers' Report

39 Nothing is advanced that would satisfy me as to the legitimate forensic purpose in disclosing this material. Even if there was some legitimate forensic purpose, I consider that the strong public interest in the confidentiality of all information provided by callers to the Crime Stoppers program would require the public interest immunity to extend over that material.

Public Interest Immunity

40 In the event that a legitimate forensic purpose is established, the Commissioner claims public interest immunity in respect of the material.

41 I have touched upon the competing public interests. It is necessary to say a little more about them. The public interest in maintaining the effectiveness of the Police Force and other agencies has been recognised as one of importance: *D v National Society for Prevention of Cruelty to Children* [1978] AC 171; *Young v Quinn* (1985) 59 ALR 225 at 237.

42 Moreover, it is essential that method used by police in the pursuit of offenders and which, if disclosed, may impede or frustrate police in that pursuit or which may reveal matters that prejudice future police activities: *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667. Balanced against this very important public interest is the public interest in ensuring, as far as possible, that the accused's right to a fair trial is not eroded. As I have previously remarked, the cases can only set out the principles which apply. The balance of the competing interests in a particular case is necessarily left to the trial Judge.

43 The Commissioner's claim is that the audio-recordings would tend to reveal sensitive police investigative methodology and that if the claim is not upheld the methodology will become more widely known among the community thereby undermining its effectiveness. Similar claims are made in respect of the unit running sheets.

44 The Commissioner points out that if knowledge of police covert operations becomes widely known criminal elements will increasingly employ counter-surveillance techniques.

45 I accept these as legitimate concerns. They are conveyed in an affidavit of Scott Hamilton Higgins, sworn 18 August 2005, on behalf of the Commissioner of Police in support of claims of public interest immunity.

46 At the hearing of 25 August 2005 counsel for the Commissioner of Police tendered a supplementary confidential affidavit of Mr Higgins, sworn 24 August 2005, in further support of claims of public interest immunity. He asked that the contents of that affidavit not be disclosed to others. I received the affidavit but indicated I would not read it until parties had had the opportunity of making submissions upon it.

47 The defence accepts that it is permissible for a judge to receive confidential material for the purposes of considering whether a claim to public interest immunity is established where that would appear to be necessary to protect the public interest. I note that a similar procedure was referred to without disapproval in *R v Francis* [2004] NSWCCA 85; 145 A Crim R 233.

48 I have, therefore, read the supplementary affidavit and have taken account of its contents. I must necessarily be elliptical to avoid disclosing the material.

49 I have given careful consideration to the legitimate points made on behalf of the Commissioner and amplified in the affidavits. In this particular case, the surveillance was conducted upon the accused. He was, of course, privy to all of the conversations which were recorded.

50 In the present case the need for disclosure as part of the fair trial process outweighs, albeit by a slim margin, the matters advanced on behalf of the Commissioner. However, in order to accommodate those concerns as much as possible, the material may only be inspected by the accused's legal advisers and not disclosed to any other person without further order.

Summary of Conclusions and Orders

(a) Profilers report 12 April 2002: the summons seeking its production is dismissed.
(b) Evidence of covert surveillance conducted on the accused in the form of notes, telephone intercepts and other material: inspection allowed by the accused's legal advisers only. Not to be disclosed to others without order.
(c) Tapes and transcripts of conversations between the accused and Kelli Budrikis: inspection of the material is permitted by the accused's legal advisers only. Not to be disclosed to any other person without further order.
(d) Notes or records of conversations with Crime Stoppers by Lena Durbridge or Lena Evans: that part of the summons relating to Crime Stoppers is dismissed.

28.55C

Livermore v R

[2006] NSWCCA 334; 67 NSWLR 659
New South Wales Court of Criminal Appeal

The Court [McClellan CJ at CL, Johnson and Latham JJ]:

1 The appellant, Dean John Livermore, appeals against his conviction at Tamworth District Court on 3 June 2005, after a trial lasting four days, on three counts of Sexual Intercourse Without Consent and one count of Assault with an Act of Indecency.

2 The three grounds of appeal all arise out of the Crown Prosecutor's closing address. In particular, those grounds turn upon the Crown Prosecutor's treatment in that address of a Crown witness, the complainant's boyfriend, in a manner that is alleged to have caused a miscarriage of justice. There are no issues relating to the admissibility of the evidence at trial, nor the directions of the trial judge, other than those touching directly upon that portion of the Crown's address that is impugned. It is not necessary therefore, for the purposes of this appeal, to canvass the evidence in the trial in great detail. The summary of the evidence that follows concentrates on the events immediately surrounding the commission of the alleged offences.

The Evidence at Trial

3 During the late afternoon of 15 April 2003, the complainant was in her flat studying. She was waiting for her boyfriend, Mick, to arrive when she heard a knock at her kitchen door. She opened the door and saw the appellant, whom she recognised as an acquaintance of her boyfriend. The appellant said that he was looking for her boyfriend so the complainant agreed to let the appellant wait inside her premises. Once inside the flat, the appellant acknowledged that he had come to see the complainant, not her boyfriend. The appellant closed the door,

approached the complainant and started biting her ear and kissing her neck. She pushed him away and told him to stop. However, he took her pants off and pulled her by the hands to the bedroom, turning the lights off as he did so.

4 Once inside the bedroom, the appellant removed his clothes and forced the complainant onto the bed. The complainant continued to struggle, including yelling and screaming throughout the attack. The appellant pinned her down and inserted his penis into her vagina, then licked and bit her genitalia. The appellant also tried to insert his penis into her mouth. He later inserted his penis into her vagina a second time.

5 The complainant managed to get off the bed and attempted to retrieve her pants. The appellant grappled with her, placing her on top of the dressing table where he attempted to insert his penis into her vagina again. The complainant pushed him away and fell to the ground. He took her hands and was trying to lift her up when a knock was heard at the door. The complainant asked 'who is it?' to which a voice responded 'Mick'. The complainant tried to put her pants on but the appellant, who was also looking for his pants, prevented her from doing so. The complainant went to the door, naked from the waist down, and opened it. As she did so, the appellant ran, naked, to the back door.

6 The complainant's boyfriend gave evidence that he arrived at the complainant's flat at about 7 p.m. He noticed that there were no lights on and that there was a BMX bike at the front door. He leaned his bike against the wall and walked around to the bedroom window. He listened but did not hear anything. He then walked to the backdoor which opened directly onto the complainant's bedroom. Whilst listening at that door, he heard the complainant say 'no, stop'. The voice was very soft and frightened. He then knocked firmly on the door and called the complainant's name. He heard the complainant say 'who is it?' and he answered. He yelled her name a second time before the complainant opened the door.

7 When the complainant opened the door a minute or so later, she fell to the floor where she curled up and cried. He heard footsteps retreating and went around the side of the flat towards the kitchen door. He saw that the kitchen door was now open and saw the appellant in the shadows. He grabbed the appellant and asked him why he was there and to whom the BMX belonged. The appellant denied doing anything and said that the bike belonged to 'Stretch'. The appellant smelt of alcohol, had no shirt on and was engaged in pulling up his pants when the complainant's boyfriend first saw him. The appellant said that Stretch was still inside. The complainant's boyfriend let the appellant go and went back inside to investigate. He took the BMX pushbike into the kitchen.

8 The complainant's boyfriend went inside and found the complainant alone in her bedroom with a phone in her hand. He said loudly to her 'What the fuck's going on. Are you cheating on me?' The complainant threw the phone against the wall and replied 'Is that what you think?' He then asked who the complainant was trying to call, to which she replied 'the police'. He then asked her what had happened and the complainant said she had been raped. He asked her how the appellant got into the house and into the bedroom to which the complainant replied 'What, don't you believe me?'

9 The complainant indicated that she wished to call her mother. Her boyfriend thought that she should ring the police, but the complainant replied that she thought the appellant might hurt her if she did so. The complainant had a shower then telephoned her mother and told her what happened. The complainant's boyfriend said that the complainant was upset and crying

and appeared to argue with her mother. Shortly thereafter, the complainant's boyfriend heard footsteps outside so he grabbed a knife from the kitchen. It appears that the appellant had returned to retrieve the bike. The complainant's boyfriend told the appellant to leave or he would kill him. At that point the complainant decided that they should ring the police. Whilst the complainant was on the phone, her boyfriend went outside and confronted the appellant. The police arrived a short time later, after the appellant had left the area.

10 The police arrived at the premises at approximately 9:30 pm and took a number of photographs, including of the complainant's bedroom. The bedroom appeared quite tidy, according to police, and a photograph of the complainant's white trousers did not indicate any damage.

11 At approximately 10 pm the police went to the appellant's residence and saw the appellant lying on a lounge, covered with a blanket looking like he had just woken up.

12 The complainant was taken to hospital and medically examined. The examining doctor found a scratch and spotted bruising on the lips of the complainant's vagina consistent with non-consensual sexual activity, but not inconsistent with vigorous consensual sexual activity. The police first spoke to the complainant at the hospital at about 11:55 pm for the purpose of obtaining an apprehended violence order against the appellant. (The complainant and her boyfriend were mistaken as to the appellant's first name but that issue did not figure prominently in the trial.) The complainant made a statement which she signed, containing a brief account of what had occurred. In addition, the complainant said that she did not want to return to her unit, that she was fearful of the appellant because he had returned to the flat to retrieve the bike, that she had told her boyfriend, the police, the examining doctor and her mother what had happened to her and that she did not wish the police to investigate the matter any further at that time.

13 On 17 April 2003 the complainant told police that she wanted police to investigate the sexual assaults. An interview was conducted with the complainant, following which the police attended the appellant's premises. The appellant agreed to attend the police station at a later date. He told police that he had gone to the complainant's unit to retrieve a bike. On 24 April, the appellant was taken to the police station and charged. He declined to participate in an interview or identification parade, following legal advice. He provided police with the clothing he had worn on the night in question and also provided a buccal swab.

14 The appellant did not give evidence at trial, nor was evidence called on his behalf. It was put to the complainant in cross examination that the sexual activity with the appellant was consensual, that she was not screaming and yelling throughout the sexual activity, that she called out 'Who's there?' when she first heard the knock on the door because she didn't want it to be Mick and that she had falsely accused the appellant of rape because Mick was angry with her for her betrayal. Those suggestions were denied.

The Grounds of Appeal

15 Three grounds of appeal are pressed, namely: —

(i) The address to the jury by the Crown Prosecutor gave rise to a miscarriage of justice.

(ii) The trial judge erred in failing to discharge the jury at the close of the Crown Prosecutor's address.

(iii) The trial judge erred in that he failed to give appropriate directions to the jury to cure inappropriate and unfair comments by the Crown Prosecutor in his address to the jury.

16 The submission in support of the first and second grounds is that an examination of the whole of the Crown address reveals a degree of unfairness and prejudice that could not be cured by directions to the jury. Specifically, the appellant took the Court to a number of passages in the transcript of the Crown's address that were said to improperly disparage a Crown witness, improperly disparage and dismiss the appellant's case at trial and undermine the role of the appellant's counsel. Ground three was argued in the alternative to ground two.

The Closing Addresses

17 The salient features of the Crown Prosecutor's closing address are set out below. The bulk of the Crown's address summarised the evidence given by the various Crown witnesses, about which no complaint is made. The appellant's principal complaint, both at trial and on appeal, concerns the injection of the Crown Prosecutor's personal opinion into the submissions which arose from the evidence and the denigration of the defence case by those submissions. In that context, it is relevant to the appeal to refer to the preliminary remarks in the address, namely:—

> I ask you to keep in mind that *no matter how strongly arguments or opinions are put before you, and whether or not you think counsel believe the arguments they're putting before you*, it's your job to decide the case, not ours. I ask you to keep in mind that no matter how strongly those arguments are put, they're just that, arguments advanced for your consideration. You're asked to decide this case in accordance with the promise you gave at the beginning of the trial, on the basis of the evidence, on the basis of your combined wisdom, and your experience of the world and your combined reasoning power [of] which there are 12 of you, is very considerable, probably three or four hundred years of experience between you. … *What I may or may [not] think, or what my opinion may or may not be is completely irrelevant*. (Italics not in original)

18 This passage, and in particular the words appearing in italics above and below, assume particular significance in the context of the issues at trial and on this appeal, given the flavour of the following aspects of the Crown's address:—

> [The complainant] told you that she asked who it was when [Mick] arrived because she was fearful that it may have been some of the accused's friends. I suggest to you that is perfectly fair. And in fact, they turned up later. The suggestion was put to [the complainant] that she asked 'who's there' because she knew Mick would be angry. *Well, the truth is I am pretty slow. I don't understand that. You say 'who's there' because you knew Mick would be angry. I don't understand that. How does that help or hinder, or do anything — it is bizarre*.
>
> …
>
> [Referring to the complainant's initial reluctance to press the complaint] Well if all this is to stop Mick being angry, it still did not stop her saying no to the police on that night did it. I will remind you of the whole of what she said to detective Donovan a bit later when I come to detective Donovan's evidence. On the one hand she has got to do something cause she's worried about Mick. On the other hand, worrying about Mick did not stop

her doing what the accused claims according to the defence. *It is all silly. This is a real person we are talking about. I have not seen a plot this bad even on that 'Desperate Housewives'*.

…

It was suggested to her in cross examination that she showered and that that had something to do with her having consented. *Once again, I don't understand. She told she showered because she felt dirty. Well it seems to me it would be within your knowledge that in almost every movie I've ever seen, where a woman is raped, she has a shower or if there is no shower available, bathes somehow*.

…

It was suggested to [the complainant] that her uncertainty when she did the photo ID was not genuine. *I don't understand that either. … But it was suggested to her that her uncertainty when she did that, wasn't genuine — I just don't understand*.

…

But these things that were raised in cross examination that I have just been talking about, they are crumbs. They are crumbs that the Crown expects Mr Parker is going to try to pile up and suggest to you that that is the basis of a reasonable doubt. And the Crown says no way. *As far as I can tell, the ones I told you I didn't understand, just don't even make sense*.

…

The next witness … after [the complainant] was [Mick]. *Now it is not part of my job to judge people. It is my job to present the evidence fairly and to the best of my ability. However, I have got to say after careful consideration I have come to the realisation that one of the witnesses in this trial is an idiot*. [Mick] was in a relationship with [the complainant]. He had only recently rung [her]. He asked about, and was invited to come around and see [her]. He told her what he was going to do, which obviously was not going to take long. He arrived within about 45 minutes, time to have a shower, get petrol and have a short visit with a friend. And [Mick] knew that [the complainant] was expecting him. [Mick] told you the words he heard from inside, before he announced his presence, were in a frightened voice, 'no, stop'. That is what he heard, 'no, stop'. I will just turn aside from that for a moment. If you suppose for a moment, that there was any truth at all in this defence case, and I'd agree that you might find that hard to imagine, but if you suppose that for a moment, if it were true, what would that mean.

…

[Mick] told you he heard with his own ears someone run from the premises. [Mick] told you he saw with his own eyes the accused trying to hide and getting dressed. *Obviously [Mick] put one and one together, and came up with some number between one and 100. Goodness knows what*. [Mick] has this conversation with the accused, 'who is it, what the fuck are you up to', gets the answer 'it's me'. [Mick] says 'what are you doing, you just come out of [the complainant's] flat' and the accused very honest, very forthright, says 'no that's bull shit'. [Mick] says 'who owns the bike' the accused says 'it's Stretch's bike'. [Mick] says 'well where's he then?'. The accused once again very honest, very helpful, says 'he is still inside'.

[Mick] has heard the accused run out. [Mick] has seen the accused hiding, getting dressed. And the conversation I have just recited is all it took to trick [Mick] into letting the accused escape and going back inside. To make it worse, he goes back inside and says

to his girlfriend who's so recently been lying on the ground at his feet half naked crying, 'what's going on …, are you cheating on me'. …

Like I said, after thinking about it long and hard, it does seem that one of the Crown witnesses is an idiot. The Crown says that you can't hold [Mick's] way of looking at things against [the complainant]. You can't hold [Mick's] thinking or apparent lack of it, his thinking or apparent lack of thought and compassion, against [the complainant]. It is not her fault that he says the things he does.

19 Immediately after the Crown's address, the appellant's counsel at trial sought a discharge of the jury on the basis that the Crown Prosecutor's expressions of personal opinion, and in particular what was said to be an 'improper attack' on the Crown witness Mick, could not be corrected by directions from the trial judge. The appellant's counsel's submissions referred to 'the Crown, clothed in the authority of the office of the Crown, presenting himself as representing the community and presenting his case fairly, repeatedly [expressing] disparaging personal views of a prosecution witness'. In the alternative, counsel sought directions in the clearest and strongest terms in the hope that the jury might disregard those views. The discharge application was refused, but the trial judge indicated he would give appropriate directions in the summing up.

20 Not surprisingly, the appellant's counsel at trial used the opportunity afforded by his closing address to attempt to redress the most damaging of the Crown Prosecutor's 'submissions'. The centrality of Mick's evidence to the defence case was highlighted in the following terms:—

In this case, ladies and gentlemen, we have important evidence, you might think it was very important evidence, from Mick …, the witness who the Crown wants to characterise as an idiot, but whose evidence when you think about it in a fair way, as you're obliged to as [the accused's] judges, detracts from the idea that you can accept [the complainant's] evidence without any criticism, or confidently, and gives some support to the idea that with the sexual activity that was happening there between the accused and [the complainant] was activity at which she was a willing participant, to which she consented.

[Counsel then referred to the detail of Mick's evidence, including the fact that Mick was listening at the complainant's bedroom window at about the same time as the accused was allegedly assaulting her on the dressing table and whilst, according to the complainant, she was yelling and screaming. Mick's failure to hear anything other than a soft frightened voice and the complainant's response to the knock on the door was contrasted with the circumstances surrounding a violent sexual assault.]

It's okay for the Crown to call [Mick] an idiot, but you're the judges of the facts. You might think that … the observations that he made …. [are] likely to be an accurate reflection. It doesn't matter if the Crown doesn't like [Mick]. We are here to evaluate his evidence and you're here to work out whether at the end of the day, I suggest to you, to work out whether you think aren't there big problems in accepting the complainant's evidence … as being a sufficient basis for you all to be able to say, 'the Crown's convinced us beyond reasonable doubt'.

21 Following defence counsel's address, the trial judge said 'I have to say, Mr Crown, I thought it was an address rather more enthusiastic and laced with personal observation than I have usually encountered in trials of this nature'. In response to this criticism, the Crown Prosecutor said that he was attempting to submit that Mick's opinions, or rather the conclusions that he

had reached, were not the proper conclusions and that those conclusions were in any event irrelevant.

The Directions

22 When dealing with the obligation upon the jury to disregard any opinions about the evidence that he might express in the course of the summing up, the trial judge said:—

> The same observations are true about the speeches of counsel. You are not limited by the arguments they raised. You are not limited by their references to the evidence and you treat any expression of personal opinion you may think you have picked up from either of them in just the way I have told you to treat mine, that is ignore them.
>
> Indeed, in this case I have to say that the Crown Prosecutor in his final address sought to categorise [Mick] as — and I quote — 'an idiot'. Now that may be the view you have yourselves formed about [Mick], it may not. It is a matter entirely for you. I did not understand the Crown to be saying that [Mick] was not to be accepted in terms of what he says he saw and heard. The attack being made by the Crown, as I understood it, was on the conclusions which it appeared [Mick] may have drawn from what he saw and heard.
>
> The Crown was suggesting those conclusions were not well founded and to the extent that he described [Mick] as an idiot in his considered — that is the Crown's considered view — *I think that was probably not appropriate*. The Crown should not convey his personal opinion of witnesses and their intellectual capacities to juries in quite such florid terms. So I have said, in any event, that is a personal opinion, you ignore personal opinions expressed by the barristers or by myself. (Italics not in original)

23 This direction represents the entirety of what the trial judge had to say about the identified excesses of the Crown's address. We turn to a consideration of the extent to which these features of the Crown's address transgressed the principles underpinning the role of the Crown Prosecutor in a criminal trial.

The Role of the Crown Prosecutor and the Limits of Trial Advocacy

24 This Court recently had occasion to repeat those aspects of the decision in *R v McCullough* (1982) 6 A Crim R 274 (at 285), touching upon the duties of a Crown Prosecutor, in *KNP v Regina* [2006] NSWCCA 213 at [32]. *McCullough* has also been referred to, with approval, in the course of this Court's decisions in *R v Joseph Attallah* [2005] NSWCCA 277, *R v Liristis* (2004) 146 A Crim R 547 at 563ff and *R v Rugari* (2001) 122 A Crim R 1 at 10. For present purposes, it is necessary to set out the following aspects of the dicta in *McCullough*:—

> It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury … However, it should also be said that the observance of those canons of conduct is not incompatible with the adoption of an advocate's role. Counsel for the Crown is obliged to put the Crown case to the jury and, when appropriate, *he is entitled to firmly and vigorously urge the Crown view about a particular issue and to test and, if necessary, to attack that advanced on behalf of the accused. But he must always do so temperately and with restraint*, bearing constantly in mind that his primary function is to aid in the attainment of justice, not the securing of convictions. As the New Zealand Court of Appeal said in *Roulston* … 'it has always been recognised that prosecuting counsel must never strain for a conviction, still less adopt tactics that involve an appeal to prejudice or amount to an intemperate or emotional attack upon the accused.'

> … The feel and atmosphere of one trial may make it reasonable and even necessary for tactics to be employed that would seem out of place and disproportionate to the circumstances of another. Nevertheless, it is wrong for Crown counsel to become so much the advocate that he is fighting for a conviction and *quite impermissible to embark upon a course of conduct calculated to persuade a jury to a point of view by the introduction of factors of prejudice or emotion. If such a situation should develop and there is a real risk that the conduct complained of may have tipped the balance against the accused then an appellate court will not hesitate to follow the safe course and order a new trial*. (Italics not in original)

25 A seminal statement of the responsibilities of a Crown Prosecutor in a criminal trial appears in *Whitehorn v The Queen* (1983) 152 CLR 657 at 663–664 per Deane J:—

> Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused trial is a fair one. The consequence of a failure to observe the standards of fairness to be expected of the Crown may be insignificant in the context of an overall trial. Where that is so, departure from those standards, however regrettable, will not warrant the interference of an appellate court with a conviction. On occasion however, *the consequences of such a failure may so affect or permeate a trial as to warrant the conclusion that the accused has actually been denied his fundamental right to a fair trial. As a general proposition, that will, of itself, mean that there has been a serious miscarriage of justice with a consequence that any conviction of the accused should be quashed and, where appropriate, a new trial ordered*. (Italics not in original)
>
> …

31 This brief review of the authorities relevant to the disposition of this appeal disclose a number of features of a Crown address that have, either alone or in combination, consistently been held to justify the censure of this Court. They are:—

(i) A submission to the jury based upon material which is not in evidence.
(ii) Intemperate or inflammatory comments, tending to arouse prejudice or emotion in the jury.
(iii) Comments which belittle or ridicule any part of an accused's case.
(iv) Impugning the credit of a Crown witness, where the witness was not afforded the opportunity of responding to an attack upon credit.
(v) Conveying to the jury the Crown Prosecutor's personal opinions.

32 In distilling these features, it is not suggested that a formulaic approach may be taken in assessing whether or not a Crown address exceeds the proper boundaries. On occasions, it may be that the overall tenor or impression made upon a jury by a Crown address which exhibits few, if any, of these features nonetheless gives rise to the prospect that an accused has not received a fair trial. However, where a number of these features are present in a Crown address, there is a very real risk that a ground of appeal based upon the unfairness occasioned to an accused by such an address will succeed.

33 The Crown address in the instant case displayed all of the above features with the exception of (iv). The Crown made a submission to the effect that women who are raped will invariably have a shower or bathe because they feel 'dirty' in the aftermath of the assault. This submission was without any foundation in the evidence at trial. No doubt the Crown Prosecutor anticipated that the appellant's counsel at trial would place some reliance on this aspect of the complainant's behaviour, it being consistent with consensual sexual intercourse. The complainant was not asked why she had showered. Rather, the Crown Prosecutor professed some personal knowledge of this characteristic of rape victims as depicted in movies. The jury was then invited to rely upon their own experience of such films, which may or may not have accorded with the Crown Prosecutor's opinions.

34 The interpretation of the behaviour of a victim of rape in popular films is hardly a reliable basis upon which to found such a submission. Apart from asking the complainant directly, it would have been permissible for the Crown Prosecutor to ask the examining doctor (who was no doubt appropriately qualified) whether it was within her experience that victims of rape complained of feeling sullied and 'dirty' and often showered after the assault, despite the likelihood that valuable forensic material would thereby be destroyed. However, no such course was taken.

35 The repeated characterisation of the complainant's boyfriend as an 'idiot' was highly improper. The trial judge was correct in suggesting to the jury that the Crown Prosecutor was not asking the jury to disregard what the witness had heard and seen on the night in question. In that sense, the Crown Prosecutor's submissions were not strictly speaking an attack upon the credit of the complainant's boyfriend.

36 However, the vice in the submission was much more insidious. It was an intemperate attack that was inclined to arouse the jury's prejudice towards a Crown witness who was integral to the defence case theory. It was also a submission that was designed to ridicule and belittle that case theory. By conveying to the jury in no uncertain terms that counsel representing the interests of the community and of the State regarded a witness as a fool to entertain for one moment the thought that the complainant may have had consensual sexual intercourse with the accused, the jury were in effect being told that they were also fools if they were to reach the same conclusion. Such a submission represents a significant departure from the responsibilities and obligations of a Crown Prosecutor to persuade a jury of an accused's guilt by way of balanced and rational argument based upon the evidence in the trial.

37 It was always open to the Crown Prosecutor to simply make the submission that the conclusions initially reached by Mick were perhaps founded upon an instinctive jealous reaction, rather than a calm, rational appraisal of what the complainant had said and done. It was also true that those conclusions were entirely irrelevant for the purposes of the trial. However, it is noteworthy that the Crown Prosecutor did not object at any stage to a long series of questions in cross-examination of the complainant's boyfriend, that elicited his thoughts and feelings at the relevant time.

38 The Crown Prosecutor made a number of comments that could have had no effect other than to ridicule the defence case. References to the defence case as 'bizarre', 'silly' and reminiscent of a plot worse than 'Desperate Housewives' disparaged and dismissed the accused's case. The objective features surrounding the alleged assaults upon the complainant provided the appellant with ample material capable of raising a reasonable doubt in the minds of the jury as to the alleged non-consensual nature of the sexual activity. It was the critical

issue in the trial and was worthy of serious consideration. The Crown Prosecutor's comments may well have deflected the jury from that task.

39 On a significant number of occasions the Crown Prosecutor conveyed his personal opinions in relation to the evidence and the arguments he anticipated from the appellant's counsel at trial. In telling the jury a number of times that he did not understand some aspect of the defence case, or that he must be 'slow', these submissions potentially dissuaded the jury from devoting proper care and attention to a consideration of defence counsel's arguments. The jury was implicitly told that the defence case was beyond comprehension.

40 The Crown Prosecutor's pre-emptive attempt at neutralising the submissions, of which legitimate complaint has been made, did nothing to reduce or remove the prejudice to the appellant's case at trial. Declaring to the jury that his opinions were 'completely irrelevant' simply highlights the error in conveying them to the jury at all. Once conveyed, they were designed to have an effect, that is, influencing the jury to peremptorily reject the appellant's defence. The authority of the Crown Prosecutor's office was abused in that respect.

41 The combination of these features of the Crown address represents a serious departure from the standards of fairness required of a Crown Prosecutor. Moreover, we would be inclined to that view solely on the basis of the Crown Prosecutor's disparagement of a Crown witness whose evidence was partly favourable to the appellant (see *Kennedy*). That aspect of the Crown address was particularly damaging, and the trial judge's somewhat qualified reproof ('probably not appropriate') was insufficient in the circumstances.

42 We acknowledge that the trial judge was placed in an invidious position when the application for discharge was made. No doubt, his Honour expected a measure of redress by way of defence counsel's address. Yet defence counsel's address could not counter the abuse of the Crown Prosecutor's role. His Honour was required to lend his authority to an unambiguous denunciation of the Crown Prosecutor's conduct. That was not done.

43 In any event, it would be difficult, if not impossible, to formulate directions which one could confidently assert were capable of restoring the appropriate balance to the trial. Having regard to the fact that the only issue for the jury was whether the Crown had proved beyond reasonable doubt that the complainant did not consent to sexual intercourse with the appellant, and having regard to the extent to which the Crown address deflected the jury from that issue, the trial judge should have acceded to the discharge application.

44 This Court might be forgiven for thinking that repeated condemnation of similar Crown addresses appears to have fallen on deaf ears. This is the latest in a series of appeals before this Court where a ground of appeal has alleged extravagant and improper submissions being advanced by a Crown Prosecutor during the closing address to a jury. In the present case, the Crown Prosecutor addressed the jury on 2 June 2005. By that time, a number of emphatic statements had been made by this Court in *R v MRW* (1999) 113 A Crim R 308 (10 December 1999); *Kennedy* (23 November 2000); *Rugari* (9 March 2001) and *Liristis* (27 August 2004). Since then, the Court has been required, once again, in *Attallah* (25 August 2005) and *KNP* (20 July 2006) to emphasise the obligations of a Crown Prosecutor in addressing a jury.

45 The statements made by this Court in those decisions are not novel. They emphasise the traditional role and duties of a prosecutor. In this State, Crown Prosecutors are appointed under the Crown Prosecutors Act 1986. A Crown Prosecutor is responsible to the Director of Public Prosecutions for the due exercise of the Crown Prosecutor's functions: s 4(4)

Crown Prosecutors Act 1986. The functions of Crown Prosecutors include appearing as counsel in proceedings on behalf of the Director: s 5(1)(a) Crown Prosecutors Act 1986. Crown Prosecutors perform their functions on behalf, and under the control, of the Director: *R v Janceski* (2005) 64 NSWLR 10 at 50 [253].

46 The Director may furnish written guidelines to Crown Prosecutors with respect to the prosecution of offences: s 13(1) Director of Public Prosecutions Act 1986. Pursuant to this power, the Director has issued Prosecution Guidelines. Chapter 2 of those Guidelines relates to the role and duties of the prosecutor.

47 Recent statements of the High Court of Australia emphasise the contemporary and continuing obligation of a prosecutor to present a case fairly and completely: *Subramaniam v The Queen* (2004) 79 ALJR 116 at 127–128; [2004] HCA 51 at [54]. In that case, the High Court referred to the well-known propositions that prosecutors *'are to regard themselves as ministers of justice and not struggle for a conviction'* and that although *'the duty of a prosecutor is to prosecute and not to defend, nevertheless it has long been established that a prosecution must be conducted with fairness towards the accused and with the single view to determining and establishing the truth'*.

48 We would add, with emphasis, that the role of the prosecutor must be performed without any concern as to whether the case is won or lost. As the High Court makes plain, the purpose of the prosecutor is to expose the truth which may or may not result in a conviction.

…

53 A consequence of the Crown Prosecutor's conduct in the present appeal (as in *MRW*, *Kennedy*, *Rugari* and *Liristis*) is that the appeal must be allowed. There has been a significant denial of procedural fairness that does not allow for the application of the proviso: *Weiss v The Queen* (2005) 80 ALJR 444 at 455; [2005] HCA 81 at [45]. The conviction should be quashed and there should be a new trial.

54 The adverse impact upon the administration of justice, in these circumstances, is clear. It is expected that Crown Prosecutors will comply with professional ethical rules and statutory guidelines issued by the Director of Public Prosecutions which are consistent with judicial statements emphasising the duties of a prosecutor in a criminal trial.

We would uphold the first and second grounds of appeal …

28.56C Dupas v The Queen

[2010] HCA 20; 241 CLR 237; 267 ALR 1
High Court of Australia

1 French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and **Bell JJ**: At the conclusion of oral argument on behalf of the appellant the Court ordered that the appeal be dismissed and that the respondent's summons seeking an abridgement of time in respect of filing and serving a notice of contention also be dismissed. What follows are our reasons for joining in those orders.

2 The single ground of appeal to this Court is put in the alternative. First, the appellant complains that the Court of Appeal of the Supreme Court of Victoria[1]erred in rejecting the

appellant's challenge to the decision on 3 July 2007 of the trial judge (Cummins J) refusing him a permanent stay of the proceedings upon his charge of the murder of Mersina Halvagis at Fawkner, Victoria, on 1 November 1997. The ground on which the stay had been sought, prior to the empanelment of the jury, was that pre-trial publicity gave rise to irremediable prejudice such as would preclude his fair trial at any time.

3 The trial proceeded before Cummins J and a jury. The case against the appellant was a circumstantial one in which the prosecution relied on three identification witnesses and an alleged confession by the appellant to one Andrew Fraser who was in gaol with him at the time. On 9 August 2007 the appellant was convicted and thereafter sentenced to life imprisonment with no minimum term. His appeal against conviction succeeded on grounds relating to the conduct of the trial which are not presently material, and a new trial was ordered. However, the appellant's challenge to the refusal by the trial judge of the stay application failed in the Court of Appeal.

4 The second way in which the ground of appeal by the appellant to this Court is put is that the Court of Appeal should not have directed a retrial and should have stayed his trial permanently, or until further order.

5 The appellant seeks orders vacating the order of the Court of Appeal for a retrial and, in its place, imposing a permanent stay or a stay until further order.

6 Before his trial for the murder of Ms Halvagis, the appellant had twice been convicted of murder. In August 2000 he had been convicted of the murder of Nicole Patterson in April 1999[2]and in August 2004 he had been convicted of the murder in October 1997 of Margaret Maher.[3] Upon each conviction the appellant had been sentenced to life imprisonment with no minimum term. The killings of all three vulnerable women had been by knife attack and characterised by extreme violence and brutality. The appellant's applications for leave to appeal against each of the two earlier convictions for murder were refused.

7 The two convictions for murder, the refusal of each of the leave applications, and the third murder charge had received wide media publicity, adverse to the appellant, and on the stay application Cummins J received a body of evidence of that publicity. This included publicity over some seven years, on seven internet sites, in approximately 120 newspaper articles and four books, all of which related either wholly or extensively to the appellant. The appellant had also been referred to in a number of television programs, and his image had been depicted in some of those programs. The appellant was identified in the media from an early stage as a suspect in regard to the murder of Ms Halvagis.

8 In response to questions from the trial judge as to the currency of the pre-trial publicity and as to how easy it was to access, the appellant's counsel referred to three periods of intense media publicity — late 2000 (relating to the murder of Ms Patterson), late 2004 (relating to the murder trial where the victim was Ms Maher), and early 2005 (where the appellant was named as a suspect in the murder of Ms Halvagis); counsel referred also to material currently available on the internet and to the use of the Google search engine to access articles electronically stored on the World Wide Web. A summary of the pre-trial publicity can be found in the reasons of Ashley JA.[4] The essence of the appellant's submission before Cummins J was that 'the ubiquity and pervasiveness of the accused's reputation as a serial killer, is such that no fair trial can now be had'. It was contended that, if a permanent stay were not granted, any subsequent conviction would necessarily constitute a miscarriage of justice.

9 Cummins J considered that, if acted upon by a jury, the pre-trial publicity would have precluded a fair trial upon the third murder charge. Nevertheless, his Honour concluded that he had 'very responsible confidence that the jury, appropriately directed, will firewall its deliberations and verdict from extraneous considerations and from prejudice in this case'.

10 His Honour so concluded for the following reasons:

> First, each juror will swear or affirm to give a true verdict according to the evidence. Second, the jury will be directed, with reasons therefore, to give a true verdict according to the evidence. Third, the jury operationally will observe and will inevitably be influenced by the care with which evidence is received and tested during the trial. Fourth, the jury will be assisted in its task by the nature of a jury trial, its methods of testing and of consideration and of analysis, its valuing of care and of scrupulousness and its conscientious commitment to fairness. Fifth, citizens in this community selected to act as jurors show, and historically have shown, a robust capacity and conscientious capacity to act on evidence and to put aside extraneous data and considerations and demonstrate an honourable commitment to fairness.

His Honour also said he considered that the jurors would comply with his directions not to do their own research, not to have access to the internet, and to have regard only to the evidence led in court, that they would not know or be able to recall much of the detail of the historical material referred to in the data placed before him and that none of the panel would prospectively know that the case for which they were summoned involved the particular accused.

11 Something more should be said respecting the outcome in the Court of Appeal. Grounds of appeal numbered 5 and 6 concerned alleged errors in the charge of the trial judge to the jury … The upshot was an order of the Court of Appeal directing a retrial, but no stay order of any description.

Abuse of process

12 The stay application made to the trial judge and the appeal to the Court of Appeal invoked the power of the Supreme Court to prevent abuse of its processes and in particular to prevent the prosecution of a criminal proceeding which would result in an unfair trial.

13 In this Court, the appellant contends that pervasive pre-trial publicity attributed guilt to the appellant in respect of the crime with which he is charged and that evidence in the trial revived that pre-trial publicity with the effect that the pre-trial publicity, particularly as to the appellant's guilt in respect of other crimes and the crime charged, could not be dismissed from the jury's consideration when deciding the guilt or innocence of the appellant. The appellant submits that an accused's right not to be tried unfairly[5] includes a right to be tried without a significant likelihood that the jury will be affected by substantial prejudice and prejudgment as a consequence of pre-trial publicity.

…

Permanent stay

18 Cummins J noted that while no permanent stay on the ground of irremediable prejudice to a fair trial had ever been ordered by the Supreme Court, the existence of the power to make such an order had been accepted by statements made in *R v Glennon*.[18] In that case, Mason CJ and Toohey J[19] said:

> [A] permanent stay will only be ordered in an extreme case[20] and there must be a fundamental defect 'of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences'.[21] And a court of criminal appeal, before it will set aside a conviction on the ground of a miscarriage of justice, requires to be satisfied that there is a serious risk that the pre-trial publicity has deprived the accused of a fair trial. It will determine that question in the light of the evidence as it stands at the time of the trial and in the light of the way in which the trial was conducted, including the steps taken by the trial judge with a view to ensuring a fair trial.

That statement should be regarded as an authoritative statement of principle.

19 The passage indicates a distinction of present relevance. The Court of Appeal was not considering, in advance of the trial, an interlocutory appeal from the order of Cummins J dismissing the stay application. The majority of the Court of Appeal decided that the conviction was to be quashed on other grounds relating to the conduct of the trial, and the immediate issue then was whether there should be an order for a new trial. The question of irremediable prejudice at a retrial was now to be decided not purely prospectively, as it had been by Cummins J, but with the assistance provided by the evidence against the appellant, which had been properly admitted at the first trial, and the steps taken by the judge to ensure a fair trial.

20 It is of particular importance to note that certain prejudicial material was admissible in the trial because the Crown case, as presented through Andrew Fraser, meant that the jury would inevitably learn of the appellant's history including at least one of his prior convictions for murder. The appellant's counsel met the forensic challenge posed by such circumstances by having the jury told at the outset that the appellant had previously been convicted of the murder of two other women. Moreover the identification evidence involved some reference back to the pre-trial publicity.

21 It also needs to be noted that prior to the empanelment of the jury, at the outset of the trial, and in his charge to the jury, Cummins J directed jurors repeatedly about the need to act fairly, calmly, without prejudice and solely on the evidence led in court and to exclude from their considerations anything that they may have read or seen outside the court. Such directions were designed to ensure that the jurors would not be affected by the pre-trial publicity in bringing in their verdict. The terms in which the repeated directions were given are exemplified by what was said by Cummins J at the outset of the trial:

> Because I am the judge of the law, ladies and gentlemen, any legal directions I give you, you must comply with. But I am not a judge of the facts and only you are the judges of the facts. So, as you are the judges of the facts, how do you act as a judge? … [Y]ou act as you would wish and expect a judge to act, fairly, calmly, without prejudice and solely on the evidence. Each of you has sworn or affirmed to give a true verdict according to the evidence. The evidence is what you hear in the four walls of this courtroom from the witnesses who will give their evidence in the witness box and the exhibits which attended as part of the evidence. [T]hat is what you judge the case on and that alone. The evidence from the witnesses here in court in front of you and the exhibits tendered as part of the evidence. During the trial, witnesses are called to give evidence and they will be questioned and tested by questions, that's the proper process of the court, ladies and gentlemen. You see that happening and you judge the case on the evidence led here in front of you in court …

A very important thing follows from that and it's this: you must not decide the case on anything outside the court …

The next thing is this, and this is very important in this case as in every case. Do not go and do your own homework or do your own research, don't go and look up old newspapers, don't go down to the local library, do not go and look at the internet, do not do any electronic searches about anyone connected with this case, that's very important ladies and gentlemen. You have sworn or affirmed to give a true verdict on the evidence led here in court, therefore looking at anything else cannot help you because that's not the evidence …

Your function is to decide the case solely [on] the evidence and I will give you various directions during the case to assist you in that regard but they are the first ones that I give you so that you know the limitations of what you should be looking at, just the evidence here in court and nothing else.

22 These proper directions demonstrate the capacity of the trial judge to relieve against the unfair consequences of the pre-trial publicity without staying the criminal proceedings.

23 In *Glennon*, Brennan J discussed the significance of the course taken by this Court (as the first and final appellate court) in *Tuckiar v The King*.[22] The public misconduct of counsel in *Tuckiar* was of decisive importance. Brennan J said of *Tuckiar* that, the conviction having been quashed, the question in that 'extreme case' had been whether a new trial should be ordered, and continued:[23]

This Court, in exercising that discretion, declined to order a retrial. The discretion to order a retrial is affected by factors that have no relevance to an application to stay a trial, particularly because an adverse exercise of the discretion subjects an accused to the burden of a second trial. A second trial of Tuckiar would have been affected by the certain knowledge of his guilt that counsel at his first trial had indefensibly revealed to any future jury empanelled in Darwin, and no other venue was practicable.

24 Did the Court of Appeal err in the present case by failing to treat it as an extreme or singular case in which there should be no retrial?

The function of the jury

25 Nettle JA[24] based his decision upon the footing that to grant an indefinite stay 'would be to recognise that the media has the capacity to render an accused unable to be tried' and this would deny the 'social imperative' that an accused be brought to trial.

26 There is an important point here. It is often said that the experience and wisdom of the law is that, almost universally, jurors approach their tasks conscientiously. The point was made as follows by Hughes J, with the endorsement of the English Court of Appeal, in *R v Abu Hamza*:[25]

Extensive publicity and campaigns against potential defendants are by no means unknown in cases of notoriety. Whilst the law of contempt operates to minimise it, it is not always avoidable, especially where intense public concern arises about a particular crime and a particular defendant before any charge is brought. Jurors are in such cases capable of understanding that comment in the media might or might not be justified and that it is to find out whether it is that is one of their tasks. They are capable of understanding that

> allegations which have been made may be true or may not be and that they, the jury, are to have the opportunity and responsibility of hearing all the evidence which commentators in the media have not and of deciding whether in fact the allegations are true or not. They are not surprised to be warned not to take at face value what appears in the media, nor are they these days so deferential to politicians as to be incapable of understanding that they should make no assumptions about whether any statements made by such people are justified or not. They are also capable of understanding and habitually apply the direction that they are given about the standard of proof.

In his reasons for dismissing the stay application, which are extracted in part and described above, Cummins J used similar terms with respect to the conduct of jury trials in Victoria.

27 Earlier, in *Gammage v The Queen*[26] Windeyer J expressed the governing principle in terms which acknowledged that the jury room might not be a place of undeviating intellectual and logical rigour (a point made by Callinan J in *Gilbert v The Queen*)[27] by saying:

> A jury in a criminal case may sometimes, from compassion or prejudice or other ulterior motive, fail to perform their sworn duty to determine the case before them according to the evidence. If they do so in favour of the prisoner, and not of the Crown, the law is powerless to correct their dereliction. They must be assumed to have been faithful to their duty. Their verdict must be accepted.

28 Conclusions of this kind are not examples of the 'ordinary' questions of fact which regularly arise for determination.[28] The assumed efficacy of the jury system of which Windeyer J spoke, whereby the law proceeds on the basis that the jury acts on the evidence and in accordance with the directions of the judge, represents the policy of the common law and is more akin to a species of 'constitutional fact', in the sense of that term explained by Heydon J in *Thomas v Mowbray*.[29]

29 Whilst the criminal justice system assumes the efficacy of juries, that 'does not involve the assumption that their decision-making is unaffected by matters of possible prejudice'.[30] In *Glennon*, Mason CJ and Toohey J recognised that '[t]he possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial'.[31] What, however, is vital to the criminal justice system is the capacity of jurors, when properly directed by trial judges, to decide cases in accordance with the law, that is, by reference only to admissible evidence led in court and relevant submissions, uninfluenced by extraneous considerations. That capacity is critical to ensuring that criminal proceedings are fair to an accused.

'Extreme' or 'singular' case

30 The appellant seeks to uphold findings of Nettle and Ashley JJA that the case was an extreme, or singular,[32] case. The appellant contends that the balance of authority in the High Court has approved a concept of unfairness such that it might arise irrespective of its source and whether or not it was controllable by court processes.[33] The balance of persuasion[34] in *Glennon*, the appellant submits, has allowed for the possibility of the grant of a stay in circumstances of prejudicial media publicity. The appellant contends that there is no reason in principle or practice why the extreme category of case warranting the imposition of a permanent stay ought not to include circumstances of prejudicial pre-trial media publicity.

31 The appellant relies upon the example given by Deane, Gaudron and McHugh JJ, the dissentients, in *Glennon* of the grant of a stay as follows:[35]

> [O]ne cannot exclude, as a matter of law, the possibility that an 'extreme' or 'singular' case might arise in which the effect of a sustained media campaign of vilification and prejudgment is such that, notwithstanding lapse of time and careful and thorough directions of a trial judge, any conviction would be unsafe and unsatisfactory by reason of a significant and unacceptable likelihood that it would be vitiated by impermissible prejudice and prejudgment.

32 However, the reference by their Honours to impermissible prejudice and prejudgment gives insufficient effect to the policy of the common law respecting the efficacy of the jury system. No doubt that policy must give way, for example, in specific instances of apprehended jury tampering and other criminal misconduct.[36] But that is far from the present case. This is not a case of an apprehended defect at the retrial of such a nature that (to adopt what was said by Mason CJ and Toohey J in *Glennon*)[37] nothing that the trial judge could do in the conduct of the retrial could relieve against its unfair consequences.

33 In *Glennon*,[38] in describing cases in which a permanent stay will be ordered as extreme, Mason CJ and Toohey J refer back to a passage in *Jago v District Court (NSW)*[39] containing a reference to *R v His Honour Judge C F McLoughlin and Cooney; Ex parte The Director of Prosecutions*.[40] There, the Full Court of the Supreme Court of Queensland recognised that for a court to grant a permanent stay of criminal proceedings is a rare occurrence, a drastic remedy to be applied in exceptional cases which might arise if there had been some conduct on the part of a prosecuting authority shown to result in prejudice to an accused in obtaining a fair trial.[41]

34 The decision in *Tuckiar*[42] is referred to in *Glennon* variously as unique,[43] extreme[44] and bizarre.[45] In *Tuckiar*, unfairness to the accused at a retrial, which could not be relieved against, was, as Brennan J said, 'the certain knowledge of his guilt',[46] revealed in open court by his counsel at his first trial. There is a difference between media opinion as to guilt and a public revelation of guilt by an accused's own counsel. The unfair consequences of the former can be relieved against by direction from the trial judge whereas the unfair consequences of the latter cannot be remedied.

35 Characterising a case as extreme or singular is to recognise the rarity of a situation in which the unfair consequences of an apprehended defect in a trial cannot be relieved against by the trial judge during the course of a trial. There is no definitive category of extreme cases in which a permanent stay of criminal proceedings will be ordered. In seeking to apply the relevant principle in Glennon, the question to be asked in any given case is not so much whether the case can be characterised as extreme, or singular, but rather, whether an apprehended defect in a trial is 'of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences'.47

36 There is nothing remarkable or singular about extensive pre-trial publicity, especially in notorious cases, such as those involving heinous acts. That a trial is conducted against such a background does not of itself render a case extreme, in the sense that the unfair consequences of any prejudice thereby created can never be relieved against by the judge during the course of the trial.

37 A further consideration is the need to take into account the substantial public interest of the community in having those who are charged with criminal offences brought to trial,[48] the 'social imperative' as Nettle JA called it, as a permanent stay is tantamount to a continuing

immunity from prosecution.[49] Because of this public interest, fairness to the accused is not the only consideration bearing on a court's decision as to whether a trial should proceed.[50]

38 The apprehended defect in the appellant's trial, namely unfair consequences of prejudice or prejudgment arising out of extensive adverse pre-trial publicity, was capable of being relieved against by the trial judge, in the conduct of the trial, by thorough and appropriate directions to the jury. Because that is so, it is not necessary for the purposes of this case to undertake any broad inquiry into the full extent of the court's inherent power to grant a permanent stay of criminal proceedings in order to prevent unfairness to an accused.

39 There was no error of principle in the application of *Glennon* by Cummins J in deciding that the appellant's trial, if allowed to proceed, would be fair. The majority in the Court of Appeal was correct in rejecting ground 1 of the appeal alleging error by Cummins J in refusing the application for a permanent stay. Furthermore, in all of the circumstances of this trial, the pre-trial publicity was not such as to give rise to an unacceptable risk that it had deprived the appellant of a fair trial. A stay permanently or until further order was not warranted.

40 For these reasons we joined in the orders made at the conclusion of the hearing.

Footnotes

1. *R v Dupas (No 3)* [2009] VSCA 202.
2. *R vDupas* [2000] VSC 356.
3. *R v Dupas* [2004] VSC 281.
4. *R v Dupas (No 3)* [2009] VSCA 202 at [77].
5. *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23 at 57 per Deane J; [1989] HCA 46.

...

18. (1992) 173 CLR 592; [1992] HCA 16.
19. [1992] HCA 16; (1992) 173 CLR 592 at 605–6.
20. *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23 at 34.
21. *Barton v The Queen* [1980] HCA 48; (1980) 147 CLR 75 at 111 per Wilson J; [1980] HCA 48.
22. (1934) 52 CLR 335; [1934] HCA 49.
23. [1992] HCA 16; (1992) 173 CLR 592 at 617.
24. *R v Dupas (No 3)* [2009] VSCA 202 at [62]–[63].
25. See [2007] QB 659 at 685–6.
26. [1969] HCA 68; (1969) 122 CLR 444 at 463; [1969] HCA 68.
27. [2000] HCA 15; (2000) 201 CLR 414 at 440 [96]; [2000] HCA 15.
28. See *Thomas v Mowbray* [2007] HCA 33; (2007) 233 CLR 307 at 512 [614]; [2007] HCA 33.
29. [2007] HCA 33; (2007) 233 CLR 307 at 514–20 [620]–[635].
30. *Gilbert v The Queen* [2000] HCA 15; (2000) 201 CLR 414 at 420 [13] per Gleeson CJ and Gummow J.
31. [1992] HCA 16; (1992) 173 CLR 592 at 603. See also *Murphy v The Queen* [1989] HCA 28; (1989) 167 CLR 94 at 99; [1989] HCA 28.
32. These epithets were used by members of the Court of Criminal Appeal of Victoria in *Glennon*: see *R v Glennon* [1992] HCA 16; (1992) 173 CLR 592 at 623 and footnotes 69 and 70.
33. Authorities relied on were *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23 at 27–31, 33–4 per Mason CJ, 56–8 per Deane J, 71–2 per Toohey J, 75–8 per Gaudron J; *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509 at 518–20 per Mason CJ, Dawson, Toohey and McHugh JJ; *Dietrich v The Queen* [1992] HCA 57; (1992) 177 CLR 292 at 298–9 per Mason CJ and McHugh J, 326–9, 332 per Deane J, 357–8 per Toohey J, 362–5 per Gaudron J; [1992] HCA 57.

34. As to which see *Federation Insurance Ltd v Wasson* [1987] HCA 34; (1987) 163 CLR 303 at 314; [1987] HCA 34.
35. [1992] HCA 16; (1992) 173 CLR 592 at 623–4.
36. Sections 44 and 46 of the *Criminal Justice Act* 2003 (UK) confer the power to order a trial or retrial by judge alone where the likelihood of jury tampering is so substantial as to make the order necessary in the interests of justice: *R v Twomey* [2009] EWCA Crim 1035; [2010] 1 WLR 630; [2009] 3 All ER 1002.
37. [1992] HCA 16; (1992) 173 CLR 592 at 605.
38. [1992] HCA 16; (1992) 173 CLR 592 at 605.
39. [1989] HCA 46; (1989) 168 CLR 23 at 34.
40. [1988] 1 Qd R 464.
41. [1988] 1 Qd R 464 at 470–1.
42. [1934] HCA 49; (1934) 52 CLR 335.
43. [1992] HCA 16; (1992) 173 CLR 592 at 598 per Mason CJ and Toohey J.
44. [1992] HCA 16; (1992) 173 CLR 592 at 617 per Brennan J.
45. [1992] HCA 16; (1992) 173 CLR 592 at 624 per Deane, Gaudron and McHugh JJ possibly quoting counsel who appeared for the Crown.
46. *R v Glennon* [1992] HCA 16; (1992) 173 CLR 592 at 617.
47. *Barton v The Queen* [1980] HCA 48; (1980) 147 CLR 75 at 111 per Wilson J quoted in *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23 at 34 per Mason CJ and in *R v Glennon* [1992] HCA 16; (1992) 173 CLR 592 at 605 per Mason CJ and Toohey J.
48. *R v Glennon* [1992] HCA 16; (1992) 173 CLR 592 at 598 per Mason CJ and Toohey J.
49. *R v Glennon* [1992] HCA 16; (1992) 173 CLR 592 at 599 per Mason CJ and Toohey J.
50. *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23 at 33 per Mason CJ.

28.57C R v Long; Ex parte A-G (Qld)

[2003] QCA 77; 138 A Crim R 103
Queensland Court of Appeal

Jerrard JA:

66 In the very early hours of the morning of 23 June 2000 a fire burned the Palace Backpackers Hostel in Childers to the ground. Childers is a relatively small town in a farming community in Queensland, and casual work vegetable picking is available in the area. Most of the hostel residents at the time were young people doing that work, and often described as 'backpackers'. Fifteen of the 85 people staying there died in that fire. On 15 March 2002 the appellant Robert Long was convicted after a trial in Brisbane before a jury of the murder of Stacey Louise Slarke and Kelly June Slarke, twin sisters whose bodies were specifically identified within those 15. The expense of strict proof of formal identification meant only those two victims of the fire were named in the indictment.

67 Mr Long was also convicted of having wilfully and unlawfully set fire to that hostel at that time. He has appealed against his conviction, submitting both that a fair body of evidence was wrongly admitted, and that in any event his convictions were unsafe and unsatisfactory. A further ground of appeal was strongly pressed, namely that the extensive publicity surrounding the fire, the suspicion or belief he started it, his arrest, the committal hearing, and the trial, deprived him of the possibility of a fair trial.

…

Pre Trial Publicity

Grounds of Appeal (a) and (b)

151 The appellant's grounds of appeal with the greatest substance were those complaining about the pre trial publication adverse to him in both the print and electronic media. He complained that the learned trial judge erred in refusing to grant a permanent stay of the indictment sought because of the nature and effect of that pre trial publicity (ground (a)); and he also contended that a miscarriage of justice had occurred because there was a substantial risk of prejudice to him in his trial arising from pre trial media publication (ground (b)).

152 The applicant relies upon the same material for both those grounds of appeal. He supplied a supplementary record book three, which at pages 1–89 records the argument and addresses on the application for a stay heard over 11, 12, and 13 February 2002. The remainder of supplementary book three largely records the judgment given on 18 February 2002 by the learned trial judge on a different application, that being one to have the judge by order remove the trial to another court room from that in which it was listed to take place. That application was refused, and ground of appeal (c) complains that the refusal has resulted in a miscarriage of justice. The applicant's supplementary book one records at pages one to eight thereof the argument on that application.

153 The vast bulk of supplementary book one comprises, at pages 14–289, photocopies of the print media articles about the fire, the applicant, the surviving and the dead backpackers and their families, the police search for the applicant, his arrest, the committal hearing, the appellant's application for a change of venue for his trial from Bundaberg to Brisbane, applications by the appellant that the Magistrate hearing the committal proceedings disqualify himself, and articles demonstrating that the whole matter remained one of generally abiding public interest between June 2000 and the trial. The publications critical to the appellant's grounds of appeal were those made in the days after the fire and before the appellant's arrest. The publications after that date demonstrate only the continuing public interest.

154 On Monday 26 June 2000, the *Courier-Mail*, a daily newspaper circulating throughout Queensland and certainly in the area of Brisbane from which the jury panel was drawn, published a photograph of the appellant describing him as 'Australia's Most Wanted', and describing how two days before the fatal fire the hostel operators had both pursued Mr Long on foot down the Bruce Highway, after having challenged him to pay outstanding rent of about $200.00. Evidence at the trial did not support that statement, nor establish the truth of the further statement that Mr Long was 'also believed to have threatened the pair'.

155 More importantly that article also advised that:

> It also emerged yesterday that Long had an extensive criminal history of violence including convictions and charges for the attempted murder of a former de facto's six year old daughter, serious assault, assault occasioning bodily harm, burglary, and fraud. He also is alleged to have torched a caravan while his de facto was asleep inside.

For good measure the article informed readers of Mr Long having weeks earlier left a suicide note with the local barman at the Federal Hotel, and that:

> Meanwhile witnesses have reported seeing Long near a burning bin just before the fire broke out, and standing in the crowd watching across the road as the blaze engulfed the two story wooden structure.

156 The Crown led no evidence at the trial of Mr Long having been seen watching the blaze, nor any direct identification of Mr Long being seen with a burning bin 'just before' the fire broke out; and while Mr Long may have been charged with attempted murder in the past, he had not been convicted of that offence. In any event, publication of the fact of his having been charged with that offence would work an irreversible prejudice against him, particularly accompanied by the report of the allegation of his having 'torched' the caravan. The Crown did not lead any evidence of Mr Long's record of convictions at the trial; it was not admissible.

157 The *Australian*, a newspaper also circulating daily in the Brisbane area, reported the same day of the emergence of the picture of Mr Long as a 'bourbon and coke drinking bludger'. The article in that paper described his having a habit of trying to 'chat up' female backpackers while borrowing money from all and sundry, his being said to be nursing a grudge against the hostel, and that he alerted two English backpackers to expect a fire in the building hours before one began. This was accompanied by a description from 'one neighbour from his childhood', which described Mr Long as a 'very wild sort of a boy' who was 'always sneaking around peoples' houses looking through their windows'. The article further declared that a Sydney newspaper reported Long having served six months in a Grafton Jail in Northern New South Wales in 1992 for assault and malicious damage, and that he had a previous conviction for sexual assault.

158 There was no evidence led of Mr Long alerting any backpackers to expect a fire in the building hours before one began, and the quoted portions of that article provided more grounds for potential jurors feeling irreversible prejudice against Mr Long. Next day Tuesday 27 June 2000 the *Courier-Mail* featured a front page article on the experiences of his former de facto Christine Campbell with Mr Long, and a further story on that topic on page four. The headline article recounted Ms Campbell's description of Mr Long as a sadist who had tried to murder her and her children, when he 'torched a caravan in which she was sleeping with their five year daughter and two young daughters from a previous relationship. He had silently watched'. The article described Ms Campbell claiming that Mr Long had attempted to strangle her and her children, and that she had no doubt he was capable of 'torching the Childers Palace Backpackers' Hostel and that he would feel no remorse'.

159 The page four article describes Mr Long, in Ms Campbell's opinion, as a loner who wanted people to feel sorry for him and who needed to be put away. That article enlarged upon the occasion when Mr Long had allegedly attempted to kill her when her eldest daughter was sick, and described how he had broken into a house on the Gold Coast, knocked her unconscious and taken the child.

> Police caught him some time later in the front yard of the church. He was found on top of her trying to strangle her. She was in hospital with a fractured nose and bruising to her body. He went to court, pleaded it out, and went to jail.

On the same page a Brisbane criminologist was quoted as saying that the suspected Childers Hostel arsonist Robert Long could have stayed around to watch as the building erupted in flames; and that pyromaniacs often enjoyed staying back to watch the fire.

160 That night an interview with Christine Campbell was broadcast on the 'Today Tonight' television program, in which Mr Long was described by the interviewer as 'the man who once tried to kill her', and in which Ms Campbell expressed the opinion that when she heard about the fire, and that Mr Long was actually there and had been seen running away from the place,

(which was not the evidence later led) 'I knew instantly that Robert had done it'. A little later in the interview she described why it was, as the interviewer asserted, that 'she was certain Robby started the fire that claimed so many lives because he once set alight her caravan while she and her children slept'. The circumstances of that were that she had felt extremely hot, woke up, put the light on, the caravan was full of smoke, and when looking under it she saw there was 'like a camp fire sort of thing set up under the van and there were three or four AA batteries sitting within the fire'. She removed the children from the caravan and described how she 'knew he was probably watching the fire to see whether I went up or not'. The interviewer provided the further information that in 1993 Mr Long had been charged with the attempted murder of Ms Campbell's six year old daughter and that:

> Although those charges were later dropped Long pleaded guilty to a number of others relating to her abduction, to assaulting a police officer, and to burglary. He was sentenced to four years jail and the presiding judge ordered him to undergo psychiatric and psychological treatment.

161 Mr Long was sentenced, as his criminal record at AR 1459 reveals, to four years imprisonment in the Southport District Court on 18 April 1994 for the offences of breaking and entering a dwelling house on 15 May 1993 with intent in the night time, and further offences committed that same day of assault occasioning bodily harm, wilful and unlawful damage to property, child stealing, disabling with intent to facilitate an indictable offence, and the serious assault of a police officer. He was recommended for consideration on parole after serving 18 months, and it was recommended that he receive psychiatric and psychological assessment and treatment during his imprisonment.

162 On Wednesday 28 June 2000 the *Courier-Mail* published a further substantial article which described Ms Campbell saying that Mr Long had both tried to strangle her in the past and attacked her with scissors, and that in February 1997 a Darwin Fire Services Official said Ms Campbell and her three children were lucky to escape from a caravan fire which police believed was deliberately lit. Presumably that is the occasion of the incident much described in the publicity in the proceeding (sic)two days, which incident did not lead to the appellant being convicted of any offence. That fact is established simply by examining his criminal record. That *Courier-Mail* article also quoted a former landlady of Mr Long, who said she had been afraid to ask for $1,700.00 unpaid rent for fear Mr Long would 'shoot her or burn the place down'.

163 The account actually given by Ms Campbell in the interview broadcast on TV does not demonstrate with certainty that Mr Long did attempt to set fire to that caravan, or that he was even there. Nevertheless the allegation was published both as an allegation and as a positive fact. It would be readily understood by the audience at which it was aimed as the equivalent of evidence, of an overwhelmingly prejudicial nature, of a demonstrated past propensity to endanger by arson the lives of others when asleep; although the general ill will expressed by Ms Campbell might have weakened the impact of her accusations.

164 However one should describe this material, and the term frenzy of defamation may be accurate, it was not the product of any particular journalistic skill or endeavour. The material placed before the learned trial judge establishes that an unidentified police officer, from either the Queensland, New South Wales, or Federal, Police supplied a journalist from the Sydney *Daily Telegraph* on 25 June 2000 in Childers with 'some dirt on Long' (supplementary

book one at page 312). That 'dirt' included the information that Mr Long had been charged with attempted murder, child stealing, and serious assault and burglary. Likewise a formal admission (exhibit five at supplementary book three page 95 and read into the record at supplementary book three page 39) was made on behalf of journalist Paula Doneman, whose name appeared above the relevant *Courier-Mail* articles for 26, 27 and 28 June 2000. It was that the part of the story dealing with Mr Long's previous convictions and/or charges was obtained first substantially from news text articles on 18 May 1993, and 9 July 1995, and from prison (Corrective Services) sources. The individual was never identified.

165 All experienced and even inexperienced police officers, journalists, and editors know that the common law concern in Australia, to ensure that a person accused of a crime before a jury has a fair trial, has the consequence that courts go to great lengths to ensure that jurors decide cases on the basis only of admissible evidence. This rarely includes evidence of prior criminal convictions. The fact that the rampant speculation in the media about the extent of Mr Long's past criminal, anti social, or unadmirable conduct stopped on 28 June 2000, the day he was taken into custody, demonstrates that those responsible for the prior publications must have been aware of the effect that what was published would be judged likely to have on a jury likely to hear the almost inevitable charges. It would be difficult, if challenged, to conceive of publicity more prejudicial, and the material was supplied and published in that knowledge. In those circumstances the appellant's complaints in these grounds of appeal have real force.

166 Senior counsel for the appellant referred the court to the decisions of the High Court in *Murphy v R* (1988–1989) 167 CLR 94, *Glennon v R* (1992) 173 CLR 592, and *Gilbert v R* (2000) 74 ALJR 676; and those of the Queensland Court of Appeal in *R v Lewis* (1994) 1 Qd R 613, in *Johannsen & Chambers v R* (1996) 87 A Crim R 126, and in *R v Davidson* [2000] QCA 300, judgment delivered 28 July 2000. Those decisions establish that considerations which are relevant on an application for a stay based on pre trial publicity include:

1. the extent and nature of the publicity, when it occurred, and the nature of the offence charged;
2. the legitimate public interest, and legitimate private interest(s) of a person charged with a crime, the witnesses, the victim of the alleged crime and their relatives, in the ordinary and expeditious process of prosecution to verdict of those charges;[80]
3. that in this era of intense commercial publication of information about immediately current events, and easy electronic access to that, there can be no guarantee an individual juror may not have been influenced by pre trial publicity;[81]
4. that recognition of that possibility[82] requires judges to do what can be done to protect the integrity of the criminal process, including but not limited to punishment for contempt, adjourning a trial until the influence of prejudicial publicity subsides, ordering a change of venue for the hearing of the trial, ordering separate trials for different accused persons, and giving express directions to jurors that their verdict must be based on the evidence given before them on the trial and that in reaching that verdict they must disregard knowledge otherwise acquired;[83]
5. that of necessity the law places much reliance on the integrity and sense of duty of jurors to comply with such directions and give a verdict based on the evidence led.[84] Accordingly, it is necessary to show more than the possibility that a juror or jurors

would have gained knowledge of prior convictions to support the argument that it was likely those jurors would or did ignore or disobey directions given;[85]

6. that the necessary assumption that jurors understand and follow directions given by trial judges can give way to recognition that jurors' decision making is affected by matters of possible prejudice,[86] where more is shown than the mere possibility a juror would have gained knowledge of inadmissible and prejudicial matters. It is in these cases that the discretionary exercise of the powers of the trial judge is critical, including the power of adjournment for a lengthy period;
7. that a permanent stay will be ordered only in an extreme case where there has been adverse pre trial publicity of such a nature that nothing a trial judge can do in the conduct of the trial could relieve against its unfair consequences.[87] The need to maintain public confidence in the administration of justice, and the public interest in ensuring that the judicial processes are not abused and that trials are fair to the people charged, means that a permanent stay should be ordered when it is impossible to ensure that a fair trial could take place;[88]
8. that the fact that adverse publicity is deliberately generated by those for whom the Crown should properly be held responsible may have the result that justice requires a permanent stay be granted.[89]

167 The reference by Brennan and Dawson JJ in *Glennon* to a trial as fair as the court could make it … is more apposite to describe a trial which has taken place than one yet to occur. It is then that an appellate court can examine the record with the assistance of hindsight from counsel. In this matter the learned trial judge referred with some care to the authorities and to the evidence placed before him. He held, as is the law, that there is a power to stay permanently, to be exercised only in extreme circumstances, and concluded that those were not established by the evidence in the application before him. The judge made particular reference to the decision of this Court in *Lewis*, and to the observations of Pincus JA at Qd R 639. Pincus JA had suggested there that an extreme case would be one in which the crime alleged was one of a horrendous kind, and where the published material was such as to be virtually conclusive of guilt.

168 In the instant case the learned trial judge placed weight upon the legitimate public interest in the ordinary processes of prosecution, the fact that 20 months had passed since the publication the subject of particular complaint, and that careful warnings would be given by him to the jury. He also held, correctly in my view, that the evidence did not support a finding that the supplying of information about the applicant from within government sources was sufficiently condoned or authorised by those with authority in the investigation, such that the publicity could be said to have been deliberately engineered, and thus to warrant a stay. In the result he considered that the risk of prejudice was not so great as to amount to a 'significant and unacceptable likelihood that the trial would be vitiated by inadmissible prejudice and pre judgment'.[90]

169 The appellant's argument that the learned judge erred in refusing to grant a permanent stay only attempts to identify one matter that the learned judge is said to have overlooked, and that is the possibility of internet access by a juror to the pre trial publication during the actual trial itself. The appellant established by evidence on the appeal that a BBC website contained extracts from the media about the fire and surrounding events, and therefore some matters about Mr Long. This included that:

> Witnesses described the 37 year old itinerant fruit picker as a heavy drinking loner with a long criminal record. Reports said he bore a grudge against the hostel; information that as at 29 June 2000, Mr Long was regarded both as a witness and a suspect but was yet to be interviewed and had not been arrested; information that in 1993 he appeared in court in Queensland after abducting Ms Campbell's six year old daughter and attempting to strangle her; and had later been sentenced to four years imprisonment for attempted murder, assault and burglary; and information that his former lover Christine Campbell said he had once tried to set fire a to a caravan she was staying in with three children, and that she also claimed Mr Long once attacked her with a pair of scissors.

170 The judgment of the learned trial judge on the application for a permanent stay did not make any specific reference to the then applicant's contention that the jurors might learn this prejudicial and inadmissible information about Mr Long by internet access. The possibility of such access is a difficulty facing trial judges, and the Criminal Law Amendment Act 2002 (Qld), not in force as at the date of trial, has inserted s 69A into the Jury Act 1995 (Qld), prohibiting thereby a person who has been sworn as a juror in a criminal trial from inquiring about the defendant in the trial until the jury has given its verdict or the person has been discharged by the judge. That legislative recognition of the possibility of internet access by jury members, and the fact that information was available about Mr Long before and during the trial, still leaves the possibility that one or more jurors had access to that information as a mere possibility. The authorities earlier described require the appellant to show more than that.

171 The learned trial judge did give the jury specific directions about acting only on the evidence both at the start of the trial (AR 15–16) and at the beginning and end of his summing up (at AR 1341–43 and 1423–24). The firm and persuasive directions at the start of the trial included:

> Evidence is what you see and hear in this court room. It includes any exhibits I admit into evidence during the course of the trial. It does not include anything you heard on radio, see on television, or read in the newspapers. It does not include anything you might have been told by friends, relatives or acquaintances.
>
> All we know of the facts at this time is that the Palace Backpackers Hostel in Childers burnt down in the early hours of the 23rd June 2000, and that a number of young residents died. That was a tragedy but it doesn't justify determining the case against Mr Long on anything but the evidence. Justice is not served by finding scape goats.
>
> We don't know at this time, nor is there yet before you anything to suggest, that Mr Long was in any way involved. More importantly we don't know if he was involved in any way which makes him guilty of any charge on the indictment. That's what you will be called upon to decide at the conclusion of this trial.
>
> Before Mr Meredith opens the case for the prosecution you should clear your mind of any preconceptions you have about the case. Listen to the evidence and decide the case on that and that alone. It is critically important to remember in a trial like this which will attract a lot of publicity that Mr Long is presumed to be innocent.

172 His Honour said a few moments later:

> Don't take the risk of being influenced by anything outside this room, so don't discuss with anyone matters concerning the case outside other members of the jury. Certainly don't

attempt any private investigation of the matter. You will have enough to deal with over the course of this trial, which is currently estimated as lasting six weeks, without doing anything else.

173 The judgment of Pincus JA in *Lewis* (supra) makes clear (at page 639) that even in a case where the extreme circumstances necessary to justify a stay on the basis of pre-trial publicity are established, a stay is not automatic and remains a matter of discretionary judgment. In this case the learned trial judge correctly directed himself as to the law and took into account all relevant matters, save that he did not specifically mention the possibility of internet access. He gave directions at the appropriate times in terms which could not be misunderstood. He was not asked to give any others. The judgments of Mason CJ and Toohey in *Murphy* (at CLR 101) and in *Glennon* (at CLR 600) stress the importance in appeals such as this one of recognising that it is an appeal from a discretionary decision of a trial judge. As the correct principles were applied by the learned judge to the relevant facts, which included that more than a year and a half had passed since that adverse publicity and that the judge intended to give firm directions to the jury, the trial judge is not shown to have erred in law in the exercise of his discretion. By the time of the trial, the judge was entitled to hold that this was not a case in which there was nothing the judge could do in the conduct of the trial to relieve against the consequences of that earlier publicity; and that was the critical question, rather than whether or not it was an extreme case.

Miscarriage of justice

174 This leaves for consideration the appellant's argument that a miscarriage of justice has occurred because of the substantial risk of prejudice arising from that publicity. The appellant relies upon the same material for the arguments that a substantial risk of prejudice was unavoidable. I would put it that a risk of substantial prejudice was possible by the time of trial, but that three matters are relevant when assessing whether a miscarriage of justice has occurred. The first is that no judge would want to preside over a trial which was unfair, and the directions the trial judge actually gave show him trying very hard to prevent that. Secondly, the remark last quoted from his directions at the very start of the trial reflect the important reality that in a trial of serious charges of any length, the uniform experience of counsel, solicitors, and judges supplies the observation that jurors, like lawyers, become wholly occupied with the evidence that they see and hear in the absorbing, engaging, and dramatic process that is a criminal trial.

175 Thirdly, the evidence in this trial both made a strong circumstantial case, and was presented in a way that made that case interesting and would have held attention. The order in which the witnesses were called provided an almost chronological account of the events before, during, and after the fire as they sequentially occurred, and as relevant to the evidence of each witness. The evidence opened with a description of the hostel from its managers and staff, and closed with evidence of the confession. In those circumstances, as the trial judge told the jury and as is the common experience in such criminal trials, the jurors had more than 'enough to deal with' from the admissible evidence they heard. They also heard an opening address about it, occasional objections taken to portions of it during the trial, submissions from counsel about it, and a summary of it in the final observations to them by the trial judge. In those circumstances there is not an unacceptable risk that one or more jurors relied upon any information not established in evidence. Where that evidence establishes a strong

circumstantial case, quite apart from the hotly contested evidence about which the appellant has particularly complained, the appellant's complaint that the pre trial publicity has caused a miscarriage of justice must be dismissed.

…

185 The orders of the court should be:

- That the appeal by Robert Paul Long against his convictions for murder and arson be dismissed.
- The appeal by the Attorney General against the sentence imposed on Mr Long be dismissed.

[McMurdo P and Davies JA gave separate judgments also dismissing the appeal.]

Footnotes

80. See *Murphy v R* at CLR 98, *Glennon v R* at CLR 598, and *Johansen* & *Chambers* at p 131.
81. As observed by Mason CJ and Toohey J in *Murphy v R* at CLR 101, cited by Brennan J in *R v Glennon* CLR at 614; and see *Lewis* at p 636.
82. Mason CJ and Toohey J in *Glennon* at CLR 603.
83. See *Glennon* at CLR 614 per Brennan J, and *Murphy* at 99 per Mason CJ and Toohey J.
84. See *Glennon* at 614/615 per Brennan J*, Gilbert* at [13] and [31], *Davidson* at [13], and *Lewis* at p 637.
85. *Davidson* at 14, adapted to the facts of this case.
86. *Gilbert* at [13].
87. *Glennon* at 605 per Mason CJ and Toohey J, adapted to the present case. Brennan J (with whom Dawson J agreed) accepted that principle without enthusiasm at CLR 615–616; preferring the view that a trial as fair as the court could make it would produce no miscarriage of justice.
88. *Johannsen* & *Chambers* at pages 131 and 142.
89. *Lewis* at 636 per Pincus JA.
90. The trial judge quite correctly cited this as the relevant requirement for a permanent stay, suggested in the joint judgment of Deane, Gaudron and McHugh JJ in *Glennon* at CLR 623–624.

28.58C

Dietrich v R

(1992) 177 CLR 292; 109 ALR 385
High Court of Australia

Mason CJ and **McHugh J**: This application for special leave to appeal seeks to raise the question whether the applicant's trial in the County Court at Melbourne miscarried by virtue of the fact that he was unrepresented by counsel. In our opinion, and in the opinion of the majority of this court, the common law of Australia does not recognize the right of an accused to be provided with counsel at public expense. However, the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal justice system. The power to grant a stay necessarily extends to a case in which

representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence.

The applicant is entitled to succeed because his trial miscarried by virtue of the trial judge's failure to stay or adjourn the trial until arrangements were made for counsel to appear at public expense for the applicant at the trial with the consequence that, in all the circumstances of this case, he was deprived of his right to a fair trial and of a real chance of acquittal.

The applicant was found guilty by a jury of one count of importing into Australia not less than a trafficable quantity of heroin in contravention of s 233B(1)(b) of the Customs Act 1901 (Cth). The indictment on which the applicant was presented contained three further counts: two counts, which alleged possession of the heroin the subject of the importation charge, were alternatives to the more serious charge and were not considered once a verdict of guilty had been returned on the importation charge; the third additional count alleged possession of a quantity of heroin which was not the subject of the importation offence, and the applicant was found not guilty on this count. The applicant had pleaded not guilty to all counts.

The trial before Judge Nixon in the County Court lasted approximately 40 days, from presentment of the applicant on 23 May 1988 to the return of the jury's verdicts on 29 July 1988. Throughout the entire course of the trial, the applicant was unrepresented. Prior to trial, he had applied unsuccessfully to the Legal Aid Commission of Victoria for legal assistance and had also been unsuccessful in seeking reconsideration of the Commission's refusal pursuant to the review procedures available under Pt VI of the Legal Aid Commission Act 1978 (Vic). The Commission's view was that assistance would only be provided for representation for a plea of guilty, this being an approach which the applicant would not consider …

At the commencement of his trial, the applicant had therefore exhausted all avenues for legal assistance. Nevertheless, one of the grounds of his application to the Court of Criminal Appeal for leave to appeal against conviction was that every indigent accused charged with an indictable offence is entitled to counsel provided at the expense of the state and that the failure of the trial judge to appoint counsel for the applicant was a miscarriage of justice requiring that the conviction be quashed. The Court of Criminal Appeal (O'Bryan, Gray and Vincent JJ) refused leave.

It is from the order refusing leave that the applicant now seeks special leave to appeal to this court. The sole ground of the application is that the applicant's trial miscarried by virtue of the fact that he was not provided with legal representation.

Right to a fair trial

The right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system [*Jago v District Court (NSW)* (1989) 168 CLR 23, per Mason CJ at 29; per Deane J at 56; per Toohey J at 72; per Gaudron J at 75]. As Deane J correctly pointed out in *Jago v District Court of New South Wales* [ibid at 56–7], the accused's right to a fair trial is more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial, for no person can enforce a right to be tried by the state; however, it is convenient, and not unduly misleading, to refer to an accused's positive right to a fair trial …

There has been no judicial attempt to list exhaustively the attributes of a fair trial. That is because, in the ordinary course of the criminal appellate process, an appellate court is generally called upon to determine, as here, whether something that was done or said in the course of the trial, or less usually before trial [*R v Glennon* (1992) 173 CLR 592], resulted in the accused being deprived of a fair trial and led to a miscarriage of justice. However,

various international instruments and express declarations of rights in other countries have attempted to define, albeit broadly, some of the attributes of a fair trial. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') enshrines such basic minimum rights of an accused as the right to have adequate time and facilities for the preparation of his or her defence [art 6(3)(b)] and the right to the free assistance of an interpreter when required [art 6(3)(e)]. Article 14 of the International Covenant on Civil and Political Rights ('the ICCPR'), to which instrument Australia is a party [Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980], contains similar minimum rights, as does 1 of the Canadian Charter of Rights and Freedoms [Pt 1 of the Constitution Act 1982, enacted by the Canada Act 1982 (UK)]. Similar rights have been discerned in the 'due process' clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

The argument of the applicant

The primary argument of the applicant relies in part on the explications of the right to a fair trial in the instruments to which we have referred. The argument is that, at least in any indictable matter to be tried before a judge with or without a jury that may result in imprisonment upon conviction, the interests of justice require that an indigent accused who wishes to have legal representation be provided with such representation at public expense. The central proposition in this submission is that the absence of representation for an accused who cannot afford to engage counsel necessarily means that the trial is unfair and that any conviction should be quashed.

In the course of argument, counsel for the applicant proposed a less absolute form of this proposition. He submitted that, as an incident of a court's duty to ensure that an accused receives a fair trial, a trial judge has a discretion to stay or adjourn the trial of an unrepresented accused and that, in the absence of exceptional circumstances, this discretion should be exercised in favour of the accused. This contention was proposed in the context of an alternative submission that the trial judge erred in refusing the applicant's application for an adjournment of his trial for the purpose of trying to secure representation …

…

The advantages of representation by counsel are even more clear today than they were in the nineteenth century. It is in the best interests not only of the accused but also of the administration of justice that an accused be so represented, particularly when the offence charged is serious [*McInnis v R* (1979) 143 CLR 575 at 579 per Barwick CJ; see also *Galos Hired v R* [1944] AC 149 at 155 and *Foster v R* (1982) 38 ALR 599 at 600]. Lord Devlin stressed the importance of representation by counsel when he wrote [*The Judge*, (1979), p 67]:

> Indeed, where there is no legal representation, and save in the exceptional case of the skilled litigant, the adversary system, whether or not it remains in theory, in practice breaks down.

An unrepresented accused is disadvantaged, not merely because almost always he or she has insufficient legal knowledge and skills, but also because an accused in such a position is unable dispassionately to assess and present his or her case in the same manner as counsel for the Crown [*McInnis* (1979) 143 CLR at 590 per Murphy J]. The hallowed response [see the reference to Coke's opinion in *Powell v Alabama* (1932) 287 US 45 at 61] that, in cases where the accused is unrepresented, the judge becomes counsel for him or her, extending a

'helping hand' to guide the accused throughout the trial so as to ensure that any defence is effectively presented to the jury, is inadequate for the same reason that self-representation is generally inadequate: a trial judge and a defence counsel have such different functions that any attempt by the judge to fulfil the role of the latter is bound to cause problems [See *Foster* (1982) 61 FLR at 441–2; 38 ALR at 600] …

However, the right to retain counsel and the right to have counsel provided at the expense of the state, the existence of which the applicant asserts, are not the same thing …

…

[After rejecting the arguments for a right to have counsel provided at public expense, their Honours continued:]

The position in Australia

For the foregoing reasons, it should be accepted that Australian law does not recognize that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial. Such a finding is, however, inextricably linked to the facts of the case and the background of the accused.

A trial judge faced with an application for an adjournment or a stay by an unrepresented accused is therefore not bound to accede to the application in order that representation can be secured; a fortiori, the judge is not required to appoint counsel. The decision whether to grant an adjournment or a stay is to be made in the exercise of the trial judge's discretion, by asking whether the trial is likely to be unfair if the accused is forced on unrepresented. For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only. In all other cases of serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained …

Did the applicant's trial miscarry?

The alternative argument of the applicant was that the trial judge erred in the exercise of his discretion in refusing an application by the applicant for an adjournment …

In approaching this argument, the question before this court is not merely whether or not an adjournment should have been granted but whether the applicant's conviction should be set aside 'on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice', provided that the conviction will stand if 'no substantial miscarriage of justice has actually occurred' [Crimes Act, s 568(1); *McInnis* (1979) 143 CLR at 581–2 per Mason J].

The Crown case against the applicant was as follows. On the night of 17 December 1986, the applicant arrived at Melbourne Airport from Bangkok and imported into Australia a quantity of heroin which was packaged in condoms concealed in his body. Members of the Australian Federal Police followed the applicant from the airport to his flat in Hotham Street, East St Kilda. The next morning, the applicant drove from his flat and was arrested some distance away by police. The police returned the accused to his flat and, pursuant to a lawful warrant, conducted a search. Under a rug in the study they found a quantity of heroin in a plastic bag, which became the subject of count four on the indictment, and in a kitchen bin they found a condom containing 3.7 grams of heroin, which became the subject of count one. The applicant was then charged and transferred to an isolation ward in the hospital at

Her Majesty's Prison, Pentridge. He remained in that ward until the following morning when condoms containing 66.4 grams of heroin, which the applicant had allegedly passed during the night, were discovered in the ward. This heroin also became the subject of count one.

The Crown relied on evidence of Australian Federal Police officers involved in the surveillance, arrest and search procedures, as well as evidence of prison officers, hospital staff and police officers present while the applicant was in hospital. The applicant denied the importation and alleged that the heroin discovered in his flat and in the hospital ward was placed there by police officers or other unnamed persons.

As stated earlier, the applicant was unrepresented at all stages of his lengthy trial. It is difficult to gain an accurate impression of the course of the trial from the mere 150 pages, culled from a transcript exceeding 3000 pages, that have been placed before this court, but certain important features emerge. The applicant did not wish to go to trial unrepresented. Failing appointment of counsel by the trial judge, who had no power to make such an appointment, the applicant sought leave to be assisted by what is called a 'McKenzie friend' after the procedure confirmed in *McKenzie v McKenzie* [[1971] P 33]. That application was refused. There was also a serious question prior to trial as to the applicant's fitness to plead. On several occasions, the applicant appeared to be emotionally and psychologically overwhelmed, whether genuinely or not, by the prospect of proceeding to trial unrepresented. A clinical psychologist called by the applicant testified that the applicant was an excitable, volatile person who would have great difficulty withstanding the rigours of a trial, although it appears that the opinion of a psychiatrist, who did not give evidence, was that the applicant was fit to plead. From the material before this court, it appears that the undue length of the trial may well have been occasioned by the applicant's irregular outbursts of volatile behaviour.

In this context, and before the trial proper commenced, the applicant made an informal application for an adjournment …

In our view, the trial judge's failure to adjourn the trial resulted in an unfair trial and deprived the applicant of a real chance of acquittal. Central to this conclusion is the not guilty verdict returned by the jury on count four. The evidence against the applicant appears strong on all counts but, in circumstances where the jury found him not guilty on one count, how can this court conclude that, even with the benefit of counsel, the applicant did not have any prospect of acquittal on count one, of which he was then deprived by being forced to trial unrepresented? [Compare *McInnis* (1979) 143 CLR at 583 per Mason J.] It is impossible to know the basis on which the jury found for the applicant on count four; the possibility exists that the jury found credible the alternative explanation of events given by the applicant which involved allegations of impropriety by the police. Judging by the question asked of the trial judge by the jury foreman during deliberations, the jury may also have doubted whether the first count could be made out against the applicant in relation to the heroin found in the hospital ward. If such doubts were present in the jury's mind, how can it be said that competent counsel appearing on behalf of the applicant may not have found further weaknesses in the prosecution case? On the material before this court, it appears that the applicant's defence was so disorganized and haphazard as to lack cogency. In these circumstances, the conclusion that the applicant may have lost a real chance of acquittal is compelling.

In view of the differences in the reasoning of the members of the court constituting the majority in the present case, it is desirable that, at the risk of some repetition, we identify what the majority considers to be the approach which should be adopted by a trial judge who is faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault on his or her part, is unable to obtain legal

representation. In that situation, in the absence of exceptional circumstances, the trial in such a case should be adjourned, postponed or stayed until legal representation is available. If, in those circumstances, an application that the trial be delayed is refused and, by reason of the lack of representation of the accused, the resulting trial is not a fair one, any conviction of the accused must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.

In the result, we would grant special leave to appeal, allow the appeal, set aside the conviction and order a new trial.

Deane J:

…

While the law's insistence that there be no conviction without a fair trial according to law has been long established, the practical content of the requirement that a criminal trial be fair may vary with changing social standards and circumstances [see, eg, *Hicks v R* (1920) 28 CLR 36 at 48 per Isaacs and Rich JJ] …

That is not to suggest that the determination of what is or is not necessary to satisfy the requirements of a fair trial is unprincipled. While the requirement of fairness provides the ultimate rationale and touchstone for the law's adjudgment of the minimum safeguards which must be observed in the administration of the substantive criminal law, the practical content of the requirement in a particular category of case will primarily fall to be determined by the staple processes of legal reasoning, namely, induction and deduction from earlier decisions and settled rules and practices. Inevitably, however, there will arise the rare case in which those processes of legal reasoning are inadequate in a developing area of the law or in which a court, ordinarily a final appellate court, concludes that the circumstances are such that it is entitled and obliged to reassess some rule or practice in the context of current social conditions, standards and demands and to change or reverse the direction of the development of the law [see, generally, *Jaensch v Coffey* (1984) 155 CLR 549 at 599–600]. It is in such a case that direct reference will necessarily be made to the underlying notion of fairness and that subjective values and perceptions may intrude into the judicial process. Nonetheless, the identification or the reconsideration of the existence and content of the particular rule or practice in such a case is an unavoidable concomitant of the judicial function if the law is not to lose contact with the social needs which justify its existence and which it exists to serve …

…

… As *Barton v R* [(1980) 147 CLR at 96, 103, 107, 109] establishes, the effect of the common law's insistence that a criminal trial be fair is that, if the funds and facilities necessary to enable a fair trial to take place are withheld, the courts are entitled and obliged to take steps to ensure that their processes are not abused to produce what our system of law regards as a grave miscarriage of justice, namely, the adjudgment and punishment of alleged criminal guilt otherwise than after a fair trial. If, for example, available interpreter facilities, which were essential to enable the fair trial of an unrepresented person who could neither speak nor understand English, were withheld by the government, a trial judge would be entitled and obliged to postpone or stay the trial and an appellate court would, in the absence of extraordinary circumstances, be entitled and obliged to quash any conviction entered after such an inherently unfair trial. Again, if the government failed to provide the ordinary facilities necessary to enable an accused held in custody to attend his trial, the trial judge would be entitled and obliged to postpone or stay the trial and, in the absence of such a stay or postponement, an appellate court would be entitled and obliged to quash any conviction.

Similarly, if in all the circumstances of the present case the effect of the applicant's inability to obtain legal representation was that the trial would be an unfair one, the learned trial judge should have acceded to the applicant's obvious wish that the trial be postponed or delayed for so long as such legal representation remained unavailable to him …

…

An accused is brought involuntarily to the field in which he is required to answer a charge of serious crime. Against him, the prosecution has available all the resources of government. If an ordinary accused lacks the means to secure legal representation for himself and such legal representation is not available from any other source, he will, almost inevitably, be brought to face a trial process for which he will be insufficiently prepared and with which he will be unable effectively to cope. In such a case, the adversarial process is unbalanced and inappropriate and the likelihood is that, regardless of the efforts of the trial judge, the forms and formalities of legal procedures will conceal the substance of oppression.

In determining the practical content of the requirement that a criminal trial be fair, regard must be had 'to the interests of the Crown acting on behalf of the community as well as to the interests of the accused' [*Barton v R* (1980) 147 CLR at 101 per Gibbs ACJ and Mason J]. There are circumstances in which a criminal trial will be relevantly fair notwithstanding that the accused is unrepresented. The most obvious category of case in which that is so is where an accused desires to be unrepresented or persistently neglects or refuses to take advantage of legal representation which is available [see, eg, *R v Greer* 62 A Crim R 442 at 12–15, per Kirby P at 12–15]. Another category of case in which that is so is where the accused has the financial means to engage legal representation but decides not to incur the expense. It is true that, in the context of the current level of legal fees, it is arguable that no accused should be required to devote a substantial part of his possessions to obtaining legal representation in resisting a prosecution for an alleged offence of which the law presumes him to be innocent. Nonetheless, it appears to me that it cannot be said that a trial is unfair by reason of lack of legal representation in a case where the accused possesses the means to obtain such representation but elects not to utilize them. Finally, it is arguable that there are categories of criminal proceedings where inability to obtain legal representation would not have the effect that the trial of an accused person was an unfair one. For example, there is much to be said for the view that proceedings before a magistrate or judge, without a jury, for a non-serious offence [eg where there is no real threat of deprivation of personal liberty: see *Argersinger v Hamlin* (1972) 407 US at 37–8, 40] would not be rendered inherently unfair by reason of inability to obtain full legal representation. It is, however, unnecessary to pursue that question for the purposes of the present case where the trial was a jury trial of alleged offences which were, by any standards, serious. It appears to me to be manifest that, in the absence of exceptional circumstances, the inability of an indigent accused to obtain legal representation from any source will have the consequence that such a trial is unfair. At least in relation to such a trial, I would echo the conclusion of the United States Supreme Court in *Gideon v Wainwright* [(1963) 372 US, at 344]: 'reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.'

…

It follows from the foregoing that, as a general proposition and in the absence of exceptional circumstances, a trial of an indigent person accused of serious crime will be unfair if, by reason of lack of means and the unavailability of other assistance, he is denied legal representation.

There was nothing exceptional in the circumstances of the present case which would preclude the applicability of that general proposition. That being so, the applicant has not had a fair trial. His conviction and sentence of imprisonment without such a trial necessarily constituted a miscarriage of justice. It remains to be considered whether the case is one in which the proviso contained in s 568(1) of the Crimes Act 1958 (Vict) can be applied for the reason that it appears that '*no substantial* miscarriage of justice has actually occurred' (emphasis added). In my view, it is not.

...

Special leave to appeal should be granted and the appeal allowed. The order of the Court of Criminal Appeal of Victoria refusing leave to appeal to that court should be set aside. In lieu thereof, it should be ordered that leave to appeal to that court be granted, the appeal allowed, the conviction quashed and a new trial ordered.

[**Toohey** and **Gaudron JJ** in separate judgments agreed in general with the reasoning of **Mason CJ**, **McHugh** and **Deane JJ** and the orders made. **Dawson** and **Brennan JJ** both dismissed the appeal.]

Verdicts

CHAPTER 29

ALTERNATIVE VERDICTS

29.1 Chapter 27 noted how offences overlap, so that a prosecutor often has discretion as to what charge is brought against an accused: see 27.27. The overlapping of offences sometimes makes it possible for a court to convict an accused of a different offence from that which has been charged.

29.2 The issue of an alternative verdict can be raised by the prosecution, the defence or the judge. It is not necessary to instruct the jury in every case about all alternative verdicts. However, if an issue about an alternative verdict is presented by the evidence, then it should be put to the jury. If counsel has not raised that issue, then it is the responsibility of the judge to do so: *R v Rehavi* [1999] 2 Qd R 640.

A jury should not consider an alternative verdict unless there is agreement that the accused is not guilty of the greater offence: see the majority ruling in *Stanton v R* [2003] HCA 29; (2003) 198 ALR 41. If some members of the jury believe that the accused is guilty of the greater offence but others would only convict on an alternative verdict, the jury should be discharged. Alternative verdicts should not be used as compromise solutions to genuine disagreements.

Queensland

29.3 In Queensland, the range of alternative verdicts in trials on indictment is governed by the Criminal Code (Qld) (Code (Qld)) ss 575–589. Summary proceedings are governed by a common law principle to the effect that there may be conviction for a lesser offence which is necessarily included in the offence charged.

29.4 The following discussion deals only with some of the main features of the Code.

1. A general provision authorises conviction of a lesser offence that is an element of the offence charged: Code (Qld) s 575. This permits, for example, a conviction of common assault (s 335) on a charge of assault occasioning bodily harm (s 339), or a conviction of unlawfully causing bodily harm (s 328) on a charge of unlawfully causing grievous bodily harm: s 320. Under s 575, the indictment must be one which involves 'circumstances of aggravation' and the lesser offence must lack the circumstances of aggravation.

2. On a charge of a homicide offence, there can be a conviction of certain specified lesser offences relating to the death, but not of any other offence: Code (Qld) ss 576–577. Importantly, a conviction of manslaughter (s 310) is permitted on a charge of murder: s 305.
3. The interrelationship of sexual offences is covered by Code (Qld) s 578. On charges of various sexual offences, it is possible to have a conviction for a wide variety of other sexual offences. The range of alternatives allows the prosecution to overcome difficulties in proving penetration where this is an element of the offence charged, or lack of consent in cases where the charge concerns a child. For example, on a charge of rape (s 349), there can be a conviction for sexual assault (s 352) or indecent dealing with a child under 16: s 210(1).
4. On a charge of an offence for which an intention to cause a specific result is an element, there may be a conviction of an offence of simply causing that result, albeit unintentionally: Code (Qld) s 579(2). For example, there could be a conviction of unlawfully causing grievous bodily harm (s 320) on a charge of intentionally causing grievous bodily harm: s 317.
5. The interrelationship of offences involving misappropriation of property is dealt with in Code (Qld) s 581. On charges of stealing (s 398), fraud (s 408C) and receiving (s 433), there can be convictions of another of these offences, if the other offence is established on the evidence. See also s 580 on offences involving injury to property.
6. On a charge of a completed offence, there can be a conviction of attempting to commit that offence, or attempting to commit any other offence which would be an alternative verdict on the charge: Code (Qld) s 583(1).

Where the evidence establishes a greater offence than that which has been charged, there can still be a conviction on the charge. That charge has been proved and it is immaterial that the evidence may also establish some other, more serious offence. This is confirmed by s 584.

Western Australia

29.5 A simple scheme applies in Western Australia by virtue of the Criminal Code (WA) (Code WA)) Ch IIA — Alternative offences. A person charged with an offence cannot be convicted of any other offence instead of that offence unless either the other offence is charged as an alternative or Ch IIA provides otherwise: Code (WA) s 10A.

If a written law that creates an offence provides an alternative to that offence then a person can be convicted of the alternative offence: s 10B. An example is provided by the offence of stealing — Code (WA) s 378:

> Any person who steals anything capable of being stolen is guilty of a crime, and is liable, if no other punishment is provided, to imprisonment for 7 years.
>
> Alternative offence: s 382, 383, 388, 390A, 409, 414, 428 or 429.

Chapter IIA provides alternatives in cases of attempt (ss 10D, 10E, 10H), conspiracy (s 10F) and procuring: s 10G. A person charged with attempting an offence, except attempted murder, may be convicted of committing the principal offence and a person charged with committing the principal offence may be convicted of an attempt. The same rule applies in respect to any offences specified as alternatives to the principal offence. Similar rules apply in

respect of a conspiracy or procuring an offence. A person may also be convicted of being an accessory after the fact to any offence: Code (WA) s 10D.

DOUBLE JEOPARDY

Principle against double jeopardy

29.6 It is a general principle of common law that a person should not be subject to 'double jeopardy'. Double jeopardy occurs when a person is put at risk on more than one occasion of being convicted and punished *either* for the same offence *or* for offences respecting the same wrongful conduct.

The concept covers prosecuting a person again after the first prosecution has failed; for example, responding to an acquittal on a murder charge by prosecuting again for murder or for another homicide offence such as manslaughter.

The concept of double jeopardy also covers multiple convictions for the same wrongful conduct, whether at the same trial or at successive trials; for example, convictions of both murder and manslaughter with respect to the same homicide, or convictions of both driving while intoxicated and driving with blood alcohol above the prescribed limit with respect to the same incident of drink driving: Transport Operations (Road Use Management) Act 1995 (Qld) s 79; Road Traffic Act 1974 (WA) ss 63–64AA.

29.7 The principle against double jeopardy reflects a number of values. First, as has been said in the High Court, finality is important for any system of justice: *R v Carroll* [2002] HCA 55; (2002) 213 CLR 635 at 29.25C. A guarantee of finality underpins the authority of the court. It also avoids the oppression of a system in which it is never known whether a matter is at an end. In addition to providing finality, the principle against double jeopardy helps ensure that the accused has full notice of the case to be answered and is not lured into making statements in answer to one charge which would damage the defence to an as yet undisclosed charge. It also protects the accused against multiple punishment and stigmatisation when the legislation has created more than one offence to cover essentially the same ground.

29.8 Double jeopardy must be distinguished from reopening issues through an appeal. There will sometimes be an error made at trial which needs correction through an appeal. In Queensland and Western Australia, rights of appeal for the accused are much more extensive than for the prosecution: see 30.8–30.9, 30.14. The greater restrictions on the prosecution may reflect the influence of the principle against double jeopardy. Nevertheless, double jeopardy does not occur when, for example, an appeal against conviction is successful but, instead of an acquittal being entered, a new trial is ordered. In this circumstance, it would be misleading to say that the accused has been put at risk a second time. The first proceedings have been invalidated at the request of the accused and the trial process commences anew.

29.9 The principle against double jeopardy has been manifested in a number of specific rules at common law. These specific rules have been subsumed under statutory provisions in Queensland and Western Australia. The wider principle against double jeopardy is still relevant because it captures some forms of double jeopardy which do not fall within the specific rules.

Section 17 of the Codes

29.10 Section 17 of the Codes provides that it is a defence to show that there have been certain previous proceedings which constitute a bar to the current prosecution. It is a statutory version of common law rules relating to the pleas of *autrefois convict* and *autrefois acquit*. Essentially, these are pleas that the accused has already been convicted or acquitted of the offence now charged or of another offence dealing with the core elements of the present charge.

In cases where s 17 applies, special pleas can be made at the commencement of the trial: Code (Qld) s 598(1)(c)–(d); Criminal Procedure Act 2004 (WA) s 126(1)(c).

29.11 Section 17 is designed to deal with forms of double jeopardy that are manifest in the technical relationship between offences. It covers ground lying at the centre of the concept of double jeopardy.

Section 17 builds on the rules relating to alternative verdicts on a charge. These rules can sometimes permit conviction for other offences than that charged: see above, **29.3–29.5**. The language of s 17 is cumbersome but its basic message is simple — where offences are related through the rules on alternative verdicts, then a verdict of guilty or not guilty on a charge of one offence precludes a subsequent conviction for the other. For example, murder and manslaughter fall within the scope of s 17 because they are related through the alternative verdict rules: there can be a conviction of manslaughter on a charge of murder. Consequently, a verdict on a charge of either murder or manslaughter precludes a subsequent conviction for either offence in relation to the same homicide.

The double jeopardy rules have been amended in Queensland to permit retrials following acquittals for certain very serious offences under some exceptional circumstances: see **29.14–29.15**. Similar legislation has been enacted or is under consideration in other jurisdictions.

29.12 The language of s 17 is cumbersome because it deals separately with two issues. The two parts of the section will here be called its 'arms'.

The first arm of s 17 provides that it is a defence to show that the accused has already been convicted or acquitted on a charge on which there might have been a conviction of the offence which is now charged. This prevents conviction of an offence for which there has previously been an acquittal or which would have been an alternative verdict in earlier proceedings. The main relevance of the rule is to stop the prosecution proceeding on a lesser charge following an acquittal on a more serious charge: for example, a manslaughter prosecution following an acquittal of murder. The lesser offence should have been raised as a possible alternative verdict at the original trial. It should not be pursued afterwards when the accused can reasonably expect that the matter is finished.

The second arm of s 17 provides that it is a defence to show that the accused has already been convicted or acquitted of an offence for which there might be a conviction on the present charge. This deals with the situation where there has been a prior verdict relating to an offence for which there could be a conviction as an alternative verdict on the present charge. The main relevance of the rule is to stop the prosecution pursuing a more serious charge after it has already secured a conviction on a less serious charge; for example, a murder prosecution following a conviction of manslaughter. The prosecution should charge the more serious offence in the first instance. The accused is entitled to know from the beginning the full case which must be answered and make decisions in respect of the defence accordingly. Moreover, the accused otherwise could not know when the matter was finished.

29.13 The Code (WA) s 17 covers all offences, whether the trials occur on indictment or by prosecution notice.

In Queensland, the end result is similar but the route is more complicated. The terms of the Code (Qld) s 17 apply to current proceedings on any 'charge', which applies to complaints as well as indictments. For prior proceedings, however, reference is made only to indictments. This leaves a gap when there were prior summary proceedings. For discharges by magistrates, the gap is covered by the Code (Qld) s 700 and the Justices Act 1886 (Qld) s 149. These sections provide that when a complaint is dismissed, a 'certificate of dismissal' can be issued which is a bar to any further prosecution for 'the same matter against the same person'.

29.14 In Queensland, the double jeopardy rules were amended in 2007. Sections 678B and 678C of the Code (Qld) provide that, under certain exceptional circumstances, the Court of Appeal may order the retrial of an acquitted person on the application of the Director of Public Prosecutions. For this purpose, a person must have been totally acquitted of any offence. A retrial cannot be ordered when the person was convicted of a lesser offence: s 678A(2).

Section 678B(1) provides for the retrial of a person acquitted of *murder* if the Court of Appeal is satisfied that, first, there is 'fresh and compelling' evidence and, second, a retrial would be in the interests of justice:

- 'Fresh' evidence is defined as evidence that was not adduced in the previous proceeding and that could not have been adduced with the exercise of reasonable diligence: s 678D(2).
- 'Compelling' evidence is defined as evidence that is reliable, substantial and highly probative: s 678D(3).
- Section 678D(4) further provides:

> Evidence that would be admissible on a retrial … is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.

This provision would apply where scientific advances have made new categories of expert evidence admissible.

Section 678C(1) provides for the retrial of a person acquitted of a '*25 year offence*' if the Court of Appeal is satisfied that, first, the acquittal was 'tainted'; and, second, a retrial would be in the interests of justice.

- A '25 year offence' means one punishable by imprisonment for life or for 25 years or more: s 678.
- An acquittal is 'tainted' if:
  - — the accused or another person has been convicted of an 'administration of justice offence' in relation to the earlier proceedings; and
  - — it is more likely than not that the accused would have been convicted but for that offence.

An 'administration of justice offence' is one under the Code Ch 16: s 678. The category includes corrupting judges or jurors, perjury, and attempting to pervert the course of justice.

In determining whether a retrial would be in the interests of justice, the court must be satisfied that a fair retrial is likely: s 678F(2). Consideration must also be given to the passage

of time and to whether the police and prosecutors have acted with reasonable diligence and expedition: s 678F(3).

29.15 The amendments in Queensland qualify the double jeopardy rules but only for exceptional circumstances where the values protected by these rules might appear clearly outweighed by the public interest in convicting offenders. The scheme is confined to the most serious offences where the public interest in obtaining a conviction is strongest. Moreover, it allows for retrial only where the costs of adhering to the double jeopardy rules are particularly high — where there is fresh and strong evidence of guilt or an acquittal has been obtained by unlawful means. Even where these conditions are satisfied, retrial may be excluded where the right to a fair trial has been impaired (for example, because of the prejudicial effect of delay or publicity) or where the passage of time would make a retrial oppressive or where police or prosecutors are at fault for the original acquittal or for not moving more expeditiously to rectify it.

The rule against multiple punishments

29.16 Many closely related offences escape the rule in s 17. However, some are caught by the rule against multiple punishments: Code (Qld) s 16 and Acts Interpretation Act 1954 (Qld) s 45; Sentencing Act 1995 (WA) (Sentencing Act (WA)) s 11. This rule does not bar multiple proceedings or, on its face, multiple convictions. It does, however, prevent a person being punished more than once for the same wrongful conduct.

There is an exception, in both Queensland and Western Australia, when someone has been convicted of an offence against a person and the victim subsequently dies from the injury. The previous conviction does not limit criminal liability for causing the death: Code (Qld) s 16; Sentencing Act (WA) s 11(3).

29.17 In Queensland, s 16 provides that an accused cannot be punished twice for 'the same act or omission'. This provision does not prohibit punishments for different offences arising from different aspects of the same conduct. For example, a particular incident of driving may give rise to a variety of offences relating to particular circumstances of that driving. In *Tricklebank v R* [1994] 1 Qd R 330, it was held that there could be punishment for the offences both of driving with blood alcohol above the prescribed limit and of dangerous driving (perhaps even with the intoxication operating as an aggravating feature of the dangerous driving, although the judges were divided on this issue). Presumably, there could not be separate punishment for the offences of driving while intoxicated and of driving with blood alcohol above the prescribed limit. For both these offences, the act is wrongfully driving after drinking. The offences are drafted separately, not to punish different acts, but in order to allow the same act to be proved in different ways.

29.18 In Western Australia, the rule applies whenever the evidence necessary to establish one offence is the same evidence necessary to establish another offence: Sentencing Act (WA) s 11(1). This provision replaced a section in the Code (WA) which had been drafted in similar terms to s 16 of the Code (Qld). Its effect may differ from that of the Queensland provision because it could permit convictions for both driving while intoxicated and driving with blood alcohol above the prescribed limit, because different evidence could be used for the two offences.

29.19 In Western Australia, it is clear that the rule against multiple punishments applies to sentences only and does not prevent multiple convictions being recorded. The Sentencing Act (WA) s 11(1) expressly provides that a person may be *convicted* of more than one offence but is not to be *sentenced* for more than one. Complications can arise when the one course of criminal conduct gives rise to separate offences such as when one course of dangerous driving results in multiple deaths. In *Eves v The State of Western Australia* [2008] WASCA 7; 49 MVR 259, Steytler P settled a difference of approach in the Court of Appeal as follows (at 6–9):

> There seem to me to be two applicable principles.
>
> The first is that there is no requirement that concurrent terms be imposed for multiple offences constituting one transaction or a continuing episode. There is a general rule, or a 'good working rule' (*Ruane v The Queen* (1979) 1 A Crim R 284), that, when a number of offences arise out of one transaction or a continuing episode, any terms of imprisonment should be made concurrent. However, recent cases have repeatedly made it clear that a sentencing judge must, in each case, consider whether the application of that general rule would result in an appropriate measure of the total criminality involved in the conduct. If it would not, then the 'rule' should not be applied. It is enough to refer, in this respect, to *R v Faithfull* [2004] WASCA 39; (2004) 142 A Crim R 554 [28] (McLure JA with whom Malcolm CJ & Wheeler J agreed) and the cases there referred to.
>
> The second applicable principle is the common element principle identified in *Pearce*.
>
> There is no dispute, in this case, concerning the applicability of the first of these two principles. The preponderance of recent authority in this State and elsewhere supports the proposition that, in cases involving multiple offences arising out of the one motor vehicle accident, it is open to a sentencing court to order at least some degree of cumulation: *R v Penn* (1994) 19 MVR 367, 368–9; *R v Skrill* [2002] NSWCCA 484; (2002) 38 MVR 175 [69]–[75]; *R v Plumb* [2003] NSWCCA 359 [12]–[21]; *Kay* [56]; *Kennewell v Rand* [2006] ACTCA 10 [55] and *Taylor* [27].

29.20 In Queensland, there is some uncertainty about the reach of s 16 of the Code (Qld). The main provision in s 16 states that a person 'can not be twice punished' which, on its face, does not prevent multiple convictions being recorded. Section 16 was interpreted as allowing the recording of multiple convictions in *R v Kolodziej* [2008] QCA 184 at [51]. On the other hand, the exception in s 16 respecting liability for a subsequent death refers to conviction rather than sentence. Moreover, Code (Qld) s 598(1)(e) provides for a special plea where:

> … the person has already been tried and convicted or acquitted of an offence committed or alleged to be committed under such circumstances that the person cannot under the provisions of the Code (Qld) be tried for the offence charged in the indictment.

This provision refers to a prohibition on trial rather than sentence. In *Carroll* (29.25C) at [16], it was suggested that the provision might operate in cases where the Code (Qld) s 16 applies. In the result, the reach of s 16 is uncertain.

Abuse of process

29.21 The doctrine of abuse of process can sometimes be used to capture instances of double jeopardy which escape the statutory provisions; on the concept of abuse of process, see 27.30, 27.39–27.44. Oppression of the accused is a form of abuse of process potentially applicable to instances of double jeopardy. An example is *R v Viers* [1983] 2 Qd R 1. In that case, police searching the house of the accused found two quantities of drugs — a small quantity and

a larger quantity which could have been intended for sale. The accused was charged with simple possession and pleaded guilty. The charge was wide enough to cover both quantities. Nevertheless, the accused was subsequently charged with possession for a specified purpose, a charge which related to the larger quantity. The indictment was drafted in a way which enabled it to escape the double jeopardy rule in the Code (Qld) s 17. Nevertheless, the prosecution was stayed as an abuse of process. It was pointed out that the accused might well have decided not to plead guilty to the first charge if he had notice of the more serious charge.

29.22 Another form of abuse of process is attempting to re-litigate essentially the same matter. Section 17 takes care of most such cases. The doctrine of abuse of process may provide a remedy in other cases where the charges concern notionally different factual matters (which is why s 17 does not apply) but the substance of the case is the same. An example is *Walton v Gardiner* (1993) 177 CLR 378; 112 ALR 289 at **27.53C**. One of the concerns in that case was that proceedings were brought in relation to a death allegedly arising from a program of treatment, when there had been earlier unsuccessful proceedings relating to other deaths allegedly arising from the same program of treatment. The substance of the complaints in the two sets of proceedings was the same. See also *Rogers v R* (1994) 181 CLR 251; 123 ALR 417, where an attempt had been made to evade a ruling that certain confessions were involuntary by laying charges of other offences covered by the same confessional statement. It was held that this was an abuse because it was an attempt to re-litigate the issue of voluntariness which had already been decided.

29.23 The issue of re-litigation has also arisen in cases where an accused who gave evidence in his or her own defence, denying guilt, was acquitted and then charged with perjury because of that denial: *Carroll* at **29.25C**. The High Court ruled that a perjury charge cannot be pursued because the prosecution would be making a second attempt to win effectively the same case. The High Court stressed the value of finality in criminal proceedings. In its view, the value of finality means that a verdict of acquittal has to be accepted as 'incontrovertibly correct', with indirect as well as direct challenges being barred. Perhaps most controversially, the High Court held that a perjury prosecution could not be pursued despite there being fresh evidence to support the charge, regardless of the cogency and weight of that evidence.

29.24 *Carroll* at **29.25C** was a Queensland case involving a charge of murder. The 2007 amendments to the double jeopardy rules (see **29.14–29.15**) were in response to the *Carroll* judgment. In a similar case, a retrial for murder could now be ordered by the Court of Appeal under Code (Qld) s 678B(1), if there was determined to be fresh and compelling evidence and it would be in the interests of justice. However, the new scheme would still not enable a prosecution for perjury, despite the provision respecting 'tainted' acquittals in s 678C(1). This is because s 678C would require conviction of perjury before any retrial could be ordered.

29.25C

R v Carroll

[2002] HCA 55; (2002) 213 CLR 635; 194 ALR 1
High Court of Australia

Gleeson CJ and **Hayne J:**

1 In 1985, the respondent gave evidence on oath, at his trial for the murder of Deidre Maree Kennedy, denying that he had killed her. Despite his denial, the jury returned a verdict of guilty. On appeal, the Court of Criminal Appeal of Queensland concluded that, on the evidence led at trial, it was not open to a properly instructed jury to conclude beyond reasonable doubt that the respondent was guilty. Accordingly, the Court ordered that the conviction be quashed and directed that a verdict of acquittal be entered.[1]

2 More than 14 years after the respondent's trial for murder, he was indicted for perjury.[2] He was charged that 'in a judicial proceeding [namely, his trial for murder, he] knowingly gave false testimony to the effect that he … did not kill … Deidre Kennedy, and the false testimony touched a matter which was material to a question then depending in [his trial for murder]'. On his trial for perjury, the jury returned a verdict of guilty. On appeal to the Court of Appeal of Queensland, that Court concluded that the trial should have been stayed as an abuse of process and that, in any event, the verdict returned by the jury was unsafe and unsatisfactory.[3] The Court ordered that the respondent's conviction for perjury be quashed and a verdict of acquittal be entered.

3 The prosecution seeks special leave to appeal from those orders, seeking to contend that, contrary to the conclusion of the Court of Appeal, the trial for perjury should not have been stayed as an abuse of process and the verdict returned by the jury was not unsafe or unsatisfactory. Argument of the application for special leave was confined, in the first instance, to argument of the issue whether the respondent could or should have been prosecuted or tried for perjury.

4 After the indictment for perjury had been presented against the respondent, but before he was arraigned, he made application under s 592A of the Criminal Code (Q) ('the Code') seeking, among other things, a direction or ruling in relation to the quashing or staying of the indictment.[4] The primary judge (Muir J) recorded[5] the respondent's submission in this respect as being that 'where an accused person was acquitted of a criminal charge, the principles of res judicata or autrefois acquit prevented that person from being tried again in respect of the facts which constituted the offence [and that] [t]he offence of perjury … did not provide an exception to this rule, except where the accused person's evidence secured or may have secured the acquittal'. The primary judge concluded that[6] the doctrines of autrefois acquit and res judicata did not prevent the bringing of the perjury charge laid against the respondent and that[7] the trial should not be stayed.

5 The respondent pleaded not guilty, stood his trial, and the jury returned a verdict of guilty of perjury. The respondent was not arraigned, and therefore was not called on to plead, until after the primary judge had ruled that the doctrines of autrefois acquit and res judicata did not prevent the bringing of the perjury charge against the respondent. The only plea the respondent made was, therefore, a plea of not guilty; he did not enter a plea in bar and did not demur to the indictment.

6 Under the Code the respondent had no available plea in bar to the indictment for perjury and, as we have said, he made no plea other than a plea of not guilty. Rather, the question

was treated in the Court of Appeal, and in the application to this Court, as being whether there were grounds for the exercise of a discretion to stay his trial on the charge of perjury, as an abuse of process. This was said to depend upon a principle that the acquittal for murder was incontrovertible. The similarity of the evidence to be called and the factual inquiry to be made on the trial of the indictment for perjury to the evidence called and factual inquiry made on his trial for murder was said to reveal that the trial of the charge of perjury would controvert the acquittal for murder.

Autrefois acquit

7 It is, nonetheless, desirable to begin consideration of the present issue by considering the provisions of the Code relevant to a plea of autrefois acquit. Sections 17, 584, 598, 602 and 631 must all be considered in identifying the scope that the Code gives to autrefois acquit as a plea in bar. It is important to identify the field of operation of those provisions because autrefois acquit is a defence to a charge,[8] is a matter which must be determined before trial of the issues that are joined on a plea of not guilty to an indictment,[9] and tenders an issue for decision which does not call for any exercise of discretion. Either the plea in bar is made out, in which case the person indicted has a complete defence to the charge, or the plea in bar is not made out, in which case the person indicted may either contest the matter by entering a plea of not guilty or may formally admit it by entering a plea of guilty. It is only at this stage that any question of exercising discretion to stay the proceedings would arise.

8 …

[After setting out sections 16 and 17 of the Criminal Code (Qld), their Honours continued:]

These two provisions, taken together, can be understood as giving effect to at least some aspects of the rules commonly encompassed by the expression 'double jeopardy'.

9 The expression 'double jeopardy' can give rise to difficulty if the sense in which it is being used is not made clear. As was pointed out in *Pearce v The Queen*:[10]

> The expression 'double jeopardy' is not always used with a single meaning. Sometimes it is used to refer to the pleas in bar of autrefois acquit and autrefois convict; sometimes it is used to encompass what is said to be a wider principle that no one should be 'punished again for the same matter'.[11] Further, 'double jeopardy' is an expression that is employed in relation to several different stages of the criminal justice process: prosecution, conviction and punishment.

As was also pointed out in *Pearce*,[12] because double jeopardy is an expression used in connection with several different stages of the process of criminal justice and because there are other (sometimes competing) forces at work in the area, the treatment of double jeopardy has not always been clearly based on identified principles. As the criminal law has become more complex, it has become even more important to examine those principles upon which the disparate principles encompassed by the expression double jeopardy are based if it is said that one or more of those principles is engaged in a particular case.

10 Sections 16 and 17 of the Code are drawn in terms more apt to deal with less complicated cases of possible intersection between offences than sometimes are now encountered. The

complexity of criminal legislation, and the problems of double jeopardy to which it can give rise, are sufficiently exemplified by reference to various forms of statutory drug offences in which, for example, there may be separate offences of possessing prohibited drugs and supplying prohibited drugs, but the offence of supplying prohibited drugs can be constituted by having goods in possession for the purpose of supply.[13] The provisions of s 17 of the Code do not readily lend themselves to circumstances in which, for example, a person is acquitted of the offence of supplying drugs (where the allegation was that the offender had drugs in possession with intent to supply) and is then charged with possession of the drugs.

11 Section 17, in terms, deals with two kinds of case. First, where an accused has been tried on an indictment on which the accused might have been convicted of the offence later charged, the accused will have a defence to that later charge. Chapter 61 of the Code (ss 575–589) identifies the alternative offences of which an accused may be convicted upon an indictment. The second kind of case with which s 17 deals may be seen as the converse of the first: where the *second* indictment preferred against an accused is such that, on *that* indictment, the accused might be convicted of an offence of which he or she has already been acquitted or convicted.

12 Neither limb of s 17 had application in the present case. On the respondent's trial for murder, perjury was not a verdict open to the jury. On his trial for perjury, murder was not a verdict open to the jury.

13 Section 598 of the Code prescribes what is to be done if the accused person does not apply to quash the indictment or move for a separate trial of one or more counts on it. The accused 'must either plead to [the indictment], or demur to it on the ground that it does not disclose any offence cognisable by the court'.[14] Seven forms of plea are specified. The section provides that two or more pleas may be pleaded together except that the plea of guilty may not be pleaded with any other plea to the same charge.[15] Of the seven forms of plea for which s 598(2) provides, only those provided in pars (d) and (e), to the extent that each is premised upon an earlier acquittal, need be considered.

14 For the same reason that s 17 had no application in this matter, s 598(2)(d) of the Code could not have been engaged. It provides that one of the pleas available to an accused is that: 'the person has already been acquitted upon an indictment on which the person might have been convicted of the offence with which the person is charged, or has already been acquitted upon indictment of an offence of which the person might be convicted upon the indictment'. As has already been pointed out, on the respondent's trial for murder, perjury was not an available verdict and murder was not a verdict available on his trial for perjury.

15 Section 598(2)(e) provides that one of the pleas available to an accused person is: 'that the person has already been tried and convicted or acquitted of an offence committed or alleged to be committed under such circumstances that the person cannot under the provisions of this Code be tried for the offence charged in the indictment'. The juxtaposition of this provision with s 598(2)(d) reveals that s 17 of the Code is not to be understood as describing exhaustively the circumstances in which a plea in bar is available. Such a plea may also be made if the accused, having already been tried and convicted or acquitted of one offence, 'committed or alleged to be committed *under such circumstances* that the person cannot *under the provisions of this Code* be tried' for the offence charged in the later indictment.

16 It may be that s 598(2)(e) has operation only in cases where s 16 of the Code applies. That is, it may be that (unless the exception for cases where death is caused by the act or omission in question applies) s 598(2)(e) is engaged only where the accused would be twice punished for the same act or omission. That is not this case and the contrary was not suggested. No doubt this was because the acts which founded the charge of murder differed markedly from the act of allegedly false swearing which founded the charge of perjury.

17 Whether or not s 598(2)(e) is to be read as confined in its operation to cases to which s 16 applies, not only is it plain that s 16 was not engaged in this case, no other provision of the Code was suggested to provide that the murder with which the respondent had been charged was committed, or was alleged to be committed, under such circumstances that he could not under the provisions of the Code later be tried for perjury.

18 That being so, neither par (d) nor (e) of s 598(2) applied and the respondent had no plea in bar available under the Code.

19 As has been pointed out earlier, although the respondent's submissions to the primary judge were cast in terms apt to invoke a plea in bar ('principles of res judicata or autrefois acquit') the argument in the Court of Appeal, and in this Court, proceeded as if there had been an application for the exercise of a discretion to stay the proceeding as an abuse of process. The conclusion that there was no available plea in bar focuses attention upon why, that being so, the trial of the perjury charges should be stayed. What is it that constitutes the alleged abuse of process?

20 The answer proffered by the respondent to these questions is that having been acquitted of murder he should not now face a charge that he lied on oath when he denied killing Deidre Kennedy. The effect of trying him for the alleged perjury is, so it was submitted, to try again the issue which was central to his trial for murder and to controvert the verdict of acquittal entered after the trial and appeal. To understand the basis for the respondent's contention that the Court of Appeal is not shown to have erred in concluding that the trial for perjury should be stayed, it is necessary to refer to some fundamental considerations.

Some fundamental underpinnings of the criminal law

21 A criminal trial is an accusatorial process in which the power of the State is deployed against an individual accused of crime. Many of the rules that have been developed for the conduct of criminal trials therefore reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious. Blackstone's precept 'that it is better that ten guilty persons escape, than that one innocent suffer'[16] may find its roots in these considerations.

22 Many aspects of the rules which are lumped together under the title 'double jeopardy' find their origins not so much in the considerations we have just mentioned as in the recognition of two other no less obvious facts. Without safeguards, the power to prosecute could readily be used by the executive as an instrument of oppression. Further, finality is an important aspect of any system of justice. As the New Zealand Law Commission said in a recent report dealing with the possibility of statutory relaxation of the rule against double jeopardy in the case of acquittals procured by perjury or perversion of the course of justice,[17] the need to secure a conclusion of disputes concerning status is widely recognised, and the status conferred by

acquittal is important. The Commission quoted what was said by Lord Wilberforce in *The Ampthill Peerage*:[18]

> Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth … and these are cases where the law insists on finality.

23 It is, nonetheless, important to recall that the four considerations which we have mentioned (the imbalance of power between prosecution and accused, seriousness for an accused of conviction, prosecution as an instrument of tyranny and the importance of finality) are not the only considerations which find reflection in the criminal law system. At the very root of the criminal law system lies the recognition by society that some conduct is to be classified as criminal and that those who are held responsible for such conduct are to be prosecuted and, in appropriate cases, punished for it. It follows that those who are guilty of a crime for which they are to be held responsible should, in the absence of reason to the contrary, be prosecuted to conviction and suffer just punishment.

24 Reference to the general propositions we have mentioned is important not because the answer to the issues now being considered can be found by deductive reasoning which takes any or all of them as a premise but because they are values to which the criminal law can be seen to give effect. They are values that may pull in different directions. There are, therefore, cases in which a balance must be struck between them. To take only one obvious example, it is accepted that in order to acquit the innocent, some who are guilty will go unpunished. But conversely, to punish the guilty, some who are innocent will suffer the very real detriments of being charged and tried for an offence they did not commit. It follows that to argue from any one of the considerations we have identified to some rule of universal application is to invite error.

25 Until very recently it has been accepted as a basal tenet of the law that no person who has been acquitted of an offence should be required to stand trial again for the *same* offence.[19] That is not what was done in the present case. The respondent, having been acquitted of the charge of murder, was not indicted again on that charge. Nonetheless, some, but not all, of the facts which it would be necessary to prove to establish the charge of perjury brought against the respondent were facts which, together with other facts, constituted the elements of the offence of murder of which he had been acquitted. Common to both charges was the prosecution's allegation that the respondent had killed Deidre Kennedy. To establish the charge of murder other facts (particularly the intention with which the killing occurred) had to be established and those other facts were not at issue at the perjury trial. On the perjury trial the prosecution had to demonstrate that the respondent had given sworn evidence that he did not kill Deidre Kennedy and, of course, that formed no part of the proofs the prosecution had to make on the murder trial. What the prosecution had to prove at each trial was, therefore, not identical.

26 Nonetheless, the factual inquiries made at the two trials, in the end, came to focus upon the same issue — did the respondent kill Deidre Kennedy? At his trial for murder, the issue which was fought was whether it was the respondent who had killed her. The trial was conducted on the footing that there had been a murder. On his trial for perjury there appears to have been no controversy about the fact that the respondent had sworn that he had not killed Deidre Kennedy; again, the focus of factual inquiry was, did he kill her? In the course of argument in the Court of Appeal the prosecutor expressly acknowledged that the perjury case was conducted, in practical effect, as a retrial for murder.

27 The trend of authority in other common law jurisdictions may appear to favour the conclusion that a prosecution for perjury may proceed where the perjury alleged is that in a previous criminal trial the accused swore that he or she was not guilty of the offence then charged against him or her.[20] Certainly there are statements to be found in those cases which would support that view.

28 What principle or principles are engaged in such cases? It is necessary to begin consideration of them by recognising that they consider two fundamentally different issues. In many cases[21] the question has been whether evidence of what are alleged to be the accused's earlier crimes (for which the accused has stood trial and of which he or she has been acquitted) may be led as similar fact evidence in a later trial for a different offence. There the issue is not whether there can be a trial of the charge preferred in the later indictment but what evidence may be led in proof of that charge. Of the cases we have mentioned, it is only in *H M Advocate v Cairns*,[22] *R v Humphrys*,[23] *R v Moore*[24] and *Grdic v The Queen*[25] that the issues presented by a subsequent charge of perjury or perverting the course of justice have been considered directly.

…

Abuse of process

34 In *Humphrys*, the House of Lords was dealing with a case that was factually very similar to the later Canadian case of *Grdic*. In both cases, a person acquitted of a driving offence was later charged with perjury with respect to testimony given at the first hearing. Whereas, in *Grdic*, the Supreme Court of Canada dealt with the matter under the rubric of issue estoppel, the House of Lords did not accept that issue estoppel applied in criminal law. However, a number of their Lordships considered that, in an appropriate case, when a prosecution for perjury is merely a second attempt to secure a conviction on a criminal charge, the court has a discretion to stay the proceedings in the exercise of its inherent jurisdiction to prevent an abuse of its process. It was such a jurisdiction that was invoked in the present case.

Incontrovertibility of an acquittal

35 Analysis by reference to rules of preclusion does not lead to the conclusion that the respondent cannot be prosecuted for perjury. Indeed, the premise for invoking the court's discretio*n* to stay the prosecution for perjury appears to be an acceptance by the respondent that the prosecution was not precluded. Rather, the application for stay is to be understood as being based on what was said in *Rogers*[26] to be 'the need for decisions of the courts, unless set aside or quashed, to be accepted as incontrovertibly correct'. It is this, rather than now rejected notions of the applicability in criminal cases of the principles of issue estoppel,[27] which was said to warrant staying the prosecution of the respondent for perjury. Attention

must first be directed to the ambit and effect of the proposition that the verdict of acquittal at the first trial is to be treated as incontrovertibly correct. Only then will it emerge whether it is necessary to consider the nature or quality of the evidence that it is sought to adduce on the second trial, in this case, for perjury.

36 On its face the principle stated in *Rogers* appears closely related to principles of preclusion. The reference to incontrovertibility makes that plain. On examination, however, the principle may be thought to find its origins in rather broader and less precise notions than those which have been developed in the rules of preclusion. First, the principle is said to apply *because* issue estoppel has no place in the criminal law.[28] Secondly, it takes the form it does because autrefois acquit, although analogous to and founded in the same principles as issue estoppel, has a different and further operation than issue estoppel would have.[29]

37 The principle is stated in various ways. In *Garrett v The Queen*, Barwick CJ, with whose reasons Stephen, Mason and Jacobs JJ agreed, described[30] it as being that 'the acquittal may not be questioned *or called in question* by any evidence which, if accepted, would overturn or *tend to overturn* the verdict' (emphasis added). Reference to calling in question and tending to overturn give the principle great width: wider than may be thought to have been stated by the Privy Council in *Sambasivam v Public Prosecutor, Federation of Malaya*,[31] a case often referred to in this connection.

38 In Connelly *v Director of Public Prosecutions*[32] Lord Pearce said:

> A man ought not to be tried for a second offence which is manifestly inconsistent *on the facts* with either a previous conviction or a previous acquittal. And it is clear that the formal pleas which a defendant can claim as of right will not cover all such cases. Instead of attempting to enlarge the pleas beyond their proper scope, it is better that the courts should apply to such cases an avowed judicial discretion based on the broader principles which underlie the pleas. (emphasis in original)

39 His Lordship was speaking in a context in which the reference to a discretion was related to the inherent jurisdiction of a court to prevent oppression and abuse of process. By hypothesis, in a case of the kind his Lordship had in contemplation, the laying of a charge would constitute oppression and abuse of process, when viewed in the light of the considerations of double jeopardy which underlie a plea of autrefois acquit, even though such a plea is not available.

40 There are cases where a charge of an offence would be manifestly inconsistent on the facts with a previous acquittal, even though no plea of autrefois acquit is available. Since, in most cases of trial by jury, it will not be known why the accused was acquitted, and in many cases the reason may simply be that the jury had a doubt about whether the prosecution had established some element of the offence, the inconsistency, if it exists, will appear from a comparison of the elements of the new charge with the verdict of not guilty of the previous charge, understood in the light of the issues at the first trial.

41 The present case provides an example. The only element of the offence of murder that was in issue at the original trial of the respondent was whether he killed Deidre Kennedy. The perjury alleged at the second trial consisted of the respondent's falsely denying, on oath, that he killed Deidre Kennedy. The falsity of the testimony was claimed to be that he said he did not kill Deidre Kennedy whereas in truth he killed her. It was accepted in argument in this

Court that, although it was not expressly averred, it was necessarily implied in the perjury indictment that the respondent had killed the child.

42 In the present case, there was manifest inconsistency between the charge of perjury and the acquittal of murder. That inconsistency arose because the prosecution based the perjury charge solely upon the respondent's sworn denial of guilt. The alleged false testimony consisted of a negative answer to a question, asked by his counsel, whether the respondent killed the child. The fact that the question asked was whether the respondent killed Deidre Kennedy rather than whether he murdered her, or whether he was guilty, is immaterial. Discretionary decisions do not turn upon such differences. Once such manifest inconsistency appeared, then the case for a stay of proceedings was irresistible.

43 The prosecuting authorities considered that they had available to them further evidence which became available only after the first trial, and which, so it was argued, strengthened the case that the respondent had murdered Deidre Kennedy. Much of the reasoning of the Court of Appeal was addressed to an examination of the strength and cogency of the new evidence. In this respect the Court was strongly influenced by the reasoning in *Humphrys* where the evidence at a later perjury trial was substantially identical with the evidence given at the first trial, and a case where new and cogent evidence of guilt had emerged.

44 The Court of Appeal concluded that the further evidence adduced at the perjury trial was deficient and unsatisfactory, and that it added little to the original evidence, but it considered that examining the strength and cogency of the new evidence was crucial to the exercise of the discretion to stay the proceeding. In that respect, the reasoning of the Court of Appeal was unduly favourable to the prosecution. The inconsistency between the charge of perjury and the acquittal of murder was direct and plain. The laying of the charge of perjury, solely on the basis of the respondent's sworn denial of guilt, for the evident purpose of establishing his guilt of murder, was an abuse of process regardless of the cogency and weight of the further evidence that was said to be available.

45 The need for decisions of the courts, unless set aside or quashed, to be accepted as incontrovertibly correct is a principle which requires that it is the verdict of acquittal which should be incontrovertible. It is not necessary in this case to attempt to decide what may be the limits of the principle about incontrovertibility and, in any event, it would be unwise to attempt to do so. It is a proposition which has not been held to preclude persons other than the prosecution asserting in later proceedings that the person committed the crime of which he or she was acquitted at trial. (Hence the decisions about what standard of proof is to be applied in civil cases in which a crime is alleged.)[33]

46 In Rogers, a majority of the Court held that for the prosecution to tender in evidence at a later trial records of interview which had been held inadmissible in an earlier prosecution for other offences would constitute a direct challenge to the earlier determination of admissibility — a determination which, if not final when made on the voir dire, became final once verdicts of acquittal were returned.[34] That being so, the majority held that the tender would be an abuse of process. In *Rogers*, there had been a finding by the trial judge in the first trial that the records of interview were not made voluntarily. There was, therefore, a positive finding to which it could be said that effect should be given. The abuse of process identified by the majority could, therefore, be said to lie in the prosecution seeking to relitigate that finding and have the trial judge at the second trial conclude that the record of interview was not shown to have been made involuntarily.

47 Whether *Rogers* or *Garrett* should be understood as standing for some wider proposition need not be decided, although it may be accepted that there may be cases where a second prosecution is argued to be oppressive and an abuse of process, even though there is no direct inconsistency between the new charge and the earlier verdict. The circumstances that may constitute oppression or an abuse of process are various.[35] The discretionary considerations that may be relevant in dealing with them cannot be rigidly confined. Nevertheless, where it is said that the abuse lies in seeking to controvert an earlier verdict of acquittal, there appears much to be said for the view that it is necessary to direct attention to the elements of the offence of which the person was acquitted and the elements of the offence with which the person is later charged. Seldom, if ever, will considering whether the later charge controverts an earlier acquittal require attention to whether evidence which would be led at a second trial is new or persuasive.

48 To approach the question by directing attention to the elements of the two offences would recognise that the principle that an acquittal is incontrovertible is a principle founded in the finality of judicial proceedings[36] and that it is what is decided in litigation that is final. Directing attention to evidence given at an earlier trial may serve to detract attention from what it is that was decided.

49 To pursue what is thought to be the objectively correct outcome of criminal proceedings is inconsistent with finality. As the Law Commission of England and Wales recognised in its report on Double Jeopardy and Prosecution Appeals,[37] finality is a value which finds its roots in personal autonomy, and which serves to delineate the proper ambit of the power of the State by the State acknowledging[38] 'that it respects the principle of limited government and the liberty of the subject'.

50 Finality of a verdict of acquittal does not necessarily prevent the institution of proceedings, or the tender of evidence, which might have the incidental effect of casting doubt upon, or even demonstrating the error of, an earlier decision. There may be cases where, at a later trial of other allegedly similar conduct of an accused, evidence of conduct may be adduced even though the accused had earlier been charged with, tried for, and acquitted of an offence said to be constituted by that conduct. R v Z,[39] R v Arp[40] and R v Degnan[41] are cases of that kind. In such cases, the earlier acquittal would not be controverted by a guilty verdict at the second trial.

Conclusion

51 Proceedings on the indictment for perjury should have been stayed, as the Court of Appeal concluded. The prosecution inevitably sought to controvert the earlier acquittal on the charge of murder.

52 The Court of Appeal also concluded, after an examination of the evidence at the perjury trial, that the evidence was so lacking in weight and cogency that the jury should have acquitted the respondent. The Court has not heard argument on that aspect of the matter. In view of the conclusion expressed above the question does not arise for decision.

53 Special leave to appeal should be granted but the appeal should be dismissed.

[**Separate** judgments, also dismissing the appeal, were given by **Gaudron** and **Gummow JJ** and by **McHugh J**.]

Footnotes

1. *Ca*rroll (1985) 19 A Crim R 410.
2. Criminal Code (Q), s 123.
3. R *v Carroll* [2001] QCA 394 at [72].
4. Section 592A provides for applications for a direction or ruling to be made '[i]f the Crown has presented an indictment' and thus, for applications before a plea is made. One of the subject matters of an application is 'the quashing or staying of the indictment'.
5. *Carroll* (2000) 115 A Crim R 164 at 166 [10].
6. (2000) 115 A Crim R 164 at 169–70 [26].
7. (2000) 115 A Crim R 164 at 170 [27].
8. s 17.
9. ss 602, 631.
10. (1998) 194 CLR 610 at 614 [9].
11. *Wemyss v Hopkins* (1875) LR 10 QB 378 at 381 per Blackburn J.
12. (1998) 194 CLR 610 at 615 [14].
13. *Dodd & Dodd* (1991) 56 A Crim R 451; cf *EPA v Australian Iron & Steel Pty Ltd* (1992) 28 NSWLR 502.
14. s 598(1).
15. s 598(3).
16. Blackstone, *Commentaries*, (1769) (1966 reprint), bk 4, c 27 at 352.
17. Law Commission, *Acquittal Following Perversion of the Course of Justice*, Rep 70, March 2001.
18. [1977] AC 547 at 569.
19. Legislative inroads on that principle have been proposed in the United Kingdom. See United Kingdom, Law Commission, *Double Jeopardy and Prosecution Appeals*, (2001) Cm 5048.
20. *H M Advocate v Cairns* 1967 SLT 165; *Grdic v The Queen* [1985] 1 SCR 810; *R v Humphrys* [1977] AC 1. See also *R v Z* [2000] 2 AC 483; *R v Arp* [1998] 3 SCR 339; *R v Moore* [1999] 3 NZLR 385; *R v Degnan* [2001] 1 NZLR 280; *Dowling v United States* 493 US 342 (1989).
21. *R v Z* [2000] 2 AC 483; *R v Degnan* [2001] 1 NZLR 280; *Dowling v United States* 493 US 342 (1989).
22. 1967 SLT 165.
23. [1977] AC 1.
24. [1999] 3 NZLR 385.
25. [1985] 1 SCR 810.
26. (1994) 181 CLR 251 at 273 per Deane and Gaudron JJ.
27. *Rogers v The Queen* (1994) 181 CLR 251; cf *R v Wilkes* (1948) 77 CLR 511; *Mraz v The Queen [No 2]* (1956) 96 CLR 62; *R v Storey* (1978) 140 CLR 364.
28. (1994) 181 CLR 251 at 254 per Mason CJ, 278 per Deane and Gaudron JJ.
29. (1994) 181 CLR 251 at 278 per Deane and Gaudron JJ.
30. (1977) 139 CLR 437 at 445.
31. [1950] AC 458 at 479 per Lord MacDermott.
32. [1964] AC 1254 at 1364.
33. For example, *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170; 110 ALR 449.
34. *Rogers* (1994) 181 CLR 251 at 255 per Mason CJ, 269 per Brennan J, 279–80 per Deane and Gaudron JJ.
35. See, for example, *Walton v Gardiner* (1993) 177 CLR 378.
36. United Kingdom, Law Commission, *Double Jeopardy and Prosecution Appeals*, (2001), Cm 5048 at par 4.2.

37. (2001), Cm 5048 at par 4.13.
38. (2001), Cm 5048 at par 4.17.
39. [2000] 2 AC 483.
40. [1998] 3 SCR 339.
41. [2001] 1 NZLR 280.

Appeals

CHAPTER 30

JURISDICTION OF APPEAL COURTS; PARDONS

30.1 The right to appeal against an adverse judgment was not recognised in the early common law. As a result, an appeal is said to be entirely a creature of statute. This chapter examines procedures for appealing decisions in criminal cases and some issues that arise.

Separate appeal schemes operate depending on the court in which the offence was tried. In both Queensland and Western Australia, the line is drawn between offences tried on indictment and offences tried summarily.

The appellate schemes of the states are applicable to Commonwealth offences committed within their boundaries: Judiciary Act 1903 (Cth) (Judiciary Act (Cth)) s 68(2).

30.2 Appellate jurisdiction in relation to trials on indictment is exercised in Queensland and Western Australia by the Court of Appeal: Criminal Code (Qld) (Code (Qld)) s 668D; Criminal Appeals Act 2004 (WA) (Criminal Appeals Act (WA)) Pt 3.

Appellate jurisdiction in relation to summary trials differs between the two states:

- In Queensland, appeals from Magistrates Court decisions in summary matters are heard by a District Court judge: Justices Act 1886 (Qld) s 222(1). The appeal is conducted by way of a new hearing on the original evidence or, with leave, on new evidence: s 223. There is no provision for any further appeal by either of the parties although the judge may refer any question of law involved in the decision to the Court of Appeal. If so, the decision will then be 'affirmed amended altered or reversed' by the Court of Appeal: s 227. In addition, the prosecution in a case involving a summary trial of an indictable offence can appeal against a sentence directly to the Court of Appeal: Code (Qld) s 669A(1)(b). If the defendant also appeals against conviction in such a case, the whole proceedings take place in the Court of Appeal: Code (Qld) s 669A(6).
- In Western Australia, appeals from Magistrate Courts in summary matters are heard by a Supreme Court judge: Criminal Appeals Act (WA) Pt 2. Leave must be granted for each ground of appeal: see 30.11. The court may allow, dismiss or vary the appeal. A decision by a judge on an appeal is subject to an appeal to the Court of Appeal: Criminal Appeals Act (WA) s 16.

30.3 The High Court may hear appeals from state Supreme Courts, including Courts of Appeal: Constitution s 73(ii); Judiciary Act (Cth) ss 35, 35AA. The High Court also has appellate jurisdiction in relation to Commonwealth offences. In such cases, an appeal may be made directly to the High Court, bypassing the state Court of Appeal: Judiciary Act (Cth) s 35(1)(b). In practice, it is most unlikely that the High Court would grant special leave in respect of a judgment that had not been the subject of an earlier appeal in the state court.

All appeals to the High Court require special leave, granted only in exceptional circumstances. In considering whether to grant leave, the High Court is directed to have regard to whether the application relates to a question of law that is of public importance or in respect of which there have been differences of opinion and whether the interests of the administration of justice, either generally or in the particular case, require consideration of the case: Judiciary Act (Cth) s 35A. The High Court will usually seek some general question of law or principle and will not readily be persuaded to hear cases where the only question is whether the particular conviction was correct.

30.4 Time limits apply to appeals, although extensions can be granted:

- In Queensland, the relevant period for notice of appeal is one calendar month: Code (Qld) s 671; Justices Act 1886 (Qld) s 222(2)(a)(i).
- In Western Australia, the time for appealing against a decision of a Magistrates Court is 28 days: Criminal Appeals Act (WA) s 10(3). The time for appealing to the Court of Appeal is 21 days: ss 17(3), 28(3).
- Applications for special leave to appeal to the High Court must be commenced within 28 days: High Court Rules 2004 r 41.02.1.

30.5 There is, generally, only one opportunity at each level of appeal. A court which has heard and dismissed an appeal against conviction has no jurisdiction to grant leave to appeal another time against the same conviction: *Grierson v R* (1938) 60 CLR 431; *R v Nudd* [2007] QCA 40. This is so even if the application to appeal is based on fresh evidence: *R v Ali* [2008] QCA 39. The restriction is said to be because appellate jurisdiction is entirely statutory and no statute expressly provides for multiple appeals. There is also the principle of finality of litigation.

Nevertheless, courts which have dismissed an application for leave to appeal have sometimes entertained another application for leave: see, for example, *R v Pettigrew* [1996] QCA 235; [1997] 1 Qd R 601. In *Pettigrew*, the court stressed the exceptional circumstance that the earlier application had been dismissed on a misunderstanding about the nature of the order (a sentence) appealed against.

There can be what in effect is an additional appeal if a petition for a pardon is referred to the Court of Appeal: Code (Qld) s 672A; Sentencing Act 1995 (WA) (Sentencing Act (WA)) s 140. See the discussion at **30.7**.

30.6 The Governor of a State has the power to issue a pardon for an offence: Code (Qld) ss 18, 672A; Sentencing Act (WA) s 137. The grant of a pardon is called the exercise of 'the royal prerogative of mercy'. The effect of a pardon is to relieve the convicted person of any punishment or other consequences of the conviction but not to quash the conviction itself: Code (Qld) s 677; Sentencing Act (WA) s 138. For Commonwealth offences, see the power of the Governor-General under Crimes Act 1914 (Cth) s 21D.

The pardoning power can be used not only to 'forgive' an offender but also to correct a miscarriage of justice.

30.7 When an application for a pardon has been made, the case may be referred to the Court of Appeal: Code (Qld) s 672A; Sentencing Act (WA) s 140. The reference may be made in Queensland by the Attorney-General or the Director of Public Prosecutions, and in Western Australia by the Attorney-General. Either a whole case may be referred or a point arising from a case may be sent for an advisory opinion. There is no such reference power for Commonwealth offences. References to state Courts of Appeal have been taken to be available for Commonwealth offences by virtue of the Judiciary Act (Cth) s 68(2): *Martens v Commonwealth of Australia* [2009] FCA 207; 253 ALR 457.

The most common way for the executive to take action on a pardon petition is to refer the whole case to the Court of Appeal. This can occur even if a regular appeal has already been heard and dismissed. There are no restrictions on the number of references that can be made.

When a whole case is referred, it is heard and determined as if it were an appeal. This does not mean that every part of the case must be re-examined. The court will focus on the issues raised in the petition. The court has the same powers as in a regular appeal. The original conviction can therefore be quashed and an acquittal entered or a new trial ordered. A decision can also be the subject of an appeal to the High Court. An example is *Mallard v R* [2005] HCA 68; (2005) 224 CLR 125; 222 ALR 236 at 30.36C.

ENTITLEMENT TO APPEAL

Queensland

30.8 A person convicted on indictment in Queensland can appeal on several grounds:

1. There can be an appeal as of right on questions of law: Code (Qld) s 668D(1)(a).
2. There can be an appeal with the leave of the appeal court on other matters relating to the conviction, including questions of fact and of mixed law and fact: Code (Qld) s 668D(1)(b). Questions of legal status (for example, 'was the driver licensed?') or legal characterisation (for example, 'was the publication obscene?') provide examples of questions of mixed law and fact: see 13.13–13.16.
3. There can also be an appeal against sentence with leave: Code (Qld) s 668D(1)(c).

30.9 The prosecution has restrictive rights of appeal in relation to a trial on indictment. The prosecution cannot appeal against an acquittal but can appeal against a sentence or a stay of proceedings: Code (Qld) s 669A(1)–(1A). In those instances, the prosecution has a right to appeal and leave to appeal is not required. The gap in the prosecution's rights of appeal is partly covered by the provisions for reference opinions: Code (Qld) s 669(2)–(2A). These provisions can be invoked when a disputed ruling of law has led to an acquittal or discharge. The Attorney-General may refer the point of law to the Court of Appeal. The court issues an advisory opinion on the question of law alone. The opinion does not affect the verdict: s 669(5). The court may indicate that the trial judge made a wrong ruling on a matter of law, clarifying the law for the future, but the actual verdict in the case remains.

30.10 There are more generous rights of appeal for offences tried summarily. Generally, either the defendant or the prosecution can appeal. The grounds of appeal can include matters of both law and fact and an appeal is permitted as of right: Justices Act 1886 (Qld) s 222(1)–(1A). However, there is a restriction on the prosecution's rights of appeal in relation to indictable offences tried summarily. For these offences, the prosecution may appeal only against sentence or an order for costs: s 222(2)(b).

Western Australia

30.11 In Western Australia, appeals to a Supreme Court judge or to the Court of Appeal can only proceed if leave is granted: Criminal Appeals Act (WA) s 9(1). Each ground of appeal must be considered separately and a judge must not give leave unless satisfied that the ground has a reasonable prospect of succeeding: ss 9(2), 27(2). In *Samuels v Western Australia* [2005] WASCA 193; (2005) 30 WAR 473 at [56], the court held:

> The ordinary meaning of the words, taken in their context (which includes the legislative purpose) must accordingly be taken to mean that a ground is required to have a rational and logical prospect of succeeding; that is, it would not be irrational, fanciful or absurd to envisage it succeeding in that forum; in effect, that it has a real prospect of success. However, it is important to bear in mind that, because the test is directed to each ground, it seems that the answer to the question whether leave to appeal is or is not granted will not involve any consideration of whether, if the ground of appeal succeeds, the error in question has led to a substantial miscarriage of justice. That issue is left for determination on the appeal proper.

30.12 Either party may appeal against a Magistrates Court decision on the grounds that the court made an error of law or fact or both, acted without or in excess of jurisdiction, imposed a sentence that was inadequate or excessive, or that there has been a miscarriage of justice: Criminal Appeals Act (WA) s 8.

30.13 A person convicted on indictment may appeal against the conviction, sentence and the grant or refusal of any order consequent on conviction: Criminal Appeals Act (WA) s 23.

The prosecution has more limited rights. There is a general right of appeal against sentence: s 24(1). There are rights to appeal against a refusal of consent to the discontinuance of the prosecution of the charge, a ruling that the court has no jurisdiction to try the offence, an order for a permanent stay of proceedings or for an adjournment of proceedings: s 24(2)(a)–(d). There is also a right to appeal against a judgment of acquittal (other than a judgment of acquittal on account of unsoundness of mind) either:

1. entered after a decision by the judge that the accused has no case to answer; or
2. entered in a trial by a judge alone: s 24(2)(e).

POWERS OF AN APPEAL COURT

30.14 On an appeal from a decision of a court of summary jurisdiction, the appeal court may make a wide range of orders: Justices Act 1886 (Qld) s 225; Criminal Appeals Act (WA) s 14. The relevant legislation does not specify any particular grounds on which the appeal court should act.

30.15 Three precise grounds are set out for quashing a conviction on indictment: Code (Qld) s 668E (1); Criminal Appeals Act (WA) s 30(3). These are:

1. that the verdict is unreasonable or cannot be supported;
2. that the trial judge made a wrong decision on a question of law; or
3. that there was a miscarriage of justice.

No criteria are set out for allowing appeals against sentences. The courts have stressed that a sentencing judge has wide discretion and that appellate courts should interfere with the exercise of that discretion only where there has been an error of principle or reasoning. On appeals by the prosecution, see *Lacey v Attorney-General of Queensland* [2011] HCA 10; 275 ALR 646 at [60]–[62]; on appeals by convicted persons, see *R v Melano* [1995] 2 Qd R 186 at 189. Such an error might be indicated in the judge's stated reasons. Alternatively, it might be inferred because the sentence was 'manifestly inadequate' or 'manifestly excessive': see also the discussion at **31.4–31.5**.

In Western Australia, appeals against sentence are not constrained by the fact that a person may be sentenced again for the same offence: Criminal Appeals Act s 41(4)(b); *The State of Western Australia v Wallam* [2008] WASCA 217; 185 A Crim R 116.

Orders quashing convictions on indictment

Ground 1 — Unreasonable or unsupportable verdict

30.16 The first ground for quashing a conviction is that the verdict is unreasonable or cannot be supported. The concern is with questions of fact rather than law, that is, with the strength of the evidence. The Queensland provision specifically refers to a verdict which 'is unreasonable, or cannot be supported having regard to the evidence'. The test has sometimes been conveyed through the expression that the verdict is 'unsafe or unsatisfactory'. However, the High Court has insisted that attention should focus on the actual language of the legislation: *MFA v R* [2002] HCA 53; (2002) 213 CLR 606; 193 ALR 184 at **30.33C**.

What is at issue is the verdict at trial and not the prosecution's case as to how the crime was committed. An appeal court can, therefore, conclude that the crime could not have been committed in the way the prosecution claimed at trial, and yet uphold a verdict of guilty. See, for example, *R v Stafford* [1997] QCA 333; leave for further appeal refused, *Stafford* B57/1997.

30.17 The key issue in relation to unreasonable or unsupportable verdicts is how much deference should be given to the conclusions reached in the trial process. The difficulty for an appeal court is that it will usually not hear the witnesses and see the evidence. It will merely be reviewing the record of what occurred at trial and considering the arguments counsel make about that record. An appeal court may be reluctant to substitute its opinion — for example, about the credibility of a witness — for that of the jury. A similar principle of deference presumably operates with respect to findings of fact in non-jury trials. The principle may be given even greater force with respect to jury trials, where the division of functions between judge and jury has a quasi-constitutional dimension: see the comments in *MFA* at 30.28C. Nevertheless, the High Court has not accepted that doubts experienced by an appeal court should be discounted just because the jury was in a better position to assess the evidence.

30.18 The test to be applied by an appeal court was established by the judgment of a majority of the High Court in *M v R* (1994) 181 CLR 487 at 493; 126 ALR 325:

> In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

This test has been endorsed in subsequent decisions of the High Court: see *Jones v R* (1997) 191 CLR 439; 149 ALR 598; *MFA* at **30.33C**. However, it still poses difficulties for appeal courts on occasions: *SKA v R* [2011] HCA 13; 276 ALR 423 where the High Court split as to whether the New South Wales Court of Appeal had correctly followed *M v R*. The majority view at [20] was that the Court of Appeal had merely decided whether there was evidence to support the conviction rather than making its own independent assessment of the evidence as *M v R* requires.

30.19 There may be a question as to how appeal courts should approach difficult cases where verdicts of either guilty or not guilty might both appear reasonable after a study of the record and after making appropriate allowance for the jury's opportunity to hear the witnesses and see the evidence. The above passage from *M* poses two questions which will usually but arguably not invariably yield the same answers: is there 'a significant possibility that an innocent person has been convicted' and was it 'open to the jury to be to be satisfied beyond reasonable doubt that the accused was guilty'?

30.20 State courts of appeal have generally asked whether it was open to the jury to be satisfied of guilt: see, for example, *Hunt v The State of Western Australia [No 2]* [2008] WASCA 210; 37 WAR 530 at [200]; *R v Hall* [2011] QCA 26 at [42]. Asking this question might suggest a deferential stance to jury verdicts: the conviction is to be upheld even if it was also reasonably open to the jury *not* to be satisfied of guilt.

In *Libke v R* [2007] HCA 30; 230 CLR 559; 235 ALR 517, an especially deferential version of this approach was adopted. Hayne J said at [113]:

> It is clear that the evidence that was adduced at the trial did not all point to the appellant's guilt on this first count. But the question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard.

In *Hunt v The State of Western Australia [No 2]* at [150]–[151], Murray J endorsed this passage from *Libke* and added:

It will, I think, rarely be the case that the test expressed in that way may be satisfied before an appellate court, which must make its evaluation of the sufficiency of the evidence solely on the record, without having had the advantage of being present at the trial.

However, in *MFA* at 30.33C at [53]–[61], the High Court drew a distinction between the tests of whether a jury must have had a reasonable doubt about guilt and whether a verdict of guilt was reasonably open: the former was described at [55] as a 'broader' test for unreasonableness or unsupportability of a conviction.

30.21 Even with the broader approach favoured in *MFA*, it could be advantageous to the appellant to ask the other question from the test in *M v R*: whether there is a significant possibility that an innocent person has been convicted. This formulation has been preferred in some decisions of the High Court: see, for example, *Darkan v R* [2006] HCA 34; 228 ALR 334 (**20.39C**) at [84]; *Weiss v R* [2005] HCA 81; (2005) 224 CLR 300; 223 ALR 662 (**30.35C**) at [41].

Ground 2 — Error of law

30.22 The second ground for quashing a conviction is that the judge made a wrong decision on a question of law. For example, evidence might have been wrongly admitted, or the elements of an offence might have been misdescribed in the directions to the jury.

It is a question of law whether or not the accused has discharged the evidentiary burden relating to a defence. In *Buttigieg v R* (1993) 69 A Crim R 21 at 36, it was suggested that, although a trial judge should be generous in letting defences go to juries, an appeal court should be more cautious in deciding whether to quash a conviction because a defence was not put to the jury.

Ground 3 — Miscarriage of justice

30.23 The third ground for quashing a conviction is that there was a miscarriage of justice. This is a residual category to capture defects that do not fall within either of the other two categories; miscarriages of justice are necessarily involved in all three categories. The residual category covers various defects in the trial process; for example, errors in permitting joinder of counts or of defendants, errors in summing up the evidence, and inadequate warnings against prejudicial publicity. See also *R v Szabo* [2000] QCA 194; [2001] 2 Qd R 214, where the defence counsel had failed to advise the accused of a personal relationship with the prosecutor.

30.24 Errors by defence counsel can sometimes create miscarriages of justice and lead to convictions being quashed. For example, in *R v Carter* [2002] QCA 431; [2003] 2 Qd R 402, counsel failed to request a voir dire in relation to a record of a police interview of the accused. In *R v Sheppard* [2005] QCA 235, counsel failed to challenge a prosecution witness through cross-examination and also failed to pursue a defence claimed by the accused.

In *Nudd v R* [2006] HCA 9; (2006) 225 ALR 161 (**30.34C**), the members of the High Court were agreed that the issue to be addressed in such cases is the existence of a miscarriage of justice rather than the degree of any incompetence or negligence on the part of counsel. Some previous cases had espoused a test of 'flagrant incompetence' but this was rejected in *Nudd*.

Different views were expressed in *Nudd* as to what could amount to a miscarriage of justice. Four of the judges (Gummow, Hayne, Callinan and Heydon JJ) appeared to take the position that a miscarriage of justice occurs when an error by counsel deprived the accused of a chance of an acquittal. On that approach, any error would become irrelevant if the evidence for the prosecution was sufficiently strong. Gleeson CJ and Kirby J, however, took a broader view of the concept of a miscarriage of justice. In their view, there would be a miscarriage if there was a departure from the essential elements of a fair trial, regardless of the strength of the evidence. In the result, however, the appeal in *Nudd* itself was denied by all members of the High Court.

30.25 One of the main sources of complaint about counsel is advice given to the accused on whether or not to give evidence at trial. Ordinarily such advice will be regarded as a matter of trial tactics lying beyond the scope for appellate review. In *R v ND* [2003] QCA 505, however, it was concluded that one of the grounds for the advice involved an error of law. In addition, the accused was not advised of advantages of testifying. On the failure of counsel to provide appropriate advice with respect to the significance of not testifying, see also *Sankar v The State of Trinidad and Tobago* [1995] 1 All ER 236. Under some circumstances, failure to provide positive advice to testify can also require a conviction to be quashed: *R v Clinton* [1993] 2 All ER 998.

Other orders

30.26 There is an express proviso in Queensland and Western Australia (and other jurisdictions) that an appeal can be dismissed, even though its point(s) might be decided in favour of the appellant, if the conviction involved 'no substantial miscarriage of justice': Code (Qld) s 668E(1A); Criminal Appeals Act (WA) s 30(4). This is commonly called 'applying the proviso'.

In *Weiss* (**30.30C**) at [41], the High Court held that the appeal court must make its own independent assessment of the evidence, making due allowance for the 'natural limitations' of proceeding on the record, and determine whether guilt was proved beyond reasonable doubt.

30.27 It has been said that, where there are legal errors in jury directions, the prosecution must demonstrate that a conviction was inevitable if there is to be a ruling that no substantial miscarriage of justice occurred: *Arulthilakan v R* [2003] HCA 74; (2003) 203 ALR 259. In that case, the judge in a murder trial had given inaccurate directions on the law relating to causation of death. The proviso was not applied.

It was also suggested in *Weiss* (at [45]) that, even if the appeal court is persuaded of guilt, the appeal should be allowed if the trial involved 'a significant denial of procedural fairness'. In the earlier decision in *Wilde v R* (1988) 164 CLR 365; 76 ALR 570, the High Court acknowledged that there is a category of 'fundamental errors' which are so grave that the accused has hardly had a proper or fair trial at all. In that eventuality, it was conceded that the proviso could not be applied however strong the evidence against the accused. Similarly, in *Cesan v The Queen* [2008] HCA 52; 236 CLR 358; 250 ALR 192, it was said at [81]:

> There may be cases … in which there is a process failure of such significance that, whatever the apparent weight of the evidence against the accused person, it cannot be said that there has not been a substantial miscarriage of justice.

In *Cesan*, the High Court of Australia quashed convictions in a case where the trial judge had been asleep during significant parts of the trial: see 28.41.

30.28 If a conviction is quashed, a verdict of acquittal can be entered by the appeal court if that is justified: Code (Qld) s 668E(2); Criminal Appeals Act (WA) s 30(5)(b). However, even though a conviction has been quashed, the appellant may incontrovertibly be guilty of a lesser offence. In that eventuality, the appeal court can enter a conviction of the lesser offence: Code (Qld) s 668F(2); Criminal Appeals Act (WA) s 30(5)(c). It is also possible that quashing a conviction may leave no clear answer as to the disposition of the case. The trial may have miscarried but perhaps the accused would have been convicted even if error had been avoided. In that eventuality, the appeal court can order a new trial: Code (Qld) s 669; Criminal Appeals Act (WA) s 30(5)(a).

NEW ARGUMENTS AND EVIDENCE

30.29 New arguments can be made on appeal unless they were withheld at trial for reasons of forensic strategy. For example, if a homicide occurred in the course of a fight, the primary defence at trial might be self-defence. An alternative defence might be provocation, although that would only reduce murder to manslaughter. Even if the alternative defence of provocation was never raised by defence counsel at trial, counsel on appeal might be permitted to argue for a provocation defence. Suppose, however, that the defence at trial was 'alibi' (that is, 'it wasn't me — I was somewhere else'). If the accused is convicted of murder, the appeal court might not be interested in hearing arguments about self-defence or provocation that were never raised at trial. The accused would have chosen a line of defence and might have to live with the consequences of that choice.

New arguments can be raised before the High Court as well as the Court of Appeal. It will be exceptional for the High Court to grant leave to appeal with respect to a ground not raised in the Court of Appeal: see *Heron v R* [2003] HCA 17; (2003) 197 ALR 81 at [1], [10] and [21]. Nevertheless, it can happen; see, for example, *Fingleton v R* [2005] HCA 34; (2005) 227 CLR 166: 216 ALR 474, where the appeal was eventually allowed on a ground first raised by the High Court itself when the application for leave to appeal was considered.

30.30 New evidence can sometimes be introduced in the Court of Appeal. It is not permitted in the High Court for constitutional reasons: see *Eastman v R* [2000] HCA 29; (2000) 203 CLR 1; 172 ALR 39.

Ordinarily, the evidence must be 'fresh' rather than just 'new': see, for example, *R v Butler* [2009] QCA 111; (2010) 1 Qd R 325 at [41]–[42]. 'New' evidence would be any evidence that was not introduced at the trial. 'Fresh' evidence, however, is evidence which was not reasonably available for the trial.

In *Green v R* (1938) 61 CLR 167 at 174–5, the requirement for additional evidence to be fresh was described as a general principle rather than a hard and fast rule. In *Gallagher v R* (1986) 160 CLR 392; 65 ALR 207, Gibbs CJ reaffirmed that evidence will not usually be considered if it could with 'reasonable diligence' have been produced at trial. Nevertheless, he then went on to say that 'this is not a universal and inflexible requirement': *Gallagher*, at CLR 395. There has been some acknowledgement, therefore, that exceptional circumstances may justify hearing new evidence even though it is not fresh: see, for example, *R v Mackay* [2011]

QCA 28 at [29]. An example is *Re Knowles* [1984] VR 751, where certain evidence had not been produced at trial because defence counsel mistakenly believed it to be inadmissible.

30.31 Statutory and common law principles were summarised by Buss JA in *BXJ v The State of Western Australia* [2010] WASCA 240(at 15, 17–21):

> This court must decide an appeal on the evidence and material that were before the lower court: s 39(1) of the *Criminal Appeals Act 2004* (WA). However, s 39(1) does not affect this court's power in s 40 to admit evidence: s 39(3). For the purposes of dealing with an appeal, this court may 'admit any other evidence': s 40(1)(e). The power under s 40(1)(e) was not intended, at least in relation to appeals against conviction, to override the common law distinction between new and fresh evidence. That distinction continues to apply. See *McHenry v The State of Western Australia [No 2]* [2010] WASCA 71 [39] (Owen JA, Jenkins J agreeing) and the cases there cited.
>
> …
>
> The common law distinction between new and fresh evidence
>
> At common law, there is, of course, a well-established distinction between new evidence, on the one hand, and fresh evidence, on the other. New evidence is evidence that could, with reasonable diligence, have been obtained or discovered for use at the trial. Fresh evidence is evidence which either did not exist as at the date of the trial or could not, with reasonable diligence, have been obtained or discovered for use at the trial. See Beamish v The Queen [2005] WASCA 62 [9].
>
> In *Lawless v The Queen* [1979] HCA 49; (1979) 142 CLR 659, Mason J said, in relation to new evidence:
>
> > However, it is not permissible for a court of criminal appeal to set aside a conviction if the newly adduced evidence, not being fresh evidence strictly so called, reveals no more than a likelihood that the jury would have returned a verdict of not guilty. Two considerations operate to bring about this result. The first is that in a criminal trial the accused is entitled to decide how his case will be conducted, in particular, what evidence he will call. He makes this decision in the light of the knowledge that he is tried but once, unless error or miscarriage of justice results in a successful appeal. He cannot therefore conduct his defence by keeping certain evidence back in the expectation that, if he is convicted, the existence of the uncalled evidence will provide a ground for a second trial at which a different or refurbished defence may be presented. Accordingly, an accused person, if convicted, generally cannot complain of a miscarriage of justice if he deliberately chooses not to call material evidence, it being actually available to him at the time of the trial, or if he fails to exercise reasonable diligence in seeking out material evidence.
> >
> > The second consideration is that there must be powerful reasons for disturbing a conviction obtained after a trial which has been regularly conducted … If the evidence newly adduced falls short of establishing that the accused should not have been convicted, there is no overwhelming reason why the conviction, regularly obtained after a fair trial should not be allowed to stand (675–6).
>
> In *Mickelberg v The Queen* [1989] HCA 35; (1989) 167 CLR 259, Mason CJ expressed the test to be applied by an appellate court, in deciding whether to set aside a conviction on the ground of fresh evidence, as follows:
>
> > It is established that the proper question is whether the court considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at the trial. This test was endorsed by four of the five Justices in *Gallagher v The Queen* ((1986) [1986] HCA 26; 160 CLR 392). Deane J and

> I (at 402) considered that the test was best expressed in those terms. Gibbs CJ (at 399) expressed his substantial agreement with the statement, although his Honour emphasised that 'no form of words should be regarded as an incantation that will resolve the difficulties of every case'. Dawson J said (at 421) that the court would need to conclude that 'a jury might entertain a reasonable doubt about the guilt of the appellant'. His Honour went on to say (at 421) that in his view the use of the expression 'significant possibility' did not involve a different standard. I am in agreement with those statements (273).

The approach of an appellate court to the consideration of fresh evidence will be different if the appellant submits that a conviction should be set aside outright (and there should not merely be a retrial) in that innocence is shown, or the existence of an appropriate doubt established. See *Ratten v The Queen* [1974] HCA 35; (1974) 131 CLR 510, 518–519 (Barwick CJ), and the examination of the relevant issues by Steytler J in *Easterday v The Queen* [2003] WASCA 69; (2003) 143 A Crim R 154 [207]–[211].

In *Rinaldi v The State of Western Australia* [2007] WASCA 53, Steytler P (Wheeler & Pullin JJA agreeing) reviewed the authorities concerning the admissibility at common law of new and fresh evidence on appeal, and said [81]–[82]:

> It has been suggested that the distinction between fresh and new evidence is not as significant as it once was: see, for example, *Nolan v The Queen*, unreported; CCA SCt of WA; Library No 970260; 22 May 1997, per Malcolm CJ with whom Pidgeon and Murray JJ were in agreement. However, as this Court has noted in *Easterday v The Queen* [2003] WASCA 69; (2003) 143 A Crim R 154 at [204] and in *Beamish* at [13], the distinction is one which is soundly based in principle and which continues to be recognised, even though there may be somewhat greater latitude in the case of criminal trials than in the case of civil trials: see *Ratten v The Queen* [1974] HCA 35; (1974) 131 CLR 510 at 517; *Mickelberg* (High Court) at 301; *De La Espriella-Velasco v The Queen* [2006] WASCA 31; (2006) 31 WAR 291 at [150]–[153].
>
> Where the evidence is fresh, the test appears to be whether there is a significant possibility that, in the light of all of the admissible evidence (including that given at the trial), a jury, acting reasonably, would have acquitted the accused: see *Gallagher* (399, 402, 421); *Mickelberg* (273, 275, 302); *Beamish* [14].

30.32 The 'fresh evidence' principle does not apply when a pardon petition is referred to the Court of Appeal: see the discussion of Code (Qld) s 672A and of Sentencing Act (WA) s 140 at 30.7. In *Mallard* (30.34C), the High Court held that, because the legislation specifies referral of 'the whole case', any admissible evidence can be considered.

30.33C **MFA v R**

[2002] HCA 53; (2002) 213 CLR 606; 193 ALR 184
High Court of Australia

McHugh, Gummow and Kirby JJ:

38 This appeal[15] concerns the test to be applied in determining whether a jury's verdict in a criminal trial is 'unreasonable' or 'cannot be supported, having regard to the evidence'. Such a determination authorises and requires[16] a court of criminal appeal to quash the conviction that has followed such a verdict and to enter an acquittal.

39 The appellant, MFA, was tried in the New South Wales District Court upon an indictment containing nine counts involving sexual offences against LB ('the complainant'). At the time

of the alleged offences, the complainant was an under-age male. The appellant was acquitted by the jury on counts 1 to 6 and on count 9. However, he was convicted on counts 7 and 8. He appealed against the convictions to the Court of Criminal Appeal of New South Wales.

40 Before that Court, and in this Court, the appellant made no complaint about the directions of law which the trial judge gave to the jury. Nor did he make any complaint concerning the conduct of the trial. His sole ground of appeal was that '[t]he verdicts of guilty on counts 7 and 8 [were] unreasonable and [could not] be supported having regard to the evidence and [having regard] to the verdicts of not guilty on counts 1, 2, 3, 4, 5, 6 and 9'.

41 The Court of Criminal Appeal dismissed the appellant's appeal against his convictions …

42 Special leave to appeal to this Court was granted upon arguments that the Court of Criminal Appeal had erred in its approach to the determination of the appellant's complaint that the jury's verdicts of guilty were unreasonable; that the formulation of that Court's reasons was defective; and that the test it had applied in determining whether the verdicts of guilty were unreasonable or unsupported in the relevant sense was erroneous.

43 The appellant has demonstrated an error on the part of the Court of Criminal Appeal. It necessitates a reconsideration by this Court of the matters canvassed in that Court. However, when this Court applies the correct test and surmounts the error of reasoning which the appellant has demonstrated, the outcome is unchanged. The appeal to this Court should be dismissed.

The test for unreasonable verdicts

44 *Application of the statutory test*: The Criminal Appeal Act 1907 (UK) introduced a major legal reform. It swept away many of the imperfect procedures that had been developed by the common law (and enacted by statute) to permit post-conviction examination of the conduct and outcome of criminal trials.[17] That Act was quickly copied in all of the Australian States. Relevantly, in New South Wales, it resulted in the enactment of the Criminal Appeal Act 1912 (NSW) ('the Act'). By s 6(1) of that Act, which mirrors the original version of s 4(1) of its progenitor, the Court of Criminal Appeal of New South Wales is required to set aside a conviction if it is:[18]

> … of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice.

45 The original formula in England was changed in 1966 to substitute a different expression, which obliged the appellate judges to consider whether the impugned verdict was 'unsafe or unsatisfactory'.[19] There was no equivalent amendment to the New South Wales Act. Relevantly, it has remained expressed in the terms in which it was first enacted. Nevertheless, Australian judges, using to their advantage decisions of the English courts in criminal appeals, fell into the habit of adopting the expression 'unsafe or unsatisfactory'. This Court too used that expression,[20] although in *M v The Queen*[21] it was noted that the phrase 'unsafe or unsatisfactory' did not appear in s 6.

46 It was not until an opinion was expressed in *Gipp v The Queen*[22] and *Fleming v The Queen*[23] that it was safer to return to the words of the statutory formulation in the place of attempted synonyms, that the requirement to test disputed verdicts against the actual language of the

criminal appeal legislation was restored. In recent years, in many contexts, this Court has insisted upon close attention to the language of applicable legislation in preference to other formulations derived from pre-statutory expositions, post-statutory explanations and (in this case) the language of foreign legislation.[24]

47 When attention is focused on the actual language of s 6(1) of the Act, it appears to confer a very large power to be applied by reference to criteria that are not stated in restrictive or narrow terms. On the face of things 'unreasonable', in particular, seems to state a very broad test.

48 Two indications in s 6(1) suggest that this seeming amplitude is to be restricted somewhat having regard to the context. The first such consideration is that the subject matter of the appellate court's decision is a 'verdict of the jury'. Conventionally, the jury has been described as the constitutional tribunal for deciding contested facts.[25] In respect of the specified cases, the jury occupies an undoubted constitutional status in the federal offences to which s 80 of the Australian Constitution applies.[26] A jury is taken to be a kind of microcosm of the community. A 'verdict of [a] jury', particularly in serious criminal cases, is accepted, symbolically, as attracting to decisions concerning the liberty and reputation of accused persons a special authority and legitimacy and hence finality.

49 In that context, and against the background of the tradition of the jury trial over the centuries, the setting aside of a jury's verdict is, on any view, a serious step. Hence, it is a step that assigns to the words 'unreasonable' or '[un]supported' in s 6(1) of the Act a strictness of meaning that, in isolation or in other contexts, those words might not enjoy.

50 The second contextual indication of what s 6(1) of the Act is driving at is given by the reference to the demonstration, 'on any other ground whatsoever', of a 'miscarriage of justice'. These words suggest that the kind of 'unreasonable' verdict or verdict that 'cannot be supported, having regard to the evidence' with which s 6(1) is concerned is one that leaves the appellate court believing that, notwithstanding the verdict, there has been a 'miscarriage of justice'.

51 These contextual indications, obliging a measure of restraint on the part of courts of criminal appeal in taking the serious step of setting aside a conviction based on the verdict of a jury, have led to judicial attempts to re-state, in other words, what s 6(1) states in the words of Parliament. Such attempts were understandable enough given that every year, in almost every jurisdiction of this country[27] (and many elsewhere where the Criminal Appeal Act 1907 (UK) was copied), hundreds of decisions must be made responding to submissions that, in the particular case, the verdict of the jury should be set aside on the nominated grounds. It was perhaps inevitable that courts of criminal appeal should struggle for verbal explanations of their own, in effect to express the reasons that they considered sufficient to justify overturning the verdict of the jury in a particular case. Such formulae would signal the advantage that the jury enjoyed over the appellate court, and the undesirability of effectively replacing jury trial of serious criminal charges with trial before a court of criminal appeal comprising (normally) three judges who ordinarily see no witnesses, hear no evidence and decide the reasonableness and supportability of the verdict by reference to selected passages of evidence to which attention is drawn by the parties.

52 *Judicial formulations of the test*: There have been a number of attempts in this Court to state the approach that it is proper for a court of criminal appeal to take in this regard. The formulae adopted have varied. The stronger formulations have provided a verbal indication

that restraint is required of a court of criminal appeal before it sets aside a conviction under a provision such as s 6(1) of the Act. Other formulae have been more ample in the expression of the circumstances in which appellate intervention is warranted.

53 The differences between individual Justices of this Court, concerning such formulae, were examined in *M*[28] and more recently in *Jones v The Queen*.[29] Before either of these cases, in *Chidiac v The Queen*,[30] Dawson J gave expression to a common formula representing what might be called the 'strong' position. He said:[31]

> If upon the whole of the evidence a jury, acting reasonably, was *bound* to have a reasonable doubt, then a verdict of guilty will be unsafe and unsatisfactory.

54 His Honour drew attention, as had been done earlier in this Court, to the fact that, unlike the later, wider powers conferred under the amended statutory provision in England, 'the legislation which prevails in this country [does not] empower a court to set aside a verdict upon any speculative or intuitive basis'.[32] To similar effect was the minority view expressed by McHugh J in *M*.[33] In that case, his Honour said that the correct test for determining whether a court of criminal appeal should set aside the conviction based on a jury verdict, on the ground that it was unreasonable, was 'whether a reasonable jury *must* have had a reasonable doubt about the accused's guilt'.[34] His Honour criticised the formulation adopted by the majority.[35]

55 Nevertheless, in *M*, the majority of this Court favoured what might be termed a 'broader' test for unreasonableness or unsupportability of a verdict. Instead of asking whether the jury 'must'[36] or were 'bound to'[37] have a reasonable doubt about the accused's guilt, the majority posed the question whether it was 'open to the jury' to be satisfied of the accused's guilt, applying the criminal standard of proof beyond reasonable doubt, acting as a reasonable jury and reaching their verdict 'upon the whole of the evidence'.

56 The majority in *M* pointed out that '[i]n most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced'.[38] In such a case of doubt, it is only where the jury's advantage of seeing and hearing the evidence can explain the difference in conclusion about the accused's guilt that the appellate court may decide that no miscarriage of justice has occurred:[39]

> If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a *significant possibility* that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.

57 The foregoing difference of opinion concerning the test to be applied was brought to a head in *M* because of the criticism voiced by McHugh J in that case to the effect that the adoption of the formula whether a verdict was 'open to the jury' had the potential to constitute 'an unwarranted intrusion into the jury's right to determine the facts in a criminal trial'.[40] However in *Jones*, when this Court returned to the question of the applicable test, McHugh J participated in the joint reasons that said:[41]

> [T]he test formulated by the majority in *M* must now be accepted as the appropriate test for determining whether a verdict is unsafe or unsatisfactory.

58 The reference to 'unsafe or unsatisfactory' in this last passage followed the language conventional of the time when *Jones* was written. Those words are to be taken there as equivalent to the statutory formula referring to the impugned verdict as 'unreasonable' or such as 'cannot be supported, having regard to the evidence'.

59 The result of this decisional history is that, until the Act, and other legislation like it, is amended by Parliament (whether along the lines of the 1966 amendment in England or otherwise) or until this Court re-expresses the formula to be applied, courts of criminal appeal in Australia are bound to apply the statutory provision as elaborated in the way stated by the majority in *M*. Ultimately, the additional formulations exist only to assist courts of criminal appeal to discharge their statutory functions. Those functions are stated, relevantly, in s 6(1) of the Act. In the end, that subsection is designed to afford a mechanism against a prospect that our community and its courts continue to regard as intolerable, namely that an innocent person has been wrongly convicted upon unreasonable and unsupported evidence and has thereby suffered a miscarriage of justice.[42] The interpretation and application of the sub-section must always keep that purpose in mind. But it involves a function to be performed within a legal system that accords special respect and legitimacy to jury verdicts deciding contested factual questions concerning the guilt of the accused in serious criminal trials.

60 *The correct test was applied*: The appellant raised a number of complaints about the way that Smart AJ stated the test to be applied by the Court of Criminal Appeal. His Honour said:[43]

> I am of the opinion that it was reasonably open to the jury to be satisfied beyond reasonable doubt as to the guilt of the appellant.

61 There is no error in this formulation. Indeed, it involved the accurate transcription of the test expressed by this Court in *M* and in *Jones* rather than the 'stronger' or more stringent test obliging an appellant to establish that the jury were 'bound to' or 'must' have entertained a reasonable doubt. It follows that the complaint about this aspect of the reasons of the Court of Criminal Appeal fails.

…

Conclusion and orders

95 A number of further complaints were raised concerning the evidence tendered against the appellant. However, the foregoing captures the substance of the appellant's arguments. It is necessary to consider cumulatively all of the aspects of the evidence of which he complains, and to ask whether, in totality, it represents an instance of verdicts that are unreasonable or unsupported by the evidence so as to result in a significant possibility of a miscarriage of justice.

96 There are, it is true, some aspects of the evidence that are less than wholly satisfactory. But that is not uncommon in most trials.[67] Experience suggests that juries, properly instructed on the law (as they were in this case), are usually well able to evaluate conflicts and imperfections of evidence. In the end, the appellate court must ask itself whether it considers that a miscarriage of justice has occurred authorising and requiring its intervention. Although we accept that minds might differ on this question, as in any case that requires this Court to grant special leave to appeal, we are not ultimately convinced that the jury's verdicts were 'unreasonable' or 'unsupported' in the statutory sense.

97 Before parting with this case we wish to make it clear that there is no difference between us and the other members of this Court about the essential issues decided in this appeal. Upon the application of the test in *M*, the operation of the principles in *MacKenzie* and the significance of the decision in *Jones*, this Court speaks with a single voice.

98 The appeal should be dismissed.

[**Gleeson CJ, Hayne** and **Callinan JJ** delivered a separate judgment, also dismissing the appeal.]

Footnotes

15. From a judgment of the New South Wales Court of Criminal Appeal: *R v MFA* [2001] NSWCCA 71.
16. *TKWJ v The Queen* [2002] HCA 46 at [62] per McHugh J referring to *Pattinson and Laws* (1973) 58 Cr App R 417 at 426.
17. Cf *Conway v The Queen* (2002) 76 ALJR 358 at 360–1 [7]–[8]; 186 ALR 328 at 330–1.
18. See *Hargan v The King* (1919) 27 CLR 13 at 23 per Isaacs J; *Fleming v The Queen* (1998) 197 CLR 250 at 257–8 [16]–[17].
19. See Criminal Appeal Act 1966 (UK), s 4(1). Section 4 of the Criminal Appeal Act 1907 (UK) was later re-enacted as s 2(1)(a) of the Criminal Appeal Act 1968 (UK). See *R v Chalkley* [1998] QB 848.
20. It is sometimes still used: *TKWJ v The Queen* [2002] HCA 46 at [69], [72].
21. (1994) 181 CLR 487 at 492. In 1995 the English statute from which this phrase was adopted by various judges, was amended to remove 'or unsatisfactory': Criminal Appeal Act 1995 (UK), s 2(1).
22. (1998) 194 CLR 106 at 147–50 [120]–[127].
23. (1998) 197 CLR 250 at 255–6 [11] citing *Gipp v The Queen* (1998) 194 CLR 106 at 114, 146–50.
24. Eg *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 77 [9], 89 [46]; *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1587 [14]–[15], 1630 [249]; 184 ALR 113 at 122, 180; *Western Australia v Ward* (2002) 76 ALJR 1098 at 1105 [2], 1108–09 [16], 1110 [25], 1216 [588]; 191 ALR 1 at 11–12, 16, 19, 164; *Wilson v Anderson* (2002) 76 ALJR 1306 at 1315–16 [47], 1331 [137], 1332–3 [144]–[146]; 190 ALR 313 at 326, 347, 350; *Attorney-General (Q) v Australian Industrial Relations Commission* [2002] HCA 42 at [113].
25. *David Syme & Co v Canavan* (1918) 25 CLR 234 at 240; *Hocking v Bell* (1945) 71 CLR 430 at 440; *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 287 [53]; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 877 [64]; 179 ALR 321 at 334.
26. Cf *Crampton v The Queen* (2000) 206 CLR 161 at 208 [127].
27. In *TKWJ v The Queen* [2002] HCA 46 at [62] the provisions of the legislation of other States and the Northern Territory are set out. In *Conway v The Queen* (2002) 76 ALJR 358 at 359 [4], 371–2 [68]–[72]; 186 ALR 328 at 329, 346–7 it is pointed out that the applicable legislation is different in relation to the Australian Capital Territory.
28. (1994) 181 CLR 487.
29. (1997) 191 CLR 439.
30. (1991) 171 CLR 432.
31. (1991) 171 CLR 432 at 451 (emphasis added).
32. *Chidiac v The Queen* (1991) 171 CLR 432 at 451–452 citing *Whitehorn v The Queen* (1983) 152 CLR 657 at 689.
33. (1994) 181 CLR 487 at 524–5.
34. *M v The Queen* (1994) 181 CLR 487 at 525 (emphasis added).

35. *M v The Queen* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ, with whom Gaudron J, at 508, agreed on this point.
36. *M v The Queen* (1994) 181 CLR 487 at 525 per McHugh J.
37. *Chidiac v The Queen* (1991) 171 CLR 432 at 451 per Dawson J.
38. (1994) 181 CLR 487 at 494.
39. *M v The Queen* (1994) 181 CLR 487 at 494 (emphasis added, footnote omitted).
40. (1994) 181 CLR 487 at 525.
41. (1997) 191 CLR 439 at 452 per Gaudron, McHugh and Gummow JJ.
42. In this sense, s 6(1) of the Act is another instance of the law's recognition that exceptions are needed to the inflexible exercise of lawful power: cf *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In liq)* (1999) 73 ALJR 306 at 332 [93.7]; 160 ALR 588 at 621–2; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 465 [73].
43. *R v MFA* [2001] NSWCCA 71 at 12.

...

67. Cf *Green v The Queen* (1997) 191 CLR 334 at 398.

30.34C Nudd v R

[2006] HCA 9; (2006) 225 ALR 161
High Court of Australia

1 Gleeson CJ: Following a trial in the Supreme Court of Queensland, before Philippides J and a jury, the appellant was convicted of being knowingly concerned in the importation into Australia of cocaine. He was sentenced to a lengthy term of imprisonment. He says that his conviction involved a miscarriage of justice, and blames his trial counsel.

2 The appellant appealed unsuccessfully to the Court of Appeal of the Supreme Court of Queensland.[1] The jurisdiction invoked was that conferred by s 668E of the *Criminal Code* (Q), which is in a form similar to the statutory provisions governing criminal appeals in the other Australian States and Territories.[2] The statutory ground of appeal was that there was a miscarriage of justice. That, as was said in *R v Birks*,[3] *Ignjatic*,[4] *TKWJ v The Queen*,[5] and *Ali v The Queen*,[6] defined the issue to be decided. The appellant's criticisms of the conduct of his trial counsel were relevant to the issue,[7] but the issue was whether there was a miscarriage of justice.

3 In this context, the concepts of justice, and miscarriage of justice, bear two aspects: outcome and process. They are different, but related.

4 In *Davies and Cody v The King*,[8] this Court said:

> From the beginning, [the English Court of Criminal Appeal] has acted upon no narrow view of the cases covered by its duty to quash a conviction when it thinks that on any ground there was a miscarriage of justice, a duty also imposed upon the Supreme Court of Victoria ... It has consistently regarded that duty as covering not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled.

...

6 ... Even though it is impossible and undesirable to attempt to reduce miscarriages of justice to a single formula, there is at least one circumstance in which a failure of process cannot be denied the character of a miscarriage of justice on the ground of the appellate court's view of the strength of the prosecution case. That is where the consequence of the failure of process is to deprive the appellate court of the capacity justly to assess the strength of the case against the appellant. There may be other circumstances in which a departure from the requirements of a fair trial according to law is such that an appellate court will identify what occurred as a miscarriage of justice, without undertaking an assessment of the strength of the prosecution case. If there has been a failure to observe the conditions which are essential to a satisfactory trial and, as a result, it appears unjust or unsafe to allow a conviction to stand, then the appeal will be allowed.

7 The concept of miscarriage of justice is as wide as the potential for error. Indeed, it is wider; for not all miscarriages involve error. Process is related to outcome, in that the object of due process is to secure a just result. Justice, however, means justice according to law, and the observance of the requirements of law according to which a criminal trial is to be conducted has a public as well as a private purpose. An unjust conviction is one form of miscarriage. Another is a failure of process of such a kind that it is impossible for an appellate court to decide whether a conviction is just. Another is a failure of process which departs from the essential requirements of a fair trial.

8 Where it is claimed that a miscarriage of justice of the second kind referred to in *Davies and Cody* and *Ratten* has occurred, the appellate court is *primarily* concerned with what happened at, or in relation to, the trial of the appellant; an investigation of why it happened is ordinarily irrelevant, and often impractical. It is natural for a person aggrieved by the outcome of a criminal trial to seek to assign blame, but where a miscarriage of justice is said to arise from a failure of process, it is the process itself that is judged, not the individual performance of the participants in the process. If a trial judge fails to instruct a jury on an essential point of law, the explanation might be that the judge was inexperienced, or ill, or absent-minded, or temporarily distracted by other concerns. That would be irrelevant. It is the acts and omissions of the judge that matter; not personal failings or problems that might account for those acts or omissions. Similarly, where the conduct of counsel, as a participant in the trial process, is said to give rise to, or to be involved in, a miscarriage of justice, ordinarily it was what was done or omitted that is of significance, rather than why that occurred.

9 Sometimes, however, a decision as to whether something that happened at, or in connection with, a criminal trial involved a miscarriage of justice requires an understanding of the circumstances, and such an understanding might involve knowledge of why it happened. A criminal trial is conducted as adversarial litigation. A cardinal principle of such litigation is that, subject to carefully controlled qualifications, parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and what lines of argument to pursue. The law does not pursue that principle at all costs. It recognises the possibility that justice may demand exceptions. Nevertheless, the nature of adversarial litigation, with its principles concerning the role of counsel, sets the context in which these issues arise. Considerations of fairness often turn upon the choices made by counsel at a trial. In *TKWJ v The Queen*, the

appellant complained that evidence of his good character was not led. This, it was said, was unfair. In rejecting that argument, this Court said that the failure to call the evidence was the result of a decision by counsel, and that, viewed objectively, it was a rational decision.[11] That, in the circumstances of the case, was conclusive. It is the fairness of the process that is in question; not the wisdom of counsel. As a general rule, counsel's decisions bind the client. If it were otherwise, the adversarial system could not function. The fairness of the process is to be judged in that light. The nature of the adversarial system, and the assumptions on which it operates, will lead to the conclusion, in most cases, that a complaint that counsel's conduct has resulted in an unfair trial will be considered by reference to an objective standard, and without an investigation of the subjective reasons for that conduct.

10 … To the extent to which it is reasonably possible, the focus of attention should be the objective features of the trial process. Nevertheless, there may be circumstances where it is relevant to ask why some act or omission occurred. In some cases, for example, it may be material to know that counsel took a certain course upon the instructions of the client. There could be circumstances in which it is material to know that a course was taken contrary to instructions. The possibility of a need to know the reason for conduct cannot altogether be eliminated. In general, however, as far as justice permits, the enquiry should be objective. As a matter of principle, such objectivity is consistent with the assumptions on which the adversarial system operates. As a matter of practicality, it avoids the difficulties inherent in turning a criminal appeal into an investigation of the performance of trial counsel.

11 There is a further reason for caution in setting out to measure the performance of counsel. Criminal trials are conducted as a contest, but the adversarial system does not require that the adversaries be of equal ability. The system does its best to provide a level playing field, but it cannot alter the fact that some players are faster, or stronger, or more experienced than others. Opposing counsel may be mismatched, but this does not make the process relevantly unfair. Judges can do their best to minimise the effects of differences between the abilities of opposing counsel, but their capacity to intervene is limited by their own obligations of neutrality. Accreditation requirements impose basic standards of professional competence, but beyond those there are large differences in individual levels of competence. The practical effect of a certain level of performance by a defence counsel might depend upon the level of performance of the prosecutor. Any experienced advocate knows that what might amount to a minor slip against one opponent could be a fatal mistake against another.

12 The reluctance of courts of criminal appeal to enter upon an assessment of the performance of trial counsel is well-founded in considerations both of principle and of pragmatism. That reluctance is reflected in the way in which courts respond to an argument that there has been a miscarriage of justice arising from the incompetence of counsel. Such arguments are becoming increasingly common. Nowadays, when most criminal trials and appeals are funded by legal aid, appellants are often represented by counsel who did not appear at the trial. By hypothesis, trial counsel lost; an appellant supported by legal aid will often want new counsel to conduct the appeal. The client may well be dissatisfied with the performance of trial counsel. Appeal counsel will have his or her own ideas about the way the defence case should have been conducted. Inevitably, in some cases, trial counsel will be blamed for failure. Such blame is pointless unless it can be related to a legal rubric of relevance to the jurisdiction being exercised by the court of criminal appeal. The relevant rubric is miscarriage of justice.

…

20 In the present case, the Queensland Court of Appeal, which had before it evidence in addition to the evidence at the trial, was correct to conclude that there was no miscarriage of justice. The facts are set out in the reasons of Callinan and Heydon JJ. The case against the appellant was overwhelming. Like other counsel in other cases, trial counsel put some hopeless arguments; but he understood that the appellant's only real prospect of success lay in seeking to persuade the jury that there was a doubt about whether the extent of the appellant's demonstrated knowledge of, and connection with, the cocaine importation was sufficient to amount to being knowingly concerned in the importation. He had an erroneous view of the law on that point; but, again, that does not make the case unique. Nothing in the material before the Court of Appeal suggested there was any real doubt about the appellant's guilt. The Court of Appeal was in a good position to determine that the conviction was not unjust. There was no failure of process that departed from the essential requirements of a fair trial. There was no miscarriage of justice.

21 The appeal should be dismissed.

Gummow and Hayne JJ: …

34 None of the matters on which the appellant relied has led to any miscarriage of justice in this matter.

35 There remains for consideration the proposition advanced by the appellant that the incompetence of counsel went to the root of his representation at trial. This contention was evidently founded in what was said about the proviso to the common form of provision for appeal against conviction, by Brennan, Dawson and Toohey JJ, in *Wilde v The Queen*:[36]

> The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice.

36 It is not necessary to explore the boundaries of this proposition or to attempt to identify circumstances in which it could find application. To do so would require close attention to what is meant by 'essential requirements of the law' and 'the root of the proceedings'. These notions may reflect what has been said by some members of the Court respecting aspects of 'due process' discerned from Ch III of the Constitution.[37] However that may be, in the context of a criminal trial it may be open to doubt whether some requirements of the law are properly to be dismissed as inessential or whether some requirements are to be classified as radical and others not.

37 In the present case, the proposition that the incompetence of the appellant's counsel went to the root of his representation is either self-evident or circular. If all that was meant was that counsel was incompetent, the addition of reference to the root of the appellant's representation is superfluous. If it was intended to convey that the incompetence of representation at trial led to a miscarriage of justice, it is a proposition that does not add to the considerations examined earlier in these reasons.

38 The appeal should be dismissed.

Kirby J: …

104 If … the sole miscarriage of justice that was in question in this appeal was that concerned with the appellate court's judgment of the guilt of the appellant, based on the

entirety of the evidence in the trial, no error has been shown in the conclusion of the Court of Appeal, discharging its own function of assessing the appellant's conviction on the basis of that evidence. There was ample, indeed overwhelming, evidence at the trial to warrant the conclusion of the Court of Appeal that the prosecution had established, to the requisite standard, that the appellant was knowingly concerned in the importation of cocaine into Australia. On this basis, although the appellant's defence was most imperfectly conducted, his conviction in his trial resulted in no substantial miscarriage of justice which had actually occurred.[142] So judged, his appeal was rightly dismissed. In substance, on this point, I agree with the analysis of Callinan and Heydon JJ.

105 *Fair trial analysis*: But what of the alternative way in which the appellant pressed his appeal? Can it be said that the defects in his representation were so egregious, frequent and obvious as to have denied the appellant the basic elements of a fair trial? What of his submission, in the words of McHugh J in *TKWJ*,[143] that 'the conduct of counsel has resulted in an unfair trial, that of itself constitutes a miscarriage of justice', without any need to prove more?

106 I have found the resolution of this issue much more difficult. In my opinion the argument is available to the appellant on a correct understanding of the content of 'miscarriage of justice', as that expression is used in s 668E(1) of the Code. So has this alternative submission been made out?

107 Of greatest concern is the failure of the appellant's legal representatives, and especially his counsel, to research and thoroughly understand the ingredients in law of the very serious charge brought against the appellant. Also troubling is the failure to take as full a proof of evidence as the appellant would provide and to advise him then on the conduct of the trial, applying the law as understood to the facts as so revealed. In a sense, these were tasks so rudimentary to the duties of a lawyer that the omission to perform them contaminated what followed.

108 Competent counsel might have made this or that particular decision in the course of running the trial. But the concordance of well-made decisions with those actually made by trial counsel in ignorance of, or mistake about, the basic ingredients of the offence, was largely coincidental. In many cases it was accidental. The defence of the appellant was arguably not conducted as the basic postulate of a properly defended criminal trial envisages. All other mistakes and errors might be explained or excused. But the defects of legal understanding, of factual analysis and of securing proper instructions on that basis are self-evidently of a most serious order.

109 Yet did they, in the end, result in a trial lacking in essential fairness as the law requires?[144] I have hesitated over the answer to this question. I regard the case as being at the borderline. Ultimately, what convinces me that the trial was not unfair (and hence that there was no miscarriage of justice of the second category) is that the prosecution evidence against the appellant was so detailed, overwhelming and in large part uncontested, that it left no significant possibility of an acquittal, otherwise open, had the appellant been differently and competently represented at the trial. In short, like Callinan and Heydon JJ, I regard the case proved against the appellant as 'effectively unanswerable'.[145]

110 The appellant, serving his long prison sentence, may say (and doubtless will) that he never obtained a proper opportunity to answer the prosecution case because his mind, and those of his legal representatives, were never ultimately focused together on the real issues

for trial and how, if at all, those issues could be answered. If I thought that any answer were reasonably available to the appellant in the record that I have read, that might have resulted in an acquittal, I would accept that complaint. Because there was no such possibility, and because the trial judge instructed the jury on the applicable law with complete accuracy, it cannot be said that the trial was unfair, occasioning a miscarriage of justice on that footing.

…

113 I agree that the appeal should be dismissed.

…

115 Callinan and Heydon JJ: The appellant was convicted by the Supreme Court of Queensland (Philippides J with a jury) of being 'knowingly concerned in' the importation of cocaine into Australia contrary to s 233B of the Customs Act 1901 (Cth). He was sentenced to 22 years imprisonment with a non-parole period fixed at 11 years.

Facts

116 It is necessary to set out the facts in some detail, not only because the events with which the Court is concerned are complex, but also because of the compelling complexion that they assume when they are so stated.

117 Police and Customs officers intercepted the yacht 'Sparkles Plenty' in Moreton Bay on 3 May 2001. On board they found 99 packets of cocaine, 29 of which were damaged by water. The undamaged cocaine weighed about 89 kilograms and had a purity of 70 per cent.

118 There were two men on the yacht when it was boarded, a citizen of the United States, Peter Jackson, and his son Gareth Jackson. They had left Mexico in May 2000 on the yacht and crossed the Pacific Ocean to Noumea which they reached on 8 November 2000. From there they flew to Australia on 7 December 2000, where they remained until their visas expired in early March 2001.

119 On 7 March 2001, Peter Jackson flew to the United States, where he obtained a false United States' passport in the name of 'David Geschke'. On 28 March 2001 he flew from the United States to Noumea on the false passport. He then sailed the yacht from Noumea to Moreton Bay where the boat was intercepted. The false passport and other items representing him to be Geschke were found on board.

120 For part of the period of three months in which the two men were in Australia they lived in a motel in Sydney. A listening device had been installed in their room to intercept telephone conversations. Eleven of those conversations were between Peter Jackson and the appellant, who is an Australian citizen and was then living in Los Angeles. Additionally, there were intercepted conversations between Jackson and other participants in the importation of the cocaine, Jackson's two sons Gareth and Klaus, Jorge Velarde, and the appellant's sister, Sylvia Aldren.

121 The role of Velarde, another citizen of the United States, was to act as an intermediary between Jackson and unidentified Australian recipients of the cocaine.

122 At the trial, the appellant admitted the passage of the yacht from Mexico, the identity of the various persons on board at different times, the movements of Peter and Gareth Jackson, the use by Peter Jackson of the false passport, the quantity of cocaine found on the yacht on its interception in Moreton Bay, and that Sylvia Aldren was his sister.

123 It remained then for the prosecution to prove that the appellant was knowingly concerned in the importation of the cocaine. This it sought to do by the tender of tapes of the telephone conversations. Not surprisingly, taken in isolation, the contents of some of the conversations were cryptic.

124 At the opening of its case, the prosecution alleged the appellant was knowingly concerned in the importation because he knew of it and 'he gave some practical assistance in some way'. In his address to the jury, the prosecutor characterized the core issues as ones of 'knowledge and practical assistance' and argued that the appellant was one of the 'inner circle' involved in this venture.

125 The prosecutor conducted the case upon the basis that it was for the prosecution to prove that the appellant's conduct had 'the effect of pushing this process along', thereby perhaps unnecessarily raising the hurdle which the prosecutor had to surmount to prove the offence.[149] Seven particulars were provided of the respects in which the appellant was said to be concerned in the importation. They were, first, that the appellant had travelled from the United States to Noumea to discuss the importation of the cocaine by Jackson under a false name. Secondly, the appellant inquired about hiring a yacht. The third was that the appellant facilitated contact between Jackson and Velarde. Next, it was said that the appellant helped Jackson to resolve difficulties in making arrangements for the importation. Fifthly, the prosecution pointed to the assistance afforded by the appellant in arranging for his sister to help Jackson to obtain a false passport. Sixthly, the prosecution contended that the purpose of a meeting between the appellant and Jackson at Los Angeles Airport was to assist with the importation of the cocaine. The last particular was that the appellant assisted Jackson to obtain the false passport.

126 The yacht was owned by a company controlled by Jackson and his family. In its voyage across the Pacific it had berthed at Papeete and Tonga before arriving in Noumea. It had remained there for more than five months before sailing for Moreton Bay. The delay, the prosecution submitted, was caused by problems the offenders had encountered in arranging for the importation: water damage to the cocaine; delays on the part of Velarde in making satisfactory arrangements for the distribution of the cocaine in Australia; and the detection by Customs officers of this country of a minute quantity of cocaine in Peter Jackson's luggage on his arrival in Australia. Despite the absence of a charge in relation to that, the prosecution asked the jury to infer that Jackson became so concerned that he had, or may have been identified and recorded as a cocaine user, that he decided to obtain a false passport to reduce the chances of apprehension on any re-entry to Australia. The intercepted conversations between the appellant and Jackson, the prosecution contended, showed clearly that the former was assisting or attempting to assist in the resolution of the problems.

127 Two attempts were made by Jackson to obtain a false passport. One was an attempt to obtain an Australian passport, which was unsuccessful. The other attempt, which was ultimately successful, was to obtain a United States passport in the name of Geschke on his return to that country in March 2001. The taped conversations between Jackson and the appellant in late February and early March 2001 were capable of being understood as offers by the appellant to Jackson of assistance in seeking to obtain false passports.

...

142 It is now necessary to turn to the incompetence of counsel for the appellant at the trial. In examining that topic, it is necessary to bear in mind that the criticisms made below must

be considered in the light of the fact that counsel was not represented in this appeal. It must also be remembered, as is explained below, that it is very hard to see what case on behalf of the appellant counsel could legitimately have advanced which would have had any prospect of success.

143 The incompetence of counsel to which the appellant particularly pointed was the former's conduct of the trial, from beginning to end, under a fundamental misapprehension as to the elements of the offence with which the appellant was charged. The misapprehension was that it was an element of the offence that an offender must provide practical assistance to any person more directly concerned in the commission of such an offence or that before an offender could be convicted he must be shown to have caused the venture to move forward. It fell to the trial judge to correct counsel and this her Honour did in her summing up to which no objection is or could be made. Her Honour said this:

> I have to correct some things on this issue said in addresses. It is not the law that in order to be concerned in the importation the accused must put forward an original idea or must assist in taking the venture in a new or different direction, nor is it the law that for the assistance to be practical that it must be effective. Rather, what is required is that the participation is a practical part of the venture. A person can give practical assistance even though the party to whom it is given is an expert on the subject of the assistance. The question is not whether the importation would have taken place without the accused, but whether the accused was concerned in the importation. Being concerned in bringing cocaine into Australia is not limited to direct involvement in the means by which the drugs were brought here such as handling the goods or sailing the boat or loading the goods or things of that nature. Someone who makes arrangements or assists in making arrangements for the importation can also be said to be concerned in the importation. The word 'concerned' covers a wide range of activities and includes acts and events which precede the actual bringing of the prohibited goods into the country. It is sufficient if a concern, that is the part played by the accused, occurs in some part of the venture which has as its object bringing drugs into the country, that is to say, if the involvement or participation is a practical part of the venture, the person is concerned in even though the participation occurs before their particular activity which actually brings the goods here.

144 There were other respects in which counsel for the appellant at the trial, who had not previously conducted a major criminal trial before a jury, was incompetent. Neither he, nor the solicitor representing the appellant, obtained his version of events at any time. Even so, counsel submitted that the appellant knew that Jackson was importing cocaine into Australia. Repeating his understanding of a need for practical assistance, at one point in his address to the jury he said this:

> My task today on the issue of practical assistance — and that's really the defence case — is to demonstrate that, really, anything that my client did, anything that you might be satisfied that my client did, is not, in the relevant criminal sense, a sense that will attract a very severe penalty, practical assistance.

145 Both in the Court of Appeal and in this Court, the appellant has submitted that a failure to call him was another example of his counsel's incompetence. As will appear, had the appellant given evidence, the defence that he would have tried to mount was that he did not know the precise destination of the cargo, which turned out to be cocaine, and that he

thought that it could have been pseudoephedrine or some other like substance, and that he believed that the boat and its cargo were headed for New Zealand.

146 There is one further aspect of the conduct of the trial of counsel for the appellant to which reference should be made. In his address to the jury, he appeared clearly to accept on behalf of his client that it was his client's voice on the telephone that had been tape-recorded:

> I didn't have to put [the appellant] in the witness box, that's his undoubted right and, having said that, you can't draw … an adverse inference, and having said that about his silence he's hardly been silent in this Court, has he? You've heard him on tape and those tapes I'd ask you to bear in mind are contemporaneous with events.

147 Again it was the trial judge who picked up the possibility of a misapprehension. Her Honour asked him whether he had instructions from his client that it was he who spoke on the telephone. The appellant's counsel said that these were his present instructions. When the trial resumed however, on the following Monday, and her Honour again in the absence of the jury, sought clarification, after some discussion counsel said that his instructions were to put the Crown to proof of the identity of the speaker on the telephone, and other substantial matters. Nonetheless he asked whether he might take further instructions. The trial judge allowed him to do so. After a brief adjournment, he then informed her Honour that he held instructions to admit that it was his client's voice on the tapes.

148 After the jury had been deliberating for nearly 24 hours, they sought assistance from the trial judge by asking the following two questions:[150]

1. Does the accused need to know the final destination of shipment, ie, Australia, in order for him to have committed an illegal act as charged?
2. If the accused was knowingly concerned in the bringing into destination X, if not being Australia, of prohibited imports and the ultimate destination became Australia through revised planning or other reasoning, does the charge still apply?

With respect to the first question, her Honour said:

> And the answer to that question is yes. The charge is importation of the drugs into Australia and I think you now have copies of the indictment.

With respect to the second question, her Honour said:

> And as to question 2, the answer is that if the accused knew that the goods were being imported into Australia as a result of — well if the accused knew that the goods were being brought into Australia [and] that the ultimate destination was Australia and by whatever means, whether it be revised planning or whatever, the charge still applies. Because the charge is the importing of the goods into Australia and that is what the accused needs to have knowledge of.

…

The appellant's argument

155 In this Court, the appellant repeats the arguments which he advanced in the Court of Appeal. In developing his submissions, he argued that the incompetence involved here went to the root of his representation at trial, and that the decisions of his counsel were neither

informed, rational nor made for any tactical reason: that he therefore has simply not had a fair trial according to law. It is not to the point, he argued, that, put another way, or in some other context, or with a different focus, some of the arguments made may have had some validity, or might be able to be plausibly or justifiably explained in retrospect. The entire defence as conducted by his counsel at the trial led inevitably to the conclusion that the appellant was guilty.

The prosecution's arguments

156 The prosecution's principal submission is that the case against the appellant was of such a kind and so strong that it seriously limited the forensic choices available and recognizable by even the most competent of counsel. It was further submitted that there were no facts which could have been elicited from any witness in cross-examination which could have supported or improved the defence. The tapes of the telephone conversations were the mainstay of the case for the prosecution and these were effectively beyond denial, and highly inculpatory, indeed consistent only with guilt.

Disposition of the appeal

157 In *TKWJ v The Queen*,[156] Gaudron J with whom Gummow J agreed, pointed out that the inquiry of an appellate court in a case of this kind was an objective one, and whether, so viewed, the course taken by counsel was capable of explanation.[157] Hayne J, with whom Gummow J also agreed, too said that an objective assessment of the conduct of the case is required.[158]

158 In this case, on any assessment, whether subjective or objective, counsel's conduct was incompetent to a serious degree. So too, on either a subjective or an objective assessment, some at least of counsel's conduct cannot be rationally justified or explained, although perhaps it can be said that the overstatement of the matters required to be proved by the prosecution may have contributed to the appellant's counsel's further and significantly greater overstatement of them. That is not however the end of the matter. Was the appellant's trial a fair one in all of the circumstances? Did justice miscarry to the extent that the appellant was deprived by his counsel's conduct of a chance of an acquittal? In answering these questions, we keep in mind that the more apparently serious the offence, the greater the need there generally will be for punctiliousness in all respects in the conduct of the trial.

159 In the end we have come to the conclusion that the appellant was not deprived of a chance of an acquittal despite the incompetence of his counsel at the trial. This is so because we consider the case against the appellant to have been a strong one, and indeed one which was effectively unanswerable. The questions he asked, the statements he made, his invitations, his advice, his persistence and his comments during the numerous telephone conversations were not those of a merely interested, but innocent bystander. Nor was the introduction of his sister to Jackson the act of a person remote from the enterprise. As the prosecution points out, there were no witnesses whom the appellant could call who could give any convincing evidence to controvert any aspect of the case against him. One among many of the inculpatory references during the telephone conversations was to the ion scanning equipment. It is almost impossible to believe that the appellant would have made that reference unless he was concerned in the project of importing the cocaine into Australia.

160 The appellant's counsel at the trial did misunderstand, and accordingly fail to advise the appellant on the elements of the offence with which he was charged. He conducted the whole case upon the basis of that failure. But the trial judge did have a proper understanding

of the elements of the offence, and was careful to instruct the jury correctly about them. It is not open to this Court, or indeed to any court, to take the view that had the appellant's counsel advised the appellant accurately about the elements of the offence, the appellant might, or would have changed his story to enable him to deny and disprove one or more of those elements. The Court now does know what the appellant's story is, and for the reasons which we have already given, and the reasons stated by McMurdo J in the Court of Appeal, that story would have been most unlikely to have provided an answer, or raised even a reasonable doubt with respect to the case for the prosecution, had it been told to the jury.

161 Of somewhat more concern is the possibility that some of the evidence of the conversations which were tape-recorded may have been the subject of a valid objection as to their admissibility against the appellant. However, even if the clearly admissible evidence on the tapes, one instance of which we have specifically mentioned, had been isolated, the case against the appellant would still have been a very strong one.

162 This is a case which does cause concern. It is most unfortunate that a person charged with such a serious crime as the appellant was, should come to be represented by a person whose competence fell short of the standard which a court should be entitled to expect. However, just as in medicine there may be terminal cases which not even the most brilliant surgeon can remedy, there will be prosecution cases which an accused could not successfully defend with the aid of the most resourceful and competent of counsel. We have come to the conclusion that this was such a case. That does not mean of course that a person against whom the case is a very strong one, is not entitled to a fair trial. But unlike in the operating theatre, there is in the criminal court a suitably qualified judge, detached from the protagonists and whose duty it is to intervene and make such corrections as need to be made to ensure a fair trial. Trial judges may only correct errors that become apparent to them, but in this case such errors as might otherwise have caused the trial to miscarry, were duly corrected by way of her Honour's summing up and insistence that instructions be duly obtained.

163 We would dismiss the appeal.

Footnotes

1. *R v Nudd* [2004] QCA 154.
2. See *Weiss v The Queen* [2005] HCA 81.
3. (1990) 19 NSWLR 677 at 685.
4. (1993) 68 A Crim R 333.
5. (2002) 212 CLR 124.
6. (2005) 79 ALJR 662; 214 ALR 1.
7. *TKWJ v R* (2002) 212 CLR 124 at 134 [30] per Gaudron J, 147–8 [74]–[76] per McHugh J.
8. (1937) 57 CLR 170 at 180 per Latham CJ, Rich, Dixon, Evatt and McTiernan JJ.

…

11. (2002) 212 CLR 214 at 130–1 [16] per Gleeson CJ, 133 [26]–[27] per Gaudron J, 155 [95] per McHugh J, 158 [107] per Hayne J.

…

36. (1988) 164 CLR 365 at 373.
37. Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court', (2004) 32 *Federal Law Review* 205.

…

142. The language of s 668E(1A) of the Code.

143. (2002) 212 CLR 124 at 148 [76].
144. *TKWJ* (2002) 212 CLR 124 at 148 [76] per McHugh J.
145. Reasons of Callinan and Heydon JJ at [159].
...
149. *Leff* (1996) 86 A Crim R 212 at 214 per Gleeson CJ.
150. *R v Nudd* [2004] QCA 154 at [64].
...
156. (2002) 212 CLR 124.
157. (2002) 212 CLR 124 at 133 [27]–[28].
158. (2002) 212 CLR 124 at 158 [107].

30.35C Weiss v R

[2005] HCA 81; (2005) 224 CLR 300; 223 ALR 662
High Court of Australia

Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ:

1 The important issue in this appeal concerns the operation of the proviso to s 568(1) of the Crimes Act 1958 (Vic) ('the Crimes Act') and how that provision is to be applied in criminal appeals conformably with the language and purpose of the statute which appears in common form throughout Australia.

The facts and disposition in the Court of Appeal

2 On 24 November 1994, Ms Helen Elizabeth Grey was murdered. She was beaten to death. In November 2000, the appellant was charged with Ms Grey's murder.

3 At the appellant's trial in the Supreme Court of Victoria, Ms Jean Horstead, with whom the appellant was living in 1994, was an important witness against the appellant. She swore that, on the night of the murder, the appellant had confessed to her that he had killed Ms Grey. Ms Horstead gave evidence that, although she had at first provided the appellant with a false alibi, some years after the murder, and after she had left the relationship with the appellant and moved to America, she had decided to tell the truth. Evidence was led that, some time after Ms Grey was murdered, the appellant formed and thereafter maintained a sexual relationship with a woman other than Ms Horstead. Over the objection of the appellant's counsel, the prosecution was permitted to adduce evidence in cross-examination of the appellant that at the time the appellant began his relationship with the other woman (whom it is convenient to refer to as RenŽe) she was not yet 15 years old. It is not now disputed that evidence of RenŽe's age should not have been adduced.

4 To have intercourse with a girl under 16 years of age and to maintain a sexual relationship with her were serious crimes.[1] None of the criminal consequences of the appellant's conduct with RenŽe was mentioned to the jury. All that they were told was that she was not yet 15 and a suggestion was made in the course of the prosecutor crossexamining the appellant, but not adopted, that RenŽe's age had been given as part of the reasons for Ms Horstead terminating her relationship with the appellant. The prosecution did not later suggest that maintaining a sexual relationship with an underage girl was a matter that went to the appellant's credit.

5 The appellant was convicted. On his appeal to the Court of Appeal of Victoria, the Court (Callaway and Batt JJA, Harper AJA) held unanimously[2] that the evidence of RenŽe's age had been wrongly admitted. Callaway JA (with whose reasons the other members of the Court

agreed) rightly held[3] that the evidence of RenŽe's age was not relevant, that it could not be led to bolster the credit of Ms Horstead and that, if it did have any significant probative value, it was outweighed by its prejudicial quality because '[t]he jury became aware, in effect, that the [appellant] had had carnal knowledge of a girl of 14'.

6 The Court of Appeal nonetheless dismissed the appellant's appeal, holding that the proviso to s 568(1) of the Crimes Act applied.

7 Having discussed the state of the authorities about the proviso and its application, Callaway JA concluded[4] that a distinction should be drawn between an appellate court asking whether, without the wrongly admitted evidence, the jury at the appellant's trial would inevitably have convicted him, and asking whether, without that evidence, any reasonable jury, properly instructed, would inevitably have convicted him. On the former test (the 'this jury' test) Callaway JA concluded[5] that the appellant's conviction was inevitable; on the latter test (the 'any reasonable jury' test) his Honour was of the opinion that it could not be said that the appellant's conviction was inevitable. That was so because:[6]

> Another jury might have taken a different view of Ms Horstead's evidence or the reliability of the [appellant's] confession, for this was a case that largely turned on the credibility of the two principal witnesses.

Having regard to some earlier Victorian decisions,[7] Callaway JA concluded that the relevant test was the 'this jury' test and that the appeal should be dismissed.

8 By special leave, the appellant now appeals to this Court on grounds confined to the application of the proviso …

Applying the proviso

31 This Court has repeatedly emphasised the need, when applying a statutory provision, to look to the language of the statute rather than secondary sources or materials.[41] In *Fleming v The Queen*,[42] the Court said that '[t]he fundamental point is that close attention must be paid to the language' of the relevant criminal appeal statute because '[t]here is no substitute for giving attention to the precise terms' in which the relevant provision is expressed.

32 Many statements are to be found in the decided cases that describe the task presented by the proviso as being to decide whether conviction was 'inevitable'.[43] Other cases[44] ask whether the accused was deprived of a 'chance which was fairly open … of being acquitted' or a 'real chance' of acquittal.

33 These expressions attempt to describe the operation of the statutory language in other words. They must not be taken as substitutes for that language. They are expressions which may mask the nature of the appellate court's task in considering the application of the proviso.

…

39 Three fundamental propositions must not be obscured. First, the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred. Secondly, the task of the appellate court is an objective task not materially different from other appellate tasks. It is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial; it is not an exercise in speculation or prediction. Thirdly, the standard of proof of criminal guilt is beyond reasonable doubt.

40 Reference to inevitability of result (or the converse references to 'fair' or 'real chance of acquittal') are useful as emphasising the high standard of proof of criminal guilt. They are also useful if they are taken as pointing to 'the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record'.[54] But reference to a jury (whether the trial jury or a hypothetical reasonable jury) is liable to distract attention from the statutory task as expressed by criminal appeal statutes, in this case, s 568(1) of the Crimes Act. It suggests that the appeal court is to do other than decide for itself whether a substantial miscarriage of justice has actually occurred.[55]

The statutory task and the proviso

41 That task is to be undertaken in the same way an appellate court decides whether the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. The appellate court must make its own independent assessment of the evidence[56] and determine whether, making due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record,[57] the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty. There will be cases, perhaps many cases, where those natural limitations require the appellate court to conclude that it cannot reach the necessary degree of satisfaction. In such a case the proviso would not apply, and apart from some exceptional cases, where a verdict of acquittal might be entered, it would be necessary to order a new trial. But recognising that there will be cases where the proviso does not apply does not exonerate the appellate court from examining the record for itself.

42 It is neither right nor useful to attempt to lay down absolute rules or singular tests that are to be applied by an appellate court where it examines the record for itself, beyond the three fundamental propositions mentioned earlier. (The appellate court must itself decide whether a substantial miscarriage of justice has actually occurred; the task is an objective task not materially different from other appellate tasks; the standard of proof is the criminal standard.) It is not right to attempt to formulate other rules or tests in so far as they distract attention from the statutory test. It is not useful to attempt that task because to do so would likely fail to take proper account of the very wide diversity of circumstances in which the proviso falls for consideration.

43 There are, however, some matters to which particular attention should be drawn. First, the appellate court's task must be undertaken on the *whole* of the record of the trial including the fact that the jury returned a guilty verdict. The court is not 'to speculate upon probable reconviction and decide according to how the speculation comes out'.[58] But there are cases in which it would be possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the trial jury. The fact that the jury did return a guilty verdict cannot be discarded from the appellate court's assessment of the whole record of trial. Secondly, it is necessary always to keep two matters at the forefront of consideration: the accusatorial character of criminal trials such as the present[59] and that the standard of proof is beyond reasonable doubt.

44 Next, the permissive language of the proviso ('the Court … *may*, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal …') is important. So, too, is the way in which the condition for the exercise of that power is expressed ('if it considers that no *substantial* miscarriage of justice has *actually* occurred'). No single universally applicable description of what constitutes 'no *substantial* miscarriage of justice' can be given. But one negative proposition may safely be

offered. It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty.

45 Likewise, no single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal, even though persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt. What can be said, however, is that there may be cases where it would be proper to allow the appeal and order a new trial, even though the appellate court was persuaded to the requisite degree of the appellant's guilt. Cases where there has been a significant denial of procedural fairness at trial may provide examples of cases of that kind.

46 It is unnecessary in this appeal to examine that issue further, or to consider the related question whether some errors or miscarriages of justice occurring in the course of a criminal trial may amount to such a serious breach of the presuppositions of the trial as to deny the application of the common form criminal appeal provision with its proviso.[60] It is also unnecessary to decide in this case whether, and if so how, the provisions of s 80 of the Constitution, obliging trial by jury in the trial on indictment of an offence against any law of the Commonwealth, imports minimum requirements into the elements of such a trial which, in particular circumstances, could not be saved by the provision of State or Territory law expressed in terms of the common form of criminal appeal provision considered in this case. The appellant's trial was conducted wholly within State jurisdiction and so was the disposition of the appeal by the Court of Appeal. No federal question therefore arises, still less any question presented by s 80 of the Constitution.

47 That an appellate court must review the whole record of trial when it is required to consider the application of the proviso may be said to tend to prolong appellate hearings and increase the burden on already overburdened intermediate appellate courts. The immediate answer to that proposition must be that it is what the common form criminal appeal provision requires. But no less importantly, the proviso, properly applied, will, in cases to which it is applicable, avoid the needless retrial of criminal proceedings.[61]

The present case

48 The Court of Appeal approached its task in the present case by asking what the trial jury would have done had the wrongly admitted evidence not been before it. Approaching the task in that way was to divert attention from the question presented by the proviso and may (we do not say must) have led the Court of Appeal to a wrong conclusion about the application of the proviso in this case.

49 Counsel for the respondent submitted on the hearing of the appeal in this Court that the appropriate start to the chain of reasoning that should have been followed by the Court of Appeal was that the trial jury must have accepted certain evidence given at trial in preference to that given by the appellant. If that was the premise from which the Court of Appeal began its consideration of whether the proviso applied, it was a premise whose validity was the very question presented by the proviso.

50 It may readily be accepted that the trial jury did accept the evidence given against the appellant and rejected his contrary evidence. But for the reasons given earlier, the possibility that the jury took account of the wrongly admitted evidence in deciding what evidence to accept or reject cannot be excluded. If the wrongly admitted evidence *was* taken into account

in reaching a conclusion about what other evidence to accept, the conclusion actually reached by the trial jury would not provide a sound basis for reaching a conclusion about whether guilt had been proved beyond reasonable doubt. It is wrong to begin an examination of whether a substantial miscarriage of justice has actually occurred by accepting, as necessarily correct, the preference by the jury for some controverted evidence when that preference may have been affected by the error that was made at trial.

51 Rather, it is necessary to look beyond what the jury may be assumed to have accepted and for the Court, so far as it properly can, to judge the evidence for itself. That is best done in this case by focusing first upon the chief evidence against the appellant — his alleged admissions — rather than exclusively or mainly upon the two questions and answers that mentioned RenŽe's age which must necessarily be considered in the context of the whole trial. The appellant was alleged to have made two confessions that he had killed Ms Grey. Evidence of one of those alleged confessions was given by Ms Horstead.

52 Ms Horstead's evidence in this regard was hotly contested. The appellant denied that he had made the statements she alleged he had made. He sought to establish that she was a disappointed and bitter woman who, once the appellant had taken up with RenŽe, and Ms Horstead's relationship with the appellant had ended, had set out, in her own words, to achieve the conviction of the appellant. But there was a further set of confessional material which was much more difficult for the appellant to deal with.

53 When first interviewed by police in November 2000 (after Ms Horstead had given police what she was later to swear was the true account of what had happened four years earlier, when Ms Grey was killed) the appellant made no admission and denied any involvement in Ms Grey's death. About 45 minutes after that interview finished he was interviewed again. In this second interview he admitted that he had visited Ms Grey on the night she was killed, that they had quarrelled and that he had struck her with a cricket bat. He admitted that he may have hit her more than once. (He said he thought that he had hit her once or twice but that it may have been more often.) He admitted that, at the scene, he had stripped the rubber grip from the handle of the bat he had used to hit Ms Grey, and had thrown the grip away on his way home from Ms Grey's house. While he denied that he had intended to hit Ms Grey, the statements he made in this interview, if accepted as true, taken with the evidence of the pathologist about the number and ferocity of the blows struck, could have supported his conviction for murder. Both interviews with police were videotaped and admitted in evidence at the appellant's trial.

54 The appellant's case at trial was that the confessions he made in the second interview were false. He sought to explain his saying what he did in the second interview by asserting that a police officer, Detective Sergeant Dean Thomas (with whom he had had earlier dealings when charged with theft), had told him, or at least suggested to him, that, if he confessed to the killing, an otherwise inevitable conviction for murder could be avoided and a plea of guilty of manslaughter accepted by the authorities.

55 Detective Thomas did not take any part in the first interview with the appellant. He gave an altogether different account of the conversation he had with the appellant after the first interview had ended. He said that the appellant, having asked to see him, told him that he wanted to confess. And on the face of the transcript of the interview there is much that would not be inconsistent with such an account of what went on in the interval between the two interviews. But, of course, the interview having been videotaped, it was available to the Court

of Appeal, and that Court could make its own judgment about what, if anything, the second interview, judged against the transcript of all else that was said at trial, revealed about the appellant's guilt.

56 In undertaking that task, the Court of Appeal would know that the jury at trial had concluded, beyond reasonable doubt, that the appellant had made confessional statements that were true. There was no doubt that he had made confessional statements to the police. The jury, and the Court of Appeal, had the video recording of those statements. The jury may also have concluded that the statements he was alleged to have made to Ms Horstead were in fact made and were true. The Court of Appeal would also know that the jury at trial would most likely have rejected the appellant's account of his conversation with Detective Thomas.

57 Neither counsel nor the trial judge had invited the jury to conclude that the appellant's evidence at trial could more easily be rejected by the jury because he was a man of poor character. There was a deal of evidence that revealed the appellant had done discreditable things with RenŽe, when under-age. On the appellant's own account of his dealings with Detective Thomas, he had asked to see him because he was a police officer who had dealt fairly with him when he was investigated for, and ultimately charged with, theft. There was frequent reference at trial to the appellant and others using drugs. And there was, of course, the evidence of his forming and maintaining a relationship with RenŽe. The possibility that any or all of these matters had been considered by the jury and taken into account against the appellant cannot be excluded. But one question for the Court of Appeal was whether, considering all of the evidence at trial, these matters of character could be put aside as unimportant side issues when viewed in the context of the whole trial, particularly as the evidence in the trial included the powerful testimony of confessions to police which the appellant did not contest making, although he sought to explain how they came about. If they could, attention could focus upon whether the videotaped confession (which the appellant had undoubtedly made) established, beyond reasonable doubt, his guilt of murder. Or was there a reasonable possibility that he had made a false confession?

58 These questions were not addressed in argument of the present appeal. Argument was confined to the point of principle revealed by the Court of Appeal's reasons. This Court does not have the whole record of the trial. Even if it did, it would be far preferable that the record first be considered by the Court of Appeal than examined for the first time in this Court. It may be that on examining the whole of the record of the trial, the Court of Appeal will not be persuaded to the requisite standard that, allowing for the natural limitations on an appellate court, what the appellant said in his second interview with police can be accepted as proving, beyond reasonable doubt, his guilt of murder. But that is a question that the Court of Appeal has not yet addressed. The matter should be remitted for that Court's further consideration. That reconsideration must take place because, in applying the proviso to s 568(1) of the Crimes Act, the Court of Appeal erred when the reasons that it gave are considered by reference to language of the Crimes Act expressing that Court's appellate duty.

Conclusion and orders

59 For these reasons, the appeal should be allowed, the orders of the Court of Appeal of the Supreme Court of Victoria made on 5 May 2004 should be set aside and the matter remitted to the Court of Appeal for its further consideration.

Footnotes

1. Crimes Act 1958 (Vic), Pt I, Div 1(8C), ss 45–49A
2. *R v Weiss* (2004) 8 VR 388.
3. (2004) 8 VR 388 at 397 [60].
4. (2004) 8 VR 388 at 400–1 [70].
5. (2004) 8 VR 388 at 400–1 [70].
6. (2004) 8 VR 388 at 401 [70] footnote 69.
7. *R v Konstandopoulos* [1998] 4 VR 381; *R v McLachlan* [1999] 2 VR 553.

...

41. See, for example, *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 77 [9] per Gaudron, Gummow, Hayne and Callinan JJ, 89 [46] per Kirby J; *Victorian Workcover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 526 [11] per Gleeson CJ, Gummow, Hayne and Callinan JJ, 545 [63] per Kirby J; *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 37–9 [11]–[15] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 111–12 [249] per Kirby J; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 6–7 [7]–[9] per Gleeson CJ, McHugh, Gummow and Hayne JJ; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 79 ALJR 1850 at 1856 [30] per Gleeson CJ, Gummow, Hayne and Heydon JJ, 1877 [167]–[168] per Kirby J.
42. (1998) 197 CLR 250 at 256 [12].
43. See, for example, *Festa v The Queen* (2001) 208 CLR 593 at 631 [121] per McHugh J.
44. See, for example, *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J; *R v Storey* (1978) 140 CLR 364 at 376 per Barwick CJ.

...

54. *Fox v Percy* (2003) 214 CLR 118 at 125–6 [23] per Gleeson CJ, Gummow and Kirby JJ.
55. cf *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716 at 1720 [11] per Gleeson CJ, McHugh, Gummow and Heydon JJ, 1722–3 [23]–[24] per Kirby J.
56. *Driscoll v The Queen* (1977) 137 CLR 517 at 524–5 per Barwick CJ; *Storey* (1978) 140 CLR 364 at 376 per Barwick CJ; *Morris v The Queen* (1987) 163 CLR 454; *M v The Queen* (1994) 181 CLR 487; *Festa* (2001) 208 CLR 593 at 631–3 [121]–[123] per McHugh J.
57. *Fox v Percy* (2003) 214 CLR 118 at 125–6 [23] per Gleeson CJ, Gummow and Kirby JJ.
58. *Kotteakos v United States* 328 US 750 at 763 (1946).
59. *RPS v The Queen* (2000) 199 CLR 620 at 630 [22] per Gaudron ACJ, Gummow, Kirby and Hayne JJ.
60. See, for example, *Wilde v The Queen* (1988) 164 CLR 365 at 373; cf *Conway v The Queen* (2002) 209 CLR 203 at 241 [103] per Kirby J referring to *R v Hildebrandt* (1963) 81 WN (Pt 1) (NSW) 143 at 148 per Herron CJ; *R v Henderson* [1966] VR 41 at 43 per Winneke CJ; *Couper* (1985) 18 A Crim R 1 at 7–8 per Street CJ.
61. Cf Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice', (1937) 20 *Journal of the American Judicature Society* 178 at 185–6.

30.36C Mallard v R

[2005] HCA 68; (2005) 224 CLR 125; 222 ALR 236
High Court of Australia

Gummow, Hayne, Callinan and Heydon JJ:

1 The appellant was tried and convicted by the Supreme Court of Western Australia (Murray J with a jury) of the murder of Mrs Lawrence, the proprietor of a jewellery shop, at Perth on 23 May 1994. The trial lasted 10 days. The appellant unsuccessfully appealed to the Court of Criminal Appeal of Western Australia. After he had served eight years of his sentence of life

imprisonment in strict security, he petitioned for clemency. The Attorney-General for Western Australia referred the petition to the Court of Criminal Appeal which dismissed the appeal. The appeal to this Court raises questions as to the way in which the Court of Criminal Appeal should proceed in determining a reference of such a petition and the evidence to which it may have regard in doing so.

…

5 The provision with which the Court is concerned in this case is similar in substance to provisions in other states.[1]

6 The significance of this history for present purposes, is that the exercise for which s 140(1)(a) of the Act provides is effectively both a substitute for, and an alternative to, the invocation, and the exercise of the Crown prerogative, an exercise in practice necessarily undertaken by officials and members of the Executive, unconfined by any rules or laws of evidence, procedure, and appellate conventions and restrictions. That history, briefly stated, argues in favour of an approach by a court on a reference of a petition by the Attorney-General to it, of a full review of all the admissible relevant evidence available in the case, whether new, fresh or already considered in earlier proceedings, however described, except to the extent if any, that the relevant Part of the Act may otherwise require.

…

The proper approach

8 Insight into the cautious way in which the Court of Criminal Appeal here (Parker, Wheeler and Roberts-Smith JJ) conceived its function under the Act and the Criminal Code can be gained from these passages in that Court's unanimous judgment:[2]

> It was accepted on both sides that on reference the court had a duty to consider the 'whole case'. The court is required to consider the case in its entirety, subject only to the limitation that it is bound to act upon legal principles appropriate to an appeal.
>
> However, there was at times a tendency for counsel for the petitioner to refer to this proposition as if it justified the hearing afresh of evidence at trial and evidence called on the appeal, without regard either to the verdict of the jury or to the previous decision of the Court of Criminal Appeal in this case. That was particularly noticeable in the petitioner's opening submissions, in which very detailed submissions were put as to discrepancies between the evidence of various witnesses as to the timing of certain events. Those matters were before the jury at the petitioner's trial, although of course they were not marshalled and emphasised in precisely the way in which the petitioner now seeks to marshal and emphasise them.

9 Their Honours then reviewed the authorities with respect to the identification and reception of evidence as fresh evidence. They drew a distinction between 'new evidence', that is, evidence available but not adduced at trial, and 'fresh evidence', which appellate courts ordinarily will receive, on the basis that it did not then exist, or, if it did, could not then have been discovered with reasonable diligence. Their whole approach thereafter proceeded on the basis of the passages that we have quoted, that is, as if there were serious inhibitions upon that Court's jurisdiction to consider, not just the evidence that was adduced at the trial, but also its relevance to the further evidence that the appellant sought to introduce and rely upon in the reference.

10 It seems to us that the approach was an erroneous one. Subject only to what we will say later about the words 'as if it were an appeal' which appear in s 140(1)(a) of the Act, the explicit reference to 'the whole case'[3] conveys no hint of any inhibition upon the jurisdiction of the Court of Criminal Appeal on a reference. Indeed, to the contrary, the words 'the whole case' embrace the whole of the evidence properly admissible, whether 'new', 'fresh' or previously adduced, in the case against, and the case for the appellant. That does not mean that the Court may not, if it think it useful, derive assistance from the way in which a previous appellate court has dealt with some, or all of the matters before it, but under no circumstances can it relieve it of its statutory duty to deal with the whole case. The history, as we have already mentioned, points in the same direction. The inhibitory purpose and effect of the words 'as if it were an appeal' are merely to confine the Court to the making of orders, and the following of procedures apposite to an appeal, and further, and perhaps most relevantly, to require the Court to consider whether the overall strength of the prosecution case requires the Court to apply the proviso contained in s 689(1) of the Criminal Code.

…

13 It follows that in proceeding as it did, the Court of Criminal Appeal erred in law. The question remains however, whether that error induced or caused a miscarriage of justice, the same question as would exercise the mind of the Executive were it to deal with a petition rather than refer it to the Court of Criminal Appeal for determination. The answer to that question may only be given after a consideration of the facts, not only as they emerged at the trial, but also as they emerged in the Court of Criminal Appeal, no matter what descriptive term the evidence adduced there might be given. It is elementary that some matters may assume an entirely different complexion in the light of other matters and facts either ignored or previously unknown.

Facts

14 Mrs Lawrence was alone in her shop when she was violently assaulted with a heavy instrument which has never been found. The assault occurred in the late afternoon. She was discovered, barely alive, but terminally injured, in a pool of her own blood, by her husband. The appellant had, on a previous occasion or occasions, been in the shop. He was a user of marijuana. Earlier on the day of the assault, he had been briefly in the custody of police officers. Following the death he was repeatedly interviewed by police officers, both while he was in hospital for the treatment of mental infirmity, and elsewhere. Only one of the interviews was recorded. During the interviews he made some highly fanciful, indeed incredible assertions and claims, as well as apparently inculpatory, confessional statements.

15 Some witnesses at the trial, with varying degrees of credibility, swore that they had seen the appellant in or about the shop at or about the time of the murder. It is sufficient for immediate purposes to say, that the whole of the evidence at the trial, including that of the appellant, despite conflicts in it, was sufficient to sustain a verdict of guilty.

16 On the reference however, further evidence was adduced. It also became apparent that a deal of it had been in the possession of investigating police before, and during the trial, and had not then been disclosed to the appellant. (Whether any of it was in the possession of the Director of Public Prosecutions is a question that is unnecessary to investigate.) Some, at least, of that evidence, the respondent concedes should have been disclosed pursuant to cll 57–60 of the Statement of Prosecution Policy and Guidelines made and gazetted pursuant to the Director of Public Prosecutions Act 1991 (WA) …

17 At this point it is relevant to note that the recent case of *Grey v The Queen*[7] in this Court stands as authority for the proposition that the prosecution must at common law also disclose all relevant evidence to an accused, and that a failure to do so may, in some circumstances, require the quashing of a verdict of guilty. As will appear, the evidence which was not produced before or at this trial, was certainly no less cogent than the evidence which was not disclosed in *Grey*.

18 Some of the further evidence related to the alleged murder weapon. In one interview, the appellant was asked what the assailant's weapon was. He replied, 'A wrench'. The appellant was asked to, and did draw a wrench, with the word 'Sidchrome' on it. That drawing was an exhibit of which much was made at the trial. The deceased's husband said in evidence, with little conviction, that he thought that there may have been a Sidchrome spanner missing from a shed which his late wife used as a workshop behind the shop. The respondent had stressed both in opening and closing the prosecution case at the trial that the wrench drawn by the appellant was the murder weapon.

19 When the appellant gave evidence he denied that he had told the police that Mrs Lawrence had been killed with a wrench. He said that his sketch of the wrench was:

> a sketch of a supposed weapon that we were talking about in our theory which I said was a gas wrench to be used on acetylene equipment. I have no idea what a gas wrench looks like. That is what I assumed it would look like in my theory.

There was in fact no acetylene equipment in the workshop.

20 During the reference a number of contradictory facts were brought out for the first time and highlighted. These included that experiments had been done on behalf of the respondent with a crescent-shaped wrench of the kind said to be the murder weapon. The experiments conducted by a forensic pathologist and police officers, included the striking with a copper anode (of the kind kept in Mrs Lawrence's workshop), and a wrench, of a pig's head in an attempt, unsuccessful, to replicate Mrs Lawrence's wounds.

21 Other facts relevant to the nature of the murder weapon are these. Residues of rust and Prussian Blue pigment had been found in Mrs Lawrence's wounds. The composition of Sidchrome wrenches is such that they rarely rust. Sidchrome spanners were sold unpainted. A layer of blue paint from a forklift located near the deceased's premises did contain Prussian Blue pigment. The forensic pathologist who undertook the experiment said that a wrench could not have caused many of the injuries because it would cause blunt, crushing-type injuries rather than the cuts and lacerations suffered by Mrs Lawrence. He had examined a variety of tools, including spanners, in a friend's workshop and had been unable to find one capable of matching the wounds sustained by Mrs Lawrence. Similarly, two investigating police officers, Detectives Brandon and Carter, had attempted without success to locate a wrench which would be likely to produce wounds similar to those inflicted on the scalp of Mrs Lawrence. In 2002, at the request of those acting on behalf of the appellant, the pathologist, Dr Cooke, performed a further experiment with a pig's head, using a Sidchrome spanner supplied to him, and again was not able to replicate the injuries sustained by Mrs Lawrence. Whether or not a pig's head would be susceptible to cutting and deformation in a way similar to a human head, was not the subject of detailed expert evidence, but clearly the prosecution's experts, in undertaking the experiment must have thought it to be of some utility.

22 The disposition by the Court of Criminal Appeal of some of this relevant, potentially at least partially, exculpatory evidence was unsatisfactorily summary and almost entirely speculative.[8]

> The material relating to the rust and the paint can be quickly disposed of. Although the petitioner's drawing of the wrench labelled it a 'Sidchrome', he also described it as 'rusty'. Two obvious possibilities, if a wrench/spanner were the relevant weapon, were either that he was mistaken in his recollection as to the brand, or alternatively that rust had adhered to it as a result of its having been stored with or used on some rusty object.

So far as the paint was concerned, it does not seem to have been suggested at trial that the entire weapon was blue. Rather, it appears from the outset to have been more likely that it had some blue adhering to it. A layer of blue paint from the forklift was indistinguishable from the blue paint specks found in the deceased's head wounds. However, paint of that colour and composition is relatively common. There were further layers in the paint from the forklift, which were of a composition not reflected in material found in Mrs Lawrence's head wounds. For that reason Mr Lynch, principal chemist at the Chemistry Centre WA, said in evidence on this appeal that he considered it unlikely that the forklift was the source of the paint in Mrs Lawrence's wounds.

So far as the rest of the material is concerned, although it has a number of nuances and variations, the broad thrust of the petitioner's submission can be summarised as being to the effect that: a wrench could not have been the murder weapon; and this fact was known to the prosecution but not disclosed to the defence. Had the jury known that it could not have been the weapon, doubt would have been cast on the petitioner's confession to use of a wrench as the weapon. That proposition falls to be evaluated against the evidence given at trial, and the evidence given before us, as to the likely weapon.

23 It was not for the Court of Criminal Appeal to seek out possibilities, obvious or otherwise, to explain away troublesome inconsistencies which an accused has been denied an opportunity to explore and exploit forensically. The body of unpresented evidence so far mentioned was potentially highly significant in two respects. The first lay in its capacity to refute a central plank of the prosecution case with respect to the wrench. The second was its capacity to discredit, perhaps explosively so, the credibility of the prosecution case, for the strength of that case was heavily dependent on the reliability of the confessional evidence, some of which was inexplicably not recorded, although it should have been recorded.

24 The Court of Criminal Appeal also seems to have been overly impressed by evidence adduced by the respondent in rebuttal of the appellant's alibi, that he had at the time of the murder, been knocking on various doors looking for marijuana, from witnesses who said that they had heard no-one knocking on their doors. The disproof and rejection of the alibi did not mean that the appellant should on that account alone have been convicted.

25 The appellant's evidence at the trial was that he had left a taxi at Bel Air Apartments, without paying (telling the taxi driver, Mr Peverall that he was going inside for money), shortly after 5 pm. While the driver waited, he entered the foyer and went through to another building, Dover Court, and then up to the top floor of it, to see whether the taxi had left. This he said, took about 20 minutes. Mr Peverall in examination in chief, said that he dropped the appellant off at Bel Air at about 4.45 to 5 pm and waited for about 20 minutes before returning to a nearby taxi rank and accepting a radio call at 5.22 pm. In cross-examination, after being shown evidence that he had given at a previous hearing that it could have been

just before, or just after 5 o'clock, he said that it was 'nearer to 5 o'clock'. Uncontradicted evidence at the trial was that the time taken to walk from Bel Air flats to Mrs Lawrence's shop was five minutes, or by another route, two minutes and 40 seconds. Both routes followed a path, directly in front of Bel Air, where Mr Peverall was waiting for the appellant to return to pay his fare. Mr Peverall was of course looking out for him. That Mr Peverall did not see him strongly suggests that he did not pass that way.

26 The body of evidence just summarized was capable, not only of establishing the appellant's absence from the scene of the murder at the time of it, but again, also of weakening the credibility of the confessional evidence. This was not a case, indeed few are, where the respective bodies of evidence can be taken as being in watertight compartments.

27 It is to the confessional evidence that we now turn. It consisted of the sum of an unrecorded interview by Detective Sergeant Caporn on 10 June 1994, a further unrecorded interview by another police officer, Detective Sergeant Brandham on 17 June 1994, and a short videotaped interview after the unrecorded interview on that day.

28 On the morning of 10 June 1994 the appellant was discharged from Graylands Hospital to answer a charge at the Central Law Courts in Perth. It was then that he was first interviewed. At 12.50 pm he was taken by police officers from the Central Law Courts to a police station where he was interviewed over a period of eight hours and 20 minutes with seven intervals. At trial he said that during the interview on 10 June 1994, he 'was in total confusion to the point where anything that he [Detective Sergeant Caporn] suggested to me I would adopt'. He was not, it may be observed, cautioned or charged during, or immediately before that interview.

29 The interview on 17 June 1994 was unrecorded. It lasted three hours. It was (to the knowledge of those conducting it) conducted after the appellant had spent most of the previous evening at a nightclub, had been beaten, and had had little sleep.

30 After the unrecorded interview of 17 June 1994, there was a videotaped interview of less than 30 minutes, described by the Court of Criminal Appeal as of a 'very unusual nature'. At the beginning of the interview, the appellant said: 'I want to be video recorded so that I can be cleared.' His closing words were that his account was 'my version, my conjecture, of the scene of the crime'. In this interview, he often spoke of himself in the third person (for example, 'initially I entered into the room, or this person entered the room … thinking that he was on his own'). He also spoke about Mrs Lawrence as if he were speculating about her conduct rather than reporting his observations of it (for example, 'I would say she would have done …'). Several times he was interrupted by the interviewers (for example, when he said, 'Judging by the damage that was shown to me in photographs …'). During it he offered further suggestions about the murder, such as:

> DET SGT BRANDON [sic]: … You said that you approached her from the rear of the shop and she asked you 'What are you doing here?'
> MR MALLARD: Yeah.
> DET SGT BRANDON: Is that right?
> MR MALLARD: That's right.
> DET SGT BRANDON: Okay. And that you said to her that you were going to rob her. This is what you told us. Okay?
> MR MALLARD: This is what I imagine this person would say.

…
DET SGT BRANDON: … Now, you also said that she gave you a purse?
MR MALLARD: A purse.
DET SGT BRANDON: All right.
MR MALLARD: I would say it would have to be a matching purse. Being a woman of taste, she would have had a matching handbag and a matching purse. At a last resort, I would have gone for a Glomesh bag.
DET SGT BRANDON: Okay. All right. You told us that she was dressed in what?
MR MALLARD: A skirt of some sort. Again, being a woman of taste and sophistication, she would have had to be — worn a nice skirt like this, but one that joins up.
…
DET SGT BRANDON: Right, and I think you said that you virtually ran there [the Stirling Bridge] from the scene?
MR MALLARD: Would have had to.
DET SGT BRANDON: Yeah.
MR MALLARD: Or caught a train much — probably at North Fremantle, but I don't think so because the tapes — there's no videotapes of that day.
DET SGT BRANDON: No problems.
MR MALLARD: So he was either very fit or he had a push-bike.

31 The Court of Criminal Appeal described the circumstances and contents of the appellant's 'confessions' as 'peculiar', adding that the appellant 'said a number of things which were, to say the least, odd'. Nonetheless, the Court concluded that the appellant had 'persist[ed] in a pattern of grudging confession as his untrue accounts were rejected, together with a continuing attempt to mislead where possible'. One of the peculiarities of course, was the appellant's use of the third person in referring to the killer. For example, in the interview of 10 June 1994 he spoke of the 'evil person' who killed Mrs Lawrence, and of the emotions that this person would be feeling, also saying 'it's murder and that's not me'.

32 The Court of Criminal Appeal did not refer to other peculiarities of the confession, which was illogically punctuated by denials that he was the murderer. During one interview, he agreed to give, and gave, a blood sample, saying 'This will clear me.'

33 In the Court of Criminal Appeal the respondent submitted that 15 facts could be identified in the appellant's confession which only the murderer could know. In response, the appellant submitted that these were in truth inconsistent with known or established facts. The appellant submitted that the Court of Criminal Appeal erred in declining, as it did, to consider this submission. This error was a consequence of the Court's self-imposed limitation upon its duty to consider the whole case. Had the Court considered that submission it would have been bound to uphold it in part at least.

34 Some examples will suffice. One to which we have already referred and need not repeat, is the evidence about the Sidchrome spanner which falls into the relevant category. The evidence of the blood patterns was different from the pattern that would probably have resulted had he struck Mrs Lawrence where he said he did. The evidence about the point, and his means of entry was, to say the least, unlikely to be true in the light of other evidence with respect to the securing of the front door of the shop.

35 During one of the interviews the appellant said that he had 'locked eyes' with a girl, Miss Barsden, the young daughter of an employee of the deceased. At trial, she said that

she had seen a man in the shop, when the car in which she was seated was stationary, and that this person 'ducked down' (beneath the counter) when he realized she was looking at him. Evidence was adduced at the reference of an ophthalmologist who had tested the appellant's eyesight and found it to be impaired to such an extent as to cast doubt on his ability to 'lock eyes' with anybody. The eyewitness' evidence at the reference was relevantly as follows:

Q: Right?
A: And I stared at him what I felt was longer than he was aware that I was looking at him. I feel that in my process of staring at this person, that when that person realised that someone was looking at him, and this is why I think he — anyway — the minute that I feel he saw me, he ducked down.
Q: Yes, so your recollection — and you have put it here, 'The man saw me looking at him.' Your view was that he realised you were looking at him and then ducked down?
A: Yes, I think so.
Q: Sure. Would you agree that you couldn't say that you actually made eye contact with him in the sense of eyes looking into eyes?
A: No, but I feel that in the process of staring at him and the process — that I feel that he looked directly at me and then that was followed by him bobbing down. I feel that he became aware that I was watching him.
Q: Quite. If you're looking at someone and that person has turned towards you and then suddenly bobs down, you would assume that he must have seen you looking at him?
A: Yes.
Q: Coming back to my question, you're not saying, are you, that you were staring into each other's eyes?
A: When he could see me he was …
Q: Pardon?
A: I could see him. I could see his eyes. I was looking at him. I feel that. Now, it's more that he saw me than eye contact …
Q: Pardon? Eye to eye contact or …?
A: No. I was looking at him.
Q: Yes?
A: And I feel that when he saw me looking at him …

36 This witness, Miss Barsden, described the man whom she saw in the shop as a man of about six feet in height. The appellant is in fact six feet seven inches tall. The facial hair she described on the man she saw also differed from the appellant's, and it is likely that the headwear of the latter in turn differed from that which she observed on the man whom she saw in the shop.

37 It is highly improbable that the perpetrator of the crime would not have had some of Mrs Lawrence's blood spattered on him or her. We interpolate that there were photographs in the possession of the respondent at the time of the trial of a large pool of blood on the floor of Mrs Lawrence's premises which, like the evidence of the experiments to which we have referred, were not produced until the reference. None of the deceased's blood was detected on the appellant or his clothing. The evidence was that the appellant explained its absence by saying that he had washed his clothes in salt water because salt water obstructed or distorted the results of scientific testing. Credible, subsequent, scientific evidence was introduced to the effect that salt water was not present in his clothing, and that had the appellant's clothes

been immersed in it as he claimed, the heavy rain falling at the time would not have been sufficient to wash all salt out of the clothing.

38 It is unnecessary to do more than refer briefly to some of the other matters relied on by the respondent as facts peculiarly within the knowledge of the murderer and known to the appellant. On examination, it can be seen that several of them were not in fact accurately or completely stated by him. His assessment of the number of blows struck was, for example, approximate and varied from time to time. There was in fact no necessary correspondence between the appellant's description of Mrs Lawrence's clothing and what in fact she was wearing when she was attacked. Similarly, there were discrepancies between the appellant's description of the premises and its actual configuration. The appellant denied that he had said much of what was attributed to him in the interviews by the police officers. The absence of any recording of most of the interviews is in these circumstances most unfortunate.

39 Enough appears to indicate that there was substance in the appellant's contention in this Court that the Court of Criminal Appeal wrongly declined to entertain a submission that most or all of the matters said by the respondent to be uniquely within the murderer's knowledge, were not objectively true, or were contradicted by other matters, or were equivocal, or were patently false: and, in consequence, for those and other reasons, including the appellant's denial that he had said what was attributed to him about them, the so-called confessions were unreliable.

40 There were numerous other matters relied on by the appellant, but we need refer to only one of them, his mental infirmity. The respondent submitted that the evidence of the appellant's psychiatric condition presented at the reference was neither fresh nor new: it was materially identical to evidence adduced at the voir dire at the trial in relation to the admissibility of the appellant's interviews with police. It was dealt with in this way by the Court of Criminal Appeal:[9]

> One of the particulars of 'fresh evidence' which is relied upon to establish that the petitioner's confessions were unreliable and should not have been admitted, or that a jury which had that evidence would be likely to have a reasonable doubt relating to them, is said to be the evidence of the psychiatric illness of the petitioner which is contained in affidavits of Dr Patchett.
>
> …
>
> On the other hand, although expert psychiatric evidence may have assisted the thrust of the submission outlined above, by confirming the petitioner's grandiose and unusual speech and thought patterns, there were apparent disadvantages associated with it. The evidence of Dr O'Dea at the voir dire described the petitioner at the relevant time as having been in a 'manic' state. He was described as liable to become 'up-tight and upset' and verbally threatening in situations of stress. He was described as having a 'rich fantasy life' but as being able to determine whether his ideas were fact or fantasy. The last of those observations might well have supported an inference that in his confessions, and particularly in the videotaped confession, the petitioner was quite able to distinguish between being asked about his own movements and being asked about some hypothetical murderer. The discussion of his 'manic' state could well have led to or strengthened a view that he was the type of person who might react disproportionately if, during the course of a robbery, Pamela Lawrence became upset and hysterical, as the police alleged that he had said she did.

41 There is considerable force in much of what the Court of Criminal Appeal said of the psychiatric evidence, its availability, its potential to damage the defence, and the forensic legitimacy of a decision not to lead it before a jury. But it had to be considered with the other evidence in obedience to a mandate to consider the whole of the case, and the whole of the case includes the evidence contradicting aspects of the appellant's confession. All of that provides a basis for further argument in favour of an inference that it should be treated as being of no or little reliability.

42 In submissions counsel for the respondent made several concessions as to some of the matters that we have discussed. We need not repeat them. They were all properly made. They alone, the respondent accepted, would require that the conviction be quashed, unless the proviso, that no substantial miscarriage of justice had occurred, should be applied. He submitted it should be. We are unable to agree. The non-presentation of the evidence to which we have referred, and having the significant forensic value that we have identified, alone, precludes this. Taken with the other evidence that we have discussed, the appellant is entitled to have the verdict quashed. This rather than a remission of the case to the Court of Criminal Appeal to decide the reference in accordance with these reasons is the appropriate course because the only possible correct conclusion there would be that the conviction should be quashed.

43 We would not however accede to the appellant's submission that a new trial should not be ordered. The appellant has already served many years of imprisonment. The case for the prosecution has now been shown to have its defects. But it also has its strengths. … Having regard however to what has in total passed and emerged it would remain well open to the respondent to elect not to have the appellant retried if it were so minded.

44 The appeal should be allowed, the orders of the Court of Criminal Appeal set aside and in place thereof it should be ordered that the conviction of the appellant be quashed, and that there be an order for retrial of the appellant.

[**Kirby J** wrote a separate judgment agreeing with the orders proposed in the joint reasons. Note: the DPP subsequently decided against a retrial.]

Footnotes

1. See Crimes Act 1900 (NSW), ss 474B and 474C; Crimes Act 1958 (Vic), s 584; Criminal Law Consolidation Act 1935 (SA), s 369; Criminal Code (Q), s 669A; Criminal Code (Tas), s 419.
2. *Mallard v The Queen* (2003) 28 WAR 1 at 5 [7]–[8].
3. Sentencing Act 1995 (WA), s 140(1)(a).

…

7. (2001) 75 ALJR 1708; 184 ALR 593.
8. (2003) 28 WAR 1 at 22 [88]–[90].
9. (2003) 28 WAR 1 at 37–9 [169]–[175].

Sentencing and Proceeds

PART 6

Sentencing Principles

CHAPTER 31

INTRODUCTION

31.1 This chapter outlines general principles of sentencing. It focuses on sentencing for the more serious offences, tried on indictment, which commonly lead to sentences of imprisonment. It does not attempt to review the full range of sentencing options and the criteria for choosing between them. These options include fines, various community-based programs and work orders, and suspended sentences of imprisonment. This chapter also does not deal with the special sentencing regimes for young offenders contained in the Juvenile Justice Act 1992 (Qld) and the Young Offenders Act 1994 (WA).

31.2 Sentencing law is partly a matter of statute and partly a matter of common law. Queensland and Western Australia have both enacted legislation specifically dealing with sentences: Penalties and Sentences Act 1992 (Qld) (PSA (Qld)); Sentencing Act 1995 (WA) (Sentencing Act (WA)). For Commonwealth offences, see Crimes Act 1914 (Cth) Pt IB. These statutes enunciate some general principles but, chiefly, set out the various sentencing dispositions available to a court. Most sentencing principles are still to be found within the common law. In recent years, the High Court has become more active, granting special leave in a number of sentencing cases to elucidate sentencing principles.

31.3 Sentencing is a matter for judges and magistrates. Juries play no part in the sentencing process though a jury may recommend leniency. A court can consider such a recommendation but is not obliged to follow it.

Few offences carry mandatory penalties. An example is the offence of murder under Criminal Code (Qld) (Code (Qld)) s 305/Criminal Code (WA) (Code (WA)) s 279; see 4.1. Murder in Queensland has a mandatory penalty of life imprisonment. In Western Australia, a life sentence is mandatory unless it would be unjust or the offender is unlikely to be a danger to the community on release: Code (WA) s 279 (4).

Except for where a mandatory penalty or a minimum penalty is specified, a judge exercises discretion as to the type and length of any sentencing disposition. Where the foot of a Code section has the words 'liable to imprisonment for *x* years' the penalty so provided is the maximum penalty for the offence: Acts Interpretation Act (1954) (Qld) s 41; Interpretation Act (1984) (WA) s 72. A court may impose any lesser term of imprisonment or a different

penalty such as a suspended sentence, a fine or a community-based order: PSA (Qld) ss 47, 153(1); Sentencing Act (WA) s 9. The maximum sentence is reserved for cases of the worst sort of their type and is rarely imposed.

In deciding on a proper sentence, a court may inform itself as it thinks fit, though a judge may not take a view of facts inconsistent with the verdict of a jury.

Victims of crime are entitled to have the harm suffered by them considered by the court: Criminal Offence Victims Act 1995 (Qld) s 14; Sentencing Act (WA) Div 4.

31.4 A sentencing judge has wide discretion. In *R v Smith* [2004] QCA 31 at [4], de Jersey CJ said: 'Fortunately under our system of sentencing straight jackets are not the characteristic: the fully informed sentencing discretion is the hallmark.' This does not, however, mean that a sentencing judge has carte blanche for the expression of personal views. Sentencing, like the exercise of any statutory discretion, is subject to various constraints. In *R v Melano* [1995] 2 Qd R 186 at 189, the Queensland Court of Appeal said:

> [T]he court's discretion … is subject to inherent limitations; it cannot be exercised for a purpose other than that for which it is given, or by reference to extraneous considerations, and material considerations must be taken into account. And, of course, sentencing principles must be applied; for example, those derived from the Penalties and Sentences Act 1992, or established by judicial decision …

Most of this chapter is devoted to the common law and statutory principles that guide the exercise of sentencing discretion. For relevant statutory principles, see PSA (Qld) ss 9–15; Sentencing Act (WA) ss 6–8; Crimes Act 1914 (Cth) s 16A.

31.5 Both the convicted person and the prosecution can appeal against a sentence: see **30.9**, **30.14**.

As was noted earlier (see **30.16**), appellate courts have insisted that they should ordinarily interfere with the exercise of the trial judge's discretion only where the sentence is based on an error of principle or reasoning. In *Lowndes v R* (1999) 195 CLR 665; 163 ALR 483, the High Court said in a joint judgment, at 672:

> [A] court of criminal appeal may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing judge exercised his or her discretion. This is basic. The discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice.

In *Lacey v Attorney-General of Queensland* [2011] HCA 10; 275 ALR 646, this approach was applied to prosecution appeals in Queensland even though Code (Qld) s 669A(1) provides that, on such appeals, 'the Court may *in its unfettered discretion* vary the sentence and impose such sentence as to the Court seems proper'. The High Court reasoned at [57]–[62] that s 669A(1) creates an appeal by way of a rehearing and therefore requires demonstration of error on the part of the sentencing judge before the appellate court's 'unfettered discretion' to vary the sentence is enlivened.

Some error of principle or reasoning might be disclosed in the sentencing judge's stated reasons. Alternatively, error might be inferred from the sentence itself. In order to be reviewable on the latter ground, the sentence must be 'manifestly inadequate' or 'manifestly excessive'.

COMMON LAW PRINCIPLES

31.6 A fundamental principle of sentencing is what might be termed *the principle of individualisation*. This is the principle that a sentence should be appropriate for all the features of the particular case, including not only the circumstances of and background to the offence but also the history and prospects of the offender. The sentencing process can involve a broad-ranging inquiry. This is quite unlike the trial process with its narrow concentration on whether the elements of the offence occurred and whether the elements of any defence were present.

The individualisation principle is an entrenched feature of the common law of sentencing. It is also reflected in the PSA (Qld) s 9 and the Sentencing Act (WA) s 6, in extensive lists of factors which are to be taken into account in sentencing an offender: see **31.15, 31.19**. See also the prescribed list of factors relevant to sentencing for Commonwealth offences: Crimes Act 1914 (Cth) s 16A.

The individualisation principle does not mean that all factors have equal weight. In general, 'offence' factors are more important than 'offender' factors.

31.7 Another fundamental principle of sentencing is *the principle of consistency* or *parity*. The consistency principle is the principle that similar cases should receive similar sentences. Perfect consistency is unattainable in a system of discretionary sentencing. Nevertheless, it can be increased by attention to precedents or by the use of sentencing guidelines: see **31.33–31.42**.

In *Wong v R* [2001] HCA 64; 207 CLR 584; 185 ALR 233, Gleeson CJ said, at [6]:

> All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.

Kirby J said at [89]:

> In *Lowe v The Queen*, Mason J explained that consistency in criminal punishment is 'a fundamental element in any rational and fair system of criminal justice'. Inconsistency, he declared, 'is calculated to lead to an erosion of public confidence in the integrity of the administration of justice' and is 'regarded as a badge of unfairness and unequal treatment under the law'. He was there speaking of disparity between the sentences imposed on co-offenders. However, the principle is one of general application.

31.8 Consistency between co-offenders is particularly important. A marked disparity will generate a 'justifiable sense of grievance': see *R v Nagy* [2003] QCA 175; [2004] 1 Qd R 63 at **31.56C**. In order to avoid this, the higher sentence may have to be reduced, even if it is within the permissible range of options and would be acceptable if considered in isolation.

31.9 A sentence should be proportionate to the gravity of the offence. In Australian law, this is generally called *the principle of proportionality*. The proportionality principle is also often called the 'retributive' principle in works on the philosophy of punishment. This does not mean retribution in sense of 'an eye for an eye'. The point is not that the punishment should match the crime but rather that the scale of punishment should be aligned to the scale of gravity for

offences. The severest punishments should be imposed for the worst offences and so on down the scale. In *Veen v R (No 2)* (1988) 164 CLR 465; 77 ALR 385 (31.55C), it was said that 'the maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed'. Proportionality or retribution, in this sense, is a principle that can limit as well as justify punishment.

The proportionality principle is reflected in the design of penal liability for offences. Differences in the maximum penalties prescribed for offences by Parliament express the community assessment of differences in the seriousness of the offences. Compare, for example, the different maximum penalties for assault and its various compounds: **5.4 Table 5.1**.

31.10 The proportionality principle is also central to discretionary sentencing. It has been recognised at common law and also given statutory recognition.

- In Queensland, the PSA (Qld) s 9(9) provides that, despite a court being permitted to treat a prior conviction as an aggravating factor, 'the sentence imposed must not be disproportionate to the gravity of the current offence'.
- In Western Australia, the Sentencing Act (WA) s 6(1) provides: 'A sentence imposed on an offender must be commensurate with the seriousness of the offence.'

The leading judicial authority on the proportionality principle is *Veen (No 2)* at **31.55C**. *Veen (No 2)* is particularly important because it asserted the paramountcy of proportionality over considerations of social protection. In essence, the offence is more important than the offender's record or prospects. With respect to the past, it was said that 'the antecedent criminal history of an offender is a factor which may be taken into account … but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence'. With respect to predictions of future dangerousness, it was said that 'a sentence should not be extended beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender'. Curiously, it was also said that a court may have regard to 'the protection of society as a factor in determining a proportionate sentence'. The meaning and significance of this qualification are unclear.

31.11 Proportionality may be a difficult issue when a person is to be sentenced for more than one offence. Imposing a number of separate, cumulative sentences could create a crushing burden, disproportionate to the criminality involved. *The principle of totality* has been developed to avoid this outcome.

The totality principle holds that a court sentencing an offender for more than one offence should not simply impose a number of separate, cumulative sentences. It should instead consider what would be an appropriate *aggregate* sentence: see *Nagy* at **31.56C**. The totality principle is also applied where different courts are imposing sentences: see, for example, *Mill v R* (1988) 166 CLR 59; 83 ALR 1.

31.12 Different views have been expressed as to how an aggregate sentence should be determined and expressed. In *Pearce v R* (1998) 194 CLR 610; 156 ALR 684 at [45], McHugh, Hayne and Callinan JJ said:

> To an offender, the only relevant question may be 'how long', and that may suggest that the sentencing judge or appellate court should have regard only to the total effective sentence … Such an approach is likely to mask error. A judge sentencing an offender for more than

one offence must fix an appropriate sentence for each offence and then consider questions of accumulation or concurrence, as well, of course, as questions of totality.

However, a later statement from the High Court appears to qualify *Pearce* and offer some support for greater flexibility. In *Johnson v R* [2004] HCA 15; (2004) 205 ALR 346 at [26], Gummow, Callinan and Heydon JJ said:

> [T]he joint judgment in *Mill* expresses a preference for what should be regarded as the orthodox, but not necessarily immutable, practice of fixing a sentence for each offence and aggregating them before taking the next step of determining concurrence. *Pearce* does not decree that a sentencing judge may never lower each sentence and then aggregate them for determining the time to be served. To do that, is not to do what the joint judgment in *Pearce* holds to be undesirable, that is, to have regard *only* to the total effective sentence to be imposed on an offender. The preferable course will usually be the one which both cases commend but neither absolutely commands.

The Queensland Court of Appeal has indicated that various options are acceptable: low cumulative sentences; higher concurrent sentences; and one sentence reflecting the overall criminality with lower sentences for the other offences. See *Nagy* (31.56C) at [23]–[35]. Nevertheless, it is established that each offence must somehow receive a separate sentence: *R v Crofts* [1998] QCA 60; [1999] 1 Qd R 386 at 387; *R v Dolan* [2008] QCA 41.

31.13 *A principle of concurrency* is a sub-principle to the principle of totality. It gives some direction about how concurrent sentences should be used to achieve the goal of an appropriate aggregate sentence.

Where several offences occurred in a single transaction (for example, assaults on a group of persons), the general principle is that the sentences should be concurrent. The nature of the offences may, however, justify a different approach. This is sometimes referred to as the 'one transaction rule'. In *Royer v The State of Western Australia* [2009] WASCA 139; 197 A Crim R 319 at [232]–[234], Miller JA pointed out that the rule is only a working rule and that it applies to circumstances in which there are multiple offences where the offender was truly engaged in one multifaceted course of criminal conduct or if all the offences taken together constitute a single invasion of the same legally protected interest.

A principle of concurrency also applies where there has been a series of similar offences (for example, a spree of breaking and entering offences). See the statement of McPherson JA in *R v Gilles* [2000] QCA 503; [2002] 1 Qd R 404 at 408, quoted in *Nagy* (31.53C) at [28].

A preference for concurrent sentences is reflected in statutory provisions to the effect that sentences are to run concurrently unless otherwise ordered: PSA (Qld) ss 155–156; Sentencing Act (WA) s 88.

STATUTORY PRINCIPLES

Queensland

31.14 The purposes for which a sentence may be imposed are listed in the PSA (Qld) s 9(1)(a)–(f), and are:

(a) to punish the offender to an extent or in a way that is just in all the circumstances; or

(b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or

(c) to deter the offender or other persons from committing the same or a similar offence; or

(d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or

(e) to protect the Queensland community from the offender; or

(f) a combination of two or more of the purposes mentioned in paragraphs (a) to (e).

In *R v Bojovic* [1999] QCA 206; (2000) 2 Qd R 183 at [34], it was said: 'A just sentence is the result of a balancing exercise that produces an acceptable combination of the purposes mentioned in s 9(1)(a) to 9(e).'

The PSA (Qld) does not provide any ordering of the objectives. See, however, the assertion of paramountcy for the proportionality principle by the High Court in *Veen (No 2)* 31.55C: see 31.10. Proportionality, together with totality, is an aspect of the justice which is sought in s 9(1)(a). The individualisation and consistency principles are also linked to the goal of ensuring justice, particularly justice as between offenders.

The PSA (Qld) does not expressly mention the purpose of reassuring non-offenders that their obedience has not disadvantaged them in comparison with offenders. It has often been argued that this is one of the most important purposes of punishment. It could perhaps be incorporated in the objective of doing 'justice', with 'justice' interpreted to mean not only justice as between offenders but also justice as between offenders and non-offenders.

31.15 The PSA (Qld) s 9(2) prescribes a number of factors to which a court must have regard in sentencing most offenders. These principles do not apply to offences involving violence to or resulting in physical harm to another person or to offences of a sexual nature committed in relation to a child under 16 years: s 9(3), (5).

The list is extensive but the factors fall into several distinct groups:

- *The principle of imprisonment as a last resort*: s 9(2)(a). This paragraph not only states the principle but also states the preferable alternative:

  (i) a sentence of imprisonment should only be imposed as a last resort; and

  (ii) a sentence that allows the offender to stay in the community is preferable; …

The principle is expressly excluded for offences involving violence to or resulting in physical harm to another person and for sexual offences against children: see s 9(3), (5) and see 31.17. Moreover, it is difficult to ascertain how much weight it is given by the courts in other cases. It certainly does not mean that a first offender cannot be imprisoned. A court may conclude that there is no other option not only because of the offender's record but also because of the seriousness of the offence.

In *R v Williams* [2004] QCA 27, McMurdo P acknowledged: 'Ordinarily a mature person who commits serious property offences, even as here with no previous convictions, could expect to serve an actual period of imprisonment.' On the other hand, in *R v Betts* [2003] QCA 159, McMurdo P said: 'It is notorious that short gaol sentences for young first offenders are unhelpful to rehabilitation.'

- *The gravity of the offence*: s 9(2)(b)–(e). Included here are:
  - the maximum and any minimum penalty for the offence;
  - the nature and seriousness of the offence including any harm done to a victim;
  - the extent to which the offender is to blame for the offence; and
  - any damage, injury or loss caused by the offence.

- *The background and prospects of the offender*: s 9(2)(f)–(g). Included here are:
  - the offender's character, age and intellectual capacity; and
  - any aggravating or mitigating factors concerning the offender.

Section 11 provides that, in determining the character of an offender, a court may consider previous convictions, community contributions and any other relevant matter. Section 9(8) specifically provides that each previous conviction must be treated as an aggravating factor if this is reasonable having regard to '(a) the nature of the previous conviction and its relevance to the current offence; and (b) the time that has elapsed since the conviction'.

- *The interests of the criminal justice system*: s 9(2)(h)–(i). Included here are:
  - the prevalence of the offence; and
  - any assistance given by the offender in the investigation of this or other offences.

These factors relate to broader concerns of the criminal justice system than the particular offence and offender. See also ss 13–13A on guilty pleas and co-operation with law enforcement authorities, discussed at **31.18–31.19**.

- *Considerations of totality*: s 9(2)(j)–(m). Included here are:
  - time spent in custody before sentence;
  - sentences imposed on the offender in other jurisdictions for offences committed at around the same time as this offence;
  - sentences already imposed on the offender that have not yet been served; and
  - sentences which the offender is liable to serve because of revocation of previous orders (for example, revocation of an order suspending imprisonment or a parole order).

Most of these factors relate to the central concerns of the totality principle: see **31.11**. That principle also justifies a court taking account of time already spent in custody.

- *Miscellaneous factors*: s 9(2)(n)–(q). Included here are:
  - the offender's compliance with a previous community-based order (for example, a probation order);
  - representations by a 'community justice group' if the offender is an Aboriginal or Torres Strait Islander person;
  - anything else prescribed by the Act to be taken into account (for example, s 13 requires a guilty plea to be taken into account — see **31.24–31.25**); and
  - any other relevant circumstance.

31.16 The PSA (Qld) s 9(4) prescribes a number of factors to which a court should have regard '*primarily*' when sentencing for offences involving violence to or resulting in physical harm to another person. Again, these factors fall into several distinct groups:

- *The prevention of future harm*: s 9(4)(a)–(b). Included here are:
  - the risk of further harm if a custodial sentence is not imposed; and
  - the need to protect against the risk of further harm.

The presence of this group of factors in s 9(4) presents the major difference from s 9(2). See also the exclusion of the principle of imprisonment as a last resort from the s 9(4) offences: see s 9(3).

- *The gravity of the offence*: s 9(4)(c)–(f). Included here are:
  - the personal circumstances of any victim;
  - the circumstances of the offence, including any death, injury or damage which is caused;
  - the nature or extent of the violence used or intended to be used; and
  - any disregard by the offender of the interests of public safety.

There are also factors relating to the gravity of the offence in s 9(2). Those identified in s 9(4) focus on the harm, violence and danger of the offence.

- *The background and prospects of the offender*: s 9(4)(g)–(j). Included here are:
  - the past record of the offender;
  - the antecedents, age and character of the offender;
  - any remorse or lack of remorse of the offender; and
  - medical, psychiatric, prison or other reports on the offender.

There are also factors relating to the background and prospects of the offender in s 9(2). Those identified in s 9(4) focus on the dangerousness of the offender.

- *Miscellaneous factors*: s 9(4)(k). All that is here is:
  - any other factor relevant to the safety of the community.

31.17 For offences of a sexual nature committed in relation to a child under 16 years, s 9(5)(b) provides that an offender must serve an actual term of imprisonment unless there are exceptional circumstances. In deciding whether there are exceptional circumstances, 'a court may have regard to the closeness of age between the offender and the child': s 9(5A).

Section 9(6) prescribes a number of factors to which a court should have regard 'primarily' when sentencing for offences of a sexual nature committed in relation to a child under 16 years. They fall into groups similar to those for offences of violence:

- *The gravity of the offence*: s 9(6)(a)–(c). Included here are:
  - the effect of the offence on the child;
  - the age of the child; and
  - the nature of the offence, including any physical harm or threats of physical harm.
- *The prevention of future harm*: s 9(6)(d)–(e), (j). Included here are:
  - the need to protect the child and other children from the risk of the offender offending;
  - the need to deter similar behaviour by other offenders; and
  - anything else relevant to the safety of children.
- *The background and prospects of the offender*: s 9(6)(f)–(i). Included here are:
  - the offender's prospects of rehabilitation;
  - the offender's antecedents, age and character;
  - any remorse or lack of remorse of the offender; and
  - any medical, psychiatric, prison or other relevant report on the offender.

31.18 The PSA (Qld) s 13(1) provides that a guilty plea must be taken into account and may reduce the sentence. The significance of guilty pleas is discussed further at 31.23–31.32.

31.19 The PSA (Qld) s 13A concerns 'cooperation with law enforcement authorities'. Such co-operation usually involves assistance with the prosecution of other offenders for the same or other offences. Section 13A establishes a procedure where a sentence is to be reduced because of co-operation. A party to the proceeding must advise the court that the offender has agreed to co-operate: s 13A(2). The offender gives a written undertaking to co-operate to the court: s 13A(3)–(4). The penalty imposed on the offender must be stated in open court: s 13A(6). The judge or magistrate must, however, state in closed court that the sentence is being reduced under s 13A and must state the sentence that would otherwise have been imposed: s 13A(7). In the event that the offender fails to co-operate as promised without reasonable excuse, sentence proceedings may be reopened: s 188(2).

Western Australia

31.20 The Sentencing Act (WA) does not contain detailed principles. Common law principles underpin the sentencing process in Western Australia. Proportionality is the paramount principle: see 31.9–31.10. In addition, the Sentencing Act (WA) s 6(1) states that 'a sentence imposed on an offender must be commensurate with the seriousness of the offence'. Section 6(3), however, states that the requirement for commensurateness does not prevent a sentence being reduced because of (a) 'any mitigating factors' or (b) 'any rule of law as to the totality of sentences'.

On the totality principle in sentencing, see 31.11–31.12. It seems odd to speak of 'rules of law' in this context, where the relevant standards are flexible.

Section 6(2) lists certain factors to be taken into account in determining the seriousness of an offence:

(a) the statutory penalty for the offence;

(b) the circumstances of the commission of the offence, including the vulnerability of any victim of the offence;

(c) any aggravating factors; and

(d) any mitigating factors.

Aggravating and mitigating factors are listed in ss 7–8: see 31.21–31.22.

Section 6(4) prohibits a sentence of imprisonment unless it is justified by either the seriousness of the offence or the need to protect the community. This makes it clear that a first offender can be sent to prison if the offence is sufficiently serious. Conversely, a recidivist can be sent to prison even though the offence is relatively minor.

Section 6(5) requires a court to take account of any relevant guidelines given in guideline judgments. See 31.37 on sentencing guidelines in Western Australia.

31.21 'Aggravating factors' are defined in the Sentencing Act (WA) s 7(1) as being 'factors which, in the court's opinion, increase the culpability of the offender'. There is a difference between aggravating factors under the Sentencing Act (WA) and circumstances of aggravation under the Code (WA). The latter increase the maximum penalty for the offence. A circumstance of aggravation is always an aggravating factor for sentencing, but an aggravating factor is not necessarily a circumstance of aggravation: *Wade v R* [2001] WASCA 252.

Certain factors are deemed not to aggravate an offence by s 7(2):

1. a plea of not guilty;
2. a criminal record; and
3. the failure of a previous sentence to achieve its purpose.

A guilty plea can, however, operate as a mitigating factor under s 8(2). In addition, while a criminal record might not be an aggravating factor, it might prevent other factors operating in mitigation.

31.22 'Mitigating factors' are defined in s 8(1) as being 'factors which, in the court's opinion, decrease the culpability of the offender or decrease the extent to which the offender should be punished'. This formulation recognises that a reduced sentence may be justified by factors independent of the culpability of the offender. Examples might be age or health, or a guilty plea, or assistance to law enforcement authorities (for example, assistance with the prosecution of other offenders for the same or other offences).

A guilty plea is specifically recognised as a mitigating factor in s 8(2). The significance of guilty pleas is discussed further at **31.24–31.33**. Assistance to law enforcement authorities is recognised in s 8(5), which provides that a court reducing a sentence on this ground 'must state that fact and the extent of the reduction in open court'. For other mitigating factors, the court is required just to state that a reduction has been made: s 8(4).

An offender who reneges on a promise to assist authorities may be resentenced: s 37A.

Commonwealth offences

31.23 In sentencing federal offenders, state courts apply the Crimes Act 1914 (Cth) Pt 1B. Section 16A sets out a comprehensive range of matters to which the court must have regard, including the nature and circumstances of the offence, the personal circumstances of the victim, the fact of a plea of guilty, the need for deterrence and punishment, any degree of co-operation, the prospect of rehabilitation and the effect of a sentence on family and dependants. If an offender reneges on a promise of co-operation with the authorities, the DPP (Cth) may appeal against the inadequacy of the sentence at any time while the offender is under sentence: s 21E.

INTOXICATION

31.24 Many offences are committed when the offender is under the influence of alcohol or drugs. Intoxication may be a relevant factor under the principle of individualisation but the courts tend to discount the mitigatory effect. In *Damiani v The State of Western Australia* [2006] WASCA 47; 165 A Crim R 358, it was said (at 2–4):

> Intoxication, whether by alcohol or drugs may explain an offence, but ordinarily will not mitigate penalty, save where the original addiction did not involve a free choice. An offender generally cannot expect a reduction in sentence because they committed the offence whilst intoxicated: *R v Rosenberger* (1994) 76 A Crim R 1.
>
> Self-induced addiction at an age of rational choice establishes moral culpability for the predictable consequences of that choice: *R v Henry* [1999] NSWCCA 111; (1999) 46 NSWLR 346, 383; *Douglas v The Queen* (1995) 56 FCR 465, 470; *Talbot v The Queen* (1992) 34 FCR

100, 105–106; *Hinchliffe v The Queen* [2001] WASCA 15. Intoxication or addiction will be weighed against the other relevant mitigating and aggravating circumstances, such as danger to the community and prospects of rehabilitation (*Channon v The Queen* [1978] FCA 16; (1978) 20 ALR 1, per Brennan J at 5 and Deane J at 21; *Veen v The Queen (No 2)* [1988] HCA 14; (1987) 164 CLR 465 at 476).

Circumstances which wholly or partly excuse the taking of alcohol or drugs, or the addiction, may go to mitigation insofar as they are properly seen to lessen the moral culpability of the offender (*R v Redenbach* (1991) 52 A Crim R 95, 99). Likewise, drug induced psychosis is not of itself a mitigating factor and so will not necessarily result in any mitigation in sentencing. The courts will evaluate moral culpability in such cases according to the offender's particular circumstances and the nature of the offence.

GUILTY PLEAS

31.25 Queensland, Western Australia and the Commonwealth recognise that it may be appropriate to reduce a sentence because of a guilty plea: PSA (Qld) s 13(1); Sentencing Act (WA) s 8(2); Crimes Act 1914 (Cth) s 16A(2)(g).

Queensland

31.26 The PSA (Qld) s 13(1) provides that a guilty plea *must* be taken into account and *may* reduce the sentence. A court is to have regard to the time the guilty plea was made or it was indicated to the relevant law enforcement agency that the plea would be made: s 13(2). The later the indication of the plea, the lesser is likely to be a reduction. Moreover, a reduction may be denied altogether where there was a very late plea.

A court must state in open court that it took account of the plea in determining the sentence: s 13(3). If no reduction is made, the court must state that fact and its *reasons* in open court: s 13(4)(b). It is common for the extent of a reduction to be quantified. This has been said to help the Court of Appeal when it is reviewing a sentence: see *Corrigan v R* [1994] 2 Qd R 415. However, specification of the reduction is not mandatory: *R v Mulholland* [2001] QCA 480.

31.27 The Act does not state how reductions in sentences are to be made. They are often made in Queensland through early parole rather than through reductions in head sentences. For most sentences of three years or less, the court must fix a date for release on parole: PSA (Qld) s 160B(3). The date chosen can reflect the guilty plea. For most other sentences, the court may fix a date of eligibility for parole: ss 160C(5), 160D(3). A prisoner is ordinarily eligible for parole after serving half of a sentence of imprisonment: Corrective Services Act 2006 (Qld) s 184(2). This is commonly reduced to about one-third when a guilty plea has been made.

Reductions in head sentences are also sometimes used. In *R v Houghton* [2002] QCA 159; 129 A Crim R 313 at [31], it was suggested that reductions in the range of 10–30 per cent are normal. Reducing the head sentence rather than the non-parole period is effectively the only option where there has been a conviction of an offence classified as a 'serious violent offence': see **31.48**. The statutory minimum period of imprisonment for these offences can be increased but not reduced by the sentencing court: PSA (Qld) s 160A(5)(a).

Western Australia

31.28 The Sentencing Act (WA) s 8(2) provides that a guilty plea 'is a mitigating factor'. The degree of mitigation is said to be greater the earlier that the plea was made or it was indicated that it would be made: s 8(2). This is, in effect, an invitation to reduce or deny a discount when a plea is late. The Criminal Procedure Act 2004 (WA) is designed in part to allow an accused person an opportunity to plead guilty at an early stage of proceedings before the entire case has been disclosed: see **28.18**.

When a court reduces a sentence because of any mitigating factor, including a guilty plea, it must state that fact in open court: s 8(4). However, as in Queensland, specification of the percentage or numerical reduction is unnecessary: *Fullgrabe v The State of Western Australia* [2006] WASCA 138.

The extent of any reduction is commonly quantified. It has been said that the range of reductions in Western Australia is 'between 20–25 per cent up to 30–35 per cent depending upon the circumstances': *H v The State of Western Australia* [2006] WASCA 53; 163 A Crim R 151.

Principles respecting guilty pleas

31.29 Discounting sentences for guilty pleas is common in many jurisdictions. In *Siganto v R* [1998] HCA 74 at [22]; (1998) 194 CLR 656; 159 ALR 94, the High Court acknowledged and endorsed the general practice. It was said:

> [A] plea of guilty is ordinarily a matter to be taken into account in mitigation; first because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial.

However, it has been questioned whether many guilty pleas are driven by remorse or acceptance of responsibility. In *R v Jones* [2000] QCA 84, Davies JA said:

> I would doubt whether at least in this State a guilty plea is usually evidence of remorse. More likely in most cases, it is evidence of an expectation on the part of an offender usually as a result of legal advice that a guilty plea will probably result in a reduced sentence.

31.30 There are two different views of the rationale for discounting sentences when guilty pleas are entered, leading to potentially divergent views as to criteria for awarding discounts in practice. These might be called 'the utilitarian view' and 'the moral view':

- *The utilitarian view*. On this view, discounts are given primarily in order to save the time and expense of trials. The subjective state of mind of the offender (for example, the presence or absence of contrition) is immaterial; so, too, is whether a conviction would have been inevitable if the plea had been not guilty. This is the view which has generally been taken by state appellate courts. See also the description of discounting as a 'purely utilitarian' exercise by Kirby J in *Cameron* at **31.57C**.
- *The moral view*. On this view, discounts are to be given to persons who deserve them. Discounting reflects a moral distinction between some persons making guilty pleas and other defendants. The subjective state of mind of the accused determines whether a discount is deserved and is therefore central to the inquiry. This view found favour with the majority of the High Court in *Cameron*.

31.31 *Cameron* (31.57C) was a case from Western Australia where the established range of discounts had been reported to be 20–25 per cent up to 30–35 per cent: see 31.27. Cameron had received only a 10 per cent discount on the ground that, because he had offered to plead guilty just before the preliminary hearing, the prosecution had incurred significant expenses in case preparation. The High Court took the view that the issue was not how much expense had been saved but, rather, when an indication of a guilty plea could reasonably have been expected. The charge had specified the wrong drug until the error was pointed out in the offer to plead guilty. Cameron could not reasonably have been expected to plead guilty earlier and was therefore entitled to the full discount.

31.32 *Cameron* holds that it is wrong, as a matter of moral principle, to make the amount of a discount dependent on utilitarian considerations; that is, the *objective* saving of expense because of a guilty plea. The majority of the High Court concluded that, if that were the only justification for a discount for pleading guilty, the differential treatment of persons pleading guilty and not guilty would amount to discrimination against persons exercising their right to a trial. To avoid this discrimination, a discount for pleading guilty would have to be based on factors subjective to the accused. In a crucial passage, Gaudron, Gummow and Callinan JJ said:

> Rather, the issue is to what extent the plea is indicative of remorse, acceptance of responsibility and willingness to facilitate the course of justice. And a significant consideration on that issue is whether the plea was entered at the first reasonable opportunity.

31.33 Following *Cameron*, the key question is how the phrase 'willingness to facilitate the course of justice' in the joint reasons should be interpreted. Is there 'willingness to facilitate the course of justice' in the common cases where the accused knows that conviction is inevitable and offers to plead guilty in the hope of obtaining a reduced sentence? The accused is willing to save the prosecution time and expense as a means to the end of a reduced sentence. Is this sufficient? Or must the accused be willing to provide more positive assistance: for example, by pleading guilty in a case where the evidence is insufficient to convict?

In *R v Houghton* [2002] QCA 159; 129 A Crim R 313 at [32], Fryberg J expressed a restrictive view of entitlement to a discount for pleading guilty. He argued for a limited discount because the evidence was so strong that the accused 'might well have regarded conviction as inevitable' and that there had been no co-operation in the prosecution of accomplices. He concluded: 'These matters do not suggest a willingness to facilitate the course of justice.' However, in *R v D* [2003] QCA 547 at [37], Chesterman J expressed a more expansive view of when discounts should be granted:

> In *Cameron*, it was made clear that a plea of guilty need not be the product of, or accompanied by, remorse on the part of a prisoner before it may be taken into account as an ameliorating factor … A plea of guilty made by a prisoner who is not remorseful and shows no contrition … may still result in a reduction in sentence on the ground that the plea expresses a 'willingness to facilitate the course of justice'.

31.34 The better view may be that the majority in *Cameron* did not intend to suggest that it would be wrong to grant a discount when an accused pleads guilty just to obtain a reduced sentence. It seems likely that few persons pleading guilty are willing to do more than avoid forcing the prosecution to trial when eventual conviction already appears inevitable. If more were to be required in order to be 'willing to assist the course of justice', the incidence of guilty pleas would probably diminish markedly. There was no indication in the joint judgment in

Cameron that a drastic change to the administration of criminal justice was contemplated. If Gaudron, Gummow and Callinan JJ had meant to impose a significant restriction on discounts for guilty pleas, they would be expected to have offered a clear indication of such a major change in sentencing practice. They would also be expected to have examined the significance of the restriction for *Cameron* itself. If positive assistance to the prosecution were to be a condition for a discount, it would hardly have sufficed that the guilty plea in *Cameron* was made at the first reasonable opportunity.

31.35 On the suggested interpretation of the joint judgment in *Cameron*, its impact on sentencing practice should be minimal. A person who voluntarily makes a guilty plea knows and accepts that a conviction will follow without trial. The plea, therefore, always manifests some willingness to assist the course of justice, in the sense described. The timing of the plea reflects the degree of willingness. An indication of the plea at the 'first reasonable opportunity' will support granting the full discount. A later plea may still merit some reduction of sentence. A very late plea may deserve nothing at all. Timing is not, however, the only relevant consideration. Special leniency might be thought appropriate for an accused who is willing to facilitate the course of justice in more positive ways or who shows remorse and acceptance of responsibility.

SENTENCING METHODOLOGY

31.36 Sentencing principles are not considered and applied afresh in every case. The principles underlie patterns of decisions in which they are largely taken for granted. They are articulated mainly in difficult cases where their application is troublesome and in cases where sentences are reversed on appeal for departure from principle. Other methodologies are used to resolve the mass of cases.

Precedents

31.37 In Queensland, heavy reliance is placed on precedents in sentencing for indictable offences. This is a characteristic feature of sentencing methodology in the state. Prosecuting and defence counsel both regularly refer to sentences previously imposed in comparable cases. Moreover, they argue about which cases are comparable. Courts imposing sentences then review the precedents and make reference to similar features supporting similar sentences and to differentiating features justifying higher or lower sentences. The process is repeated in appeals. Express references to principles tend to occur only when the precedents are unclear or their authority is disputed.

Courts using this comparative methodology often adopt what is called a 'two-stage' approach to sentencing — they speak of sentence ranges or starting points for the offence, established by the review of comparable cases, and then of discounts for mitigating factors in the immediate case. In *R v Houghton* [2002] QCA 159 at [30], Fryberg J referred to the study of comparable cases as providing "'the norm", or perhaps, in accordance with Queensland practice, the range within which the norm falls'.

31.38 In Western Australia, the use of sentencing precedent is less common. Instead the Court of Appeal considers whether a sentence is 'in the range of sentences commonly imposed', stressing that a judge may go outside the range in appropriate cases.

Sentencing guidelines

31.39 Sentencing guidelines offer another way to structure sentencing discretion. In jurisdictions where they are used, judges are expected to take them into account but retain discretion over the final result in the individual case. Guidelines can take several different forms, constraining sentencing discretion to greater or lesser degrees. Looser guidelines simply specify a range of sentencing purposes and/or a range of specific factors to be taken into account, or they rank or otherwise assign weights to the various purposes and factors. See, for example, the discussion of the proportionality principle by the High Court in *Veen (No 2)* at 31.52C. Tighter structure can be imposed by numerical guidelines which signify expectations about actual sentences for cases with certain features, usually objective features of the offence. This approach is highly developed in England where the Court of Appeal has adopted ranges of sentences for various offences. Sentences outside the ranges need justification if they are to survive.

31.40 In Queensland, statutory authorisation for the Court of Appeal to issue guideline judgments was introduced in 2010: PSA (Qld) ss 15AA–15AL. No guideline judgments have yet been issued.

The Court of Appeal can issue or review a guideline judgment on its own initiative (s 15AD) or on application by the Attorney-General, the Director of Public Prosecutions, the CEO of Legal Aid or a convicted person affected by an existing guideline: s 15AE. In addition, a Sentencing Advisory Council has been established, the functions of which include advising the Court of Appeal on whether a guideline judgment should be given or reviewed and what its content should be: s 199. The council is representative of a range of interests: s 202.

A guideline judgment respecting a state offence can be pronounced separately or as part of another judgment: ss 15AD(1)(b), 15AE(5)(b). However, for Commonwealth offences, it must be considered necessary for the purpose of determining a proceeding in relation to the offence and must be pronounced as part of the judgment for the proceeding: ss 15AD(2), 15 AE(6).

The form of a guideline judgment has not been prescribed, except with respect to guidelines for Commonwealth offences. Section 15AC provides that, for Commonwealth offences, a guideline judgment must:

> … (b) set out non-binding considerations to guide the future exercise of discretion and not purport to establish a rule of binding effect; and
> (c) articulate principles to underpin the determination of a particular sentence and not state the expected decisions in a future proceeding.

By implication, these restrictions indicate that guideline judgments for state offences can be prescriptive and detailed. The restriction for Commonwealth offences is designed to avoid any conflict with the sentencing scheme under the Crimes Act (Cth): see 31.42.

31.41 In Western Australia, the Sentencing Act (WA) s 143 authorises the Court of Appeal to give guideline judgments. The Chief Magistrate may issue non-binding guidelines to other magistrates: s 144. Although the Court of Appeal has not issued any formal guidelines, in practice many judgments serve as guidelines for other cases: see, for example, *Woods v R* [1994] 14 WAR 341 and *R v Chilvers* [2003] WASCA 87 (intrafamilial sex offences); *Birch v R* (1993) 69 A Crim R 181 (stealing in a position of trust); *Quach v R* [1999] WASCA 210 (drug trafficking); *Yarran v R* [2003] WASCA 130; (2003) 27 WAR 427 (indeterminate sentences), *WA v Jenkin* [2011] WASCA 171 (methylamphetamine lab.)

31.42 In *Wong v R* [2001] HCA 64; (2001) 207 CLR 584; 185 ALR 233, the High Court condemned a set of numerical guidelines, promulgated by the New South Wales Court of Criminal Appeal, for sentencing couriers and other low-level participants in schemes for importing narcotics which involve offences under Commonwealth law. Sentencing for Commonwealth offences is subject to the Crimes Act 1914 (Cth) s 16A(1) which requires a sentence to be 'appropriate in all the circumstances of the offence'.

The guidelines were relatively crude. They simply attached ranges of sentences to ranges of quantities for particular drugs. The Court of Criminal Appeal had acknowledged that factors other than quantity and type would need to be taken into account, usually in determining the precise sentence within the specified range, but did not indicate how this fine-tuning was to be approached. Although the Court of Criminal Appeal disclaimed any prescriptive effect for the guidelines, the High Court took the view that such effect was inevitable. Moreover, all members of the High Court concluded that the guidelines amounted to an illegitimate constraint on the exercise of the sentencing discretion conferred by the Crimes Act 1914 (Cth) s 16A.

31.43 The conclusion that crude guidelines such as those in *Wong*, above, are inconsistent with discretionary sentencing still leaves opportunities for drafting other, more sophisticated, guidelines. Such guidelines might, for example, rank the purposes of sentences or otherwise present criteria for weighing the various factors to be taken into account. In addition, numerical ranges might be acceptable if criteria were identified for selecting a point within the range or moving outside it.

In their joint judgment in *Wong* (at [78]), Gaudron, Gummow and Hayne JJ took a dramatic position with respect to sentencing guidelines in general. They contended that numerical guidelines are wrong in principle and should not be promulgated in any form. This part of the joint judgment, however, did not express a majority opinion.

'Two-stage' sentencing and 'instinctive synthesis'

31.44 In their joint (but not majority) judgment in *Wong* (at [74]), Gaudron, Gummow and Hayne JJ also expressed opposition to any form of 'two-stage' sentencing. In 'two-stage' sentencing, reference is first made to a notional sentence determined by reference to a general standard for the type of offence and an adjustment is then made to accommodate features of the specific case. According to the joint judgment, the correct methodology for sentencing is 'instinctive synthesis', in which a single judgment is made about how all the relevant factors bear upon an appropriate sentence. The relevant passages from the joint judgment were quoted in *Markarian v R* [2005] HCA 25; (2005) 215 ALR 213 (31.55C) at [37].

31.45 'Instinctive synthesis' is well established as a sentencing method in Victoria. For example, in *R v Siggins* [2002] VSCA 97 at [34], it was observed:

> It is often said that the question whether a sentence is manifestly excessive or not does not admit much discussion. It is either perceived to be or it is not.

Moreover, a characteristic feature of sentencing decisions in Victoria is the paucity of references to precedents.

'Instinctive synthesis' has not, however, achieved the same degree of support in other states and has generated a good deal of controversy.

31.46 In *Markarian* (31.55C) at [39], a majority of the High Court (Gleeson CJ, Gummow, Hayne and Callinan JJ) endorsed a modified form of instinctive synthesis. Complex mathematical calculations were condemned. On the other hand, it was conceded that transparency of reasoning is important and that simple exercises in arithmetic can sometimes serve this end. In *Markarian* itself, arithmetic was ruled inappropriate because the considerations to be weighed were numerous and complex.

Contrasting challenges to this compromise position of the majority were presented by McHugh J and Kirby J in *Markarian*. McHugh J argued for instinctive synthesis in its classic form, condemning all two-stage sentencing. Kirby J condemned any reliance on 'instinct', because of the need for transparency, and contended that it was generally acceptable methodology to proceed by way of stages.

31.47 Instinctive synthesis, in any of its forms, has had no discernible impact in either Queensland or Western Australia. It is difficult to see how it could be reconciled with the comparative methodology developed by the Queensland judiciary or with the statutory authorisation for sentencing guidelines in both states: see 31.35–31.37.

IMPRISONMENT AND PAROLE

31.48 An understanding of sentences of imprisonment requires attention to two matters. One is obviously the sentence actually pronounced. This is often called the 'head sentence'. The other is the proportion of a sentence of imprisonment that must be served in prison before release on parole, often called the 'non-release period'.

Parole or parole eligibility needs to be taken into account in the exercise of sentencing discretion. A longer sentence with early parole eligibility might effectively mean the same thing as a shorter sentence with delayed parole eligibility: see *R v Bojovic* [1999] QCA 206 ; [2000] 2 Qd R 183 at [34].

31.49 Queensland and Western Australia have schemes that allow most prisoners to be released on supervised parole after serving a proportion of their sentences: Corrective Services Act 2006 (Qld) (CSA (Qld)); Sentence Administration Act 2003 (WA).

- In Queensland, parole release dates for most sentences of 3 years or less are fixed by the sentencing court: PSA (Qld) s 160B(3). For other sentences, parole decisions are within the discretion of parole boards: CSA (Qld) s 187; and see definitions of 'Queensland board' and 'regional board' in Sch 4.
- In Western Australia, parole decisions are within the discretion of the Prisoners Review Board: Sentence Administration Act 2003 (WA) s 20.
- Commonwealth offenders are generally subject to the regimes of the states in which they are imprisoned: Crimes Act 1914 (Cth) s 19AA. Judges can, however, fix non-parole periods for Commonwealth offenders: s 19AB of the Act.

When parole release dates are not fixed at the time of sentencing, a decision whether to release on parole can be affected by post-sentence factors such as behaviour in prison.

Queensland

31.50 In Queensland, parole release dates for sentences of 3 years or less are fixed by the sentencing court unless a 'serious violent offence' or a sexual offence is involved: PSA (Qld) s 160B(3).

For longer sentences, a scheme of parole eligibility is established by the CSA (Qld). The non-release period (that is, the period before parole eligibility) for life sentences is ordinarily 15 years but rises to 20 years for multiple murderers: CSA (Qld) s 181. For other sentences, the non-release period is ordinarily half of the term of imprisonment: s 184(2). It is longer, however, for 'serious violent offences'. For these offences, it is ordinarily the shorter of 80 per cent of the term of imprisonment or 15 years: s 182(2).

31.51 Standard periods for parole eligibility can be altered by the sentencing court. A sentencing court is authorised to fix a specific parole eligibility date: PSA (Qld) ss 160C(5), 160D(3). If it does fix a specific date, that date takes priority: CSA (Qld) ss 181(4), 182(3), 184(3). However, the sentencing court is concerned only with parole eligibility. Decisions whether or not to release on parole are made by parole boards: CSA (Qld) s 187.

- In the case of a life sentence for multiple murderers, a court must make a non-release order of at least 20 years but can specify a longer period: Code (Qld) s 305(2).
- For a sentence for a 'serious violent offence', a court-fixed date of parole eligibility must be *later* than that applying under the general scheme for parole eligibility: PSA (Qld) s 160A(5)(a).
- For most other offences, the sentencing court can fix a parole eligibility date which is either earlier or later than that applying under the general scheme.

31.52 'Serious violent offence' is a technical term under the Queensland legislation. Two conditions must be met: PSA (Qld) ss 161A–161B; CSA (Qld), definition in Sch 4. Neither of them necessarily involves violence:

1. The offence must be listed in a Schedule to the PSA (Qld).
2. There must be either:
    - a sentence of 10 or more years;
    - a sentence of 5 or more years coupled with a declaration that a 'serious violent offence' has been committed; or
    - an offence involving serious violence against another person or resulting in serious harm to another person coupled with a declaration that a 'serious violent offence' has been committed.

In other words, when an offence is in the Schedule, the classification is mandatory for a sentence of 10 or more years and discretionary for a sentence of 5 or more years or for a sentence involving serious violence or resulting in serious harm.

Western Australia

31.53 In Western Australia, access to parole depends on the sentencing court making a 'parole eligibility order': Sentencing Act (WA) s 89. An order can be made for sentences of 12 months or more. There must be something positive which points towards parole although

it is unclear whether there is a bias towards parole: *Piccolo v State of Western Australia* [2007] WASCA 149; 173 A Crim R 248. A court can decide not to make an order if at least two of four factors are present:

1. the offence is serious;
2. the offender has a significant criminal record;
3. the offender, when released from custody under a release order previously made, did not comply with the order;
4. any other reason the court considers relevant.

31.54 A person for whom a parole eligibility order has been made who is serving a term of 4 years or less is eligible for parole after half the term has been served: s 93. When the sentence is more than 4 years, parole eligibility is available 2 years from the end of the term. Parole is not automatic and depends on a decision of the Prisoners Review Board.

When a life sentence is imposed for murder, the court must either set a minimum period of at least 10 years to be served before parole eligibility or order that the offender never be released: s 90.

31.55C **Veen v R (No 2)**
(1988) 164 CLR 465; 77 ALR 385
High Court of Australia

Mason CJ, Brennan, Dawson and **Toohey JJ:**

1 Early in 1971 the applicant, then almost 16, was apprehended by the police in Hyde Park in Sydney. He was already a homosexual prostitute. He was taken to the Darlinghurst Police Station where he pulled a knife out of his pocket and stabbed himself, puncturing a lung. No charge was laid against him on this occasion. In October 1971, an incident occurred in the boarding house where he was living in Albury, after he had been drinking. His landlady tried to get him to go to bed but he took a kitchen knife and lunged at the landlady. She escaped and attempted to run away. He ran after her and stabbed her three times in the back and once in the chest. On this occasion he appeared before the Children's Court and was convicted of malicious wounding and committed to an institution generally.

2 In 1975 the applicant, then aged 20, was picked up as a homosexual prostitute by a person with whom he spent the weekend. After the two had been drinking heavily, the applicant asked for payment. The other man refused saying: 'No, you black bastards are all the same, always wanting handouts.' (The applicant is an Aboriginal.) The applicant took a sharp, pointed knife from a kitchen rack and stabbed the other man to death, leaving the body with over 50 stab wounds. He was charged with murder but convicted of manslaughter by a jury. The verdict was based on s 23A(1) of the Crimes Act 1900 (NSW), the jury being satisfied that he was suffering from 'such abnormality of mind … as substantially impaired his mental responsibility'. Rath J sentenced him to life imprisonment. His Honour came to the conclusion that, although life imprisonment was not otherwise appropriate for the crime, a life sentence ought to be imposed for the protection of the community by reason of the applicant's uncontrollable urges. His application to the Court of Criminal Appeal was unsuccessful but an appeal to this Court succeeded: *Veen v The Queen* (1979) 143 CLR 458 (hereafter '*Veen (No 1)*'). The majority of the Court were of the opinion that the sentence of life imprisonment

should be quashed and that a sentence of 12 years imprisonment should be substituted. He was sentenced accordingly but was released on licence pursuant to s 463 of the Crimes Act on 20 January 1983.

3 On 27 October 1983 he killed Paul Edmund Hoson whom he stabbed repeatedly with a bread knife. Hoson was also a homosexual. He had invited Veen to his flat for the purpose of homosexual activity. Veen was again charged with murder but the Crown accepted a plea of guilty to manslaughter, again on the grounds of diminished responsibility. Hunt J sentenced him to life imprisonment. He said:

> I am satisfied that the prisoner is potentially or indeed, certainly — a continuing danger to society when released, in that he is likely to kill again or to inflict serious injury upon his release by reason of his brain damage should he be under the influence of alcohol and find himself in any situation of stress. I therefore feel unable to mitigate the severity of a life sentence by reason of the prisoner's abnormal mental condition.

His application for leave to appeal to the Court of Criminal Appeal failed and he applies for special leave to appeal to this Court. The Court of Criminal Appeal regarded the judgment of Mason J in *Veen (No 1)* as containing an authoritative enunciation of general principle, though his Honour (in whose judgment Aickin J agreed) was in the minority in that case. The judgment of Jacobs J in *Veen (No 1)*, with which Stephen and Murphy JJ expressed agreement in their respective judgments, was regarded as no longer applicable for reasons presently to be considered. It is appropriate to grant special leave in order to clarify the principles expressed in and the authority of the judgments in *Veen (No 1)*, but it is convenient to leave examination of those judgments until the facts of the present case are more fully stated.

4 Hunt J heard evidence relating to the applicant's background and medical condition. It was a sorry story. From the age of 2½ years, he was brought up by foster parents. He had a disturbed childhood. He was ultimately removed from his foster parents' custody. A male teacher at his school introduced him to homosexual activity. His academic performance was poor. He has drunk alcohol excessively. The evidence accepted by Hunt J showed that he has brain damage due to alcohol abuse. In gaol, he has been a good worker; 'very quiet, never a problem'. As to the circumstances in which the applicant killed Hoson, Hunt J found:

> I am satisfied that, at the time when the prisoner killed the victim, he was — notwithstanding what he said in his record of interview — affected by alcohol, and that this was yet another incident when the prisoner, when so affected, lost control of his aggressions and reacted violently in a destructive rage.
>
> The similarity between this incident and that which happened in 1974 (1975) is thus a chilling one. It happened within weeks of his unsupervised return to Sydney after his release on licence. Despite what appears to have been every effort on the part of the Probation and Parole Service, the supervision which was necessary to keep this man out of trouble had not been there. It is apparent that the only supervision which will ensure that the prisoner will not re-offend in this way is that which is available when he is in custody. That such is the accurate conclusion to draw is shown by the evidence led on his behalf (which is confirmed to some extent by the Probation and Parole Officer's reports produced from the gaol files) that the prisoner's behaviour whilst in custody has been good throughout his stay in maximum security.

I have therefore come to the conclusion that, as forecast by Aickin J in the High Court (at 497), the finding by Rath J that the prisoner was likely to kill again was correct — even though such finding was based on inadequate material at the time. I am satisfied that, by reason of his brain damage, the prisoner is when under the influence of alcohol likely to kill or to inflict serious injury again upon his release.

Hunt J further found:

(T)he present is clearly amongst the most serious category of cases by reason of that repetition. I accept that the prisoner himself has been severely emotionally and socially deprived, I accept the medical view that he has brain damage. That brain damage entitled him to have accepted in his favour the defence of diminished responsibility. But the extent by which the prisoner's mental responsibility was diminished for that vicious killing, unattended as it was by any extenuating circumstances, does not appear to me to have been very great. …

I am satisfied that the prisoner is potentially or indeed, certainly — a continuing danger to society when released, in that he is likely to kill again or to inflict serious injury upon his release by reason of his brain damage should he be under the influence of alcohol and find himself in any situation of stress. I therefore feel unable to mitigate the severity of a life sentence by reason of the prisoner's abnormal mental condition. … Before any further licence is contemplated, it should be necessary for far greater certainty on the part of the psychiatrists that this man is fit to lead a life outside gaol, when he will be only partially supervised, without danger to the community.

His Honour therefore sentenced the applicant to penal servitude for life.

5 The obvious difference between *Veen (No 1)* and the present case is that it was then uncertain but is now known that the applicant has a propensity to kill when he is under the influence of alcohol and under stress. In *Veen (No 1)*, the majority thought that the trial judge's view that the prisoner was 'likely sooner or later to kill or seriously injure one or more other human beings' was not justified by the evidence; in the present case, the killing of Hoson adds to the earlier acts of violence which, together with the medical evidence, amply support Hunt J's conclusion that the applicant is a continuing danger to society. There are differences between the mitigating factors of which account was taken in *Veen (No 1)* and the circumstances of the present case: here, there was no evidence of provocation as there was in *Veen (No 1)*; the prisoner's youth (he was aged 20 when the first killing occurred) has suffered the attrition of a further 8 years and his criminal record has now been supplemented by the first conviction for manslaughter.

6 However, these were not the grounds of distinction perceived by the Court of Criminal Appeal. In that Court, it was thought that the sentencing principles stated by Jacobs J with the concurrence of Stephen and Murphy JJ depended on the unavailability of psychiatric treatment for prisoners in New South Wales gaols and their Honours found that psychiatric facilities are now available and that the sentencing principles stated by Jacobs J should now be regarded as inapplicable. The principles applied were thought to be those in the dissenting judgment of Mason J. Before examining the supposed ground of distinction between *Veen (No 1)* and the present case, it would be best to examine what were the sentencing principles there laid down. It is easier to state what was not laid down as principle than to state what was. To identify the principles, it is necessary to make a brief analysis of the reasons given

for reviewing the sentence and for determining what substituted sentence was appropriate. Jacobs J (at pp 487–489) referred to three features of the case which gave rise to concern: first, the possibility that the jury found manslaughter on the ground of provocation as well as on the ground of diminished responsibility; second, a misdirection on provocation; and third, the sparsity of evidence to base a conclusion that the prisoner would in the future kill or seriously injure someone. These features, and the trial judge's view that it was not the gravest case of manslaughter, led Jacobs J to the conclusion that the sentence should be reviewed. He then referred (at p 490) to the mitigating factors mentioned in the preceding paragraph, the absence of premeditated violence and the unfortunate background of the prisoner before saying:

> This crime, very grave as it was, was not in the category of the most grave cases of unlawful killing short of murder. A life sentence under New South Wales conditions, coupled with repeated judicial pronouncements that if he were released, he would probably kill again, those pronouncements being based on an inference from the jury's verdict rather than upon the cogency of the psychiatric evidence, was too severe a punishment to impose on the applicant.

His Honour then addressed the order to be made, observing that 'I do not think that the applicant's history is such that any punishment should be awarded which is not strictly proportionate to the gravity of the offence'.

7 The sentencing principle which his Honour laid down is that a sentence should be 'proportionate to the gravity of the offence' unless, perhaps, the applicant's history warrants some departure from the principle. He then determined the appropriate proportionate sentence by reference to all the circumstances of the case. The principle of proportionality was not the point of divergence between the majority and minority, however, for that principle was embraced expressly by Mason J (with the agreement of Aickin J) at p 468. The majority decision in *Veen (No 1)* reflected their Honours' assessment of the particular circumstances of the case; it did not depend on the absence of psychiatric services in New South Wales gaols. Jacobs J referred to the absence of psychiatric services in order to reject as inapplicable to New South Wales a principle developed in England 'that an indeterminate sentence of life imprisonment may be desirable even in a case where the whole of the circumstances of the offence do not on general principles warrant such a sentence': p 477. In his Honour's view the English development, which permitted a sentence greater than the principle of proportionality would allow, proceeded from two bases which were interrelated: (1) the prisoner's mental condition could be kept under constant review and treatment under English conditions; and (2) a longer sentence is required for the protection of the community. As the New South Wales facilities for reviewing and treating mentally abnormal prisoners did not reproduce the English conditions, the first basis could not be matched in New South Wales. But there is nothing in the majority judgments which suggests that the English development should be adopted in this country if and when comparable facilities for the review and treatment of mentally abnormal offenders become available.

8 The principle of proportionality is now firmly established in this country. It was the unanimous view of the Court in *Veen (No 1)* that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender: see pp 467, 468, 482–483, 495. And cf *Walden v Hensler* (1987) 61 ALJR 646, at p 650; 75 ALR 173, at p 179, as to the care to

be exercised in imposing a sentence merely to educate possible offenders in the penalties attached to proscribed conduct. There is no occasion now to contemplate the adoption by judicial decision of the English development. Accordingly, it was unnecessary for the Court to consider the state of psychiatric services in New South Wales gaols as a fact material to the sentencing principles to be applied in this case. It was a mistake to see the distinction between the majority and minority judgments in *Veen (No 1)* as turning upon the state of psychiatric services in New South Wales gaols. Evidence as to that matter should have been rejected as irrelevant to any issue before the Court, for it was not directed either to the need of the applicant for psychiatric treatment or to the likelihood of his being offered such treatment. It is unnecessary to consider the procedure adopted by the Court of Criminal Appeal in admitting evidence as to the state of gaol psychiatric services but, subject to appropriate procedural safeguards, we would not regard that Court as being precluded from receiving further material relevant to the adoption of sentencing principles or sentencing policy of general application.

9 It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible. The distinction between what is impermissible and what is permissible is at the heart of an illuminating controversy to be found in (1953) 6 Res Judicatae between Mr C S Lewis ('The Humanitarian Theory of Punishment', at p 224) on the one hand and Drs Norval Morris and Donald Buckle ('A Reply to C S Lewis', at p 231) and Professor J J C Smart ('Comment', at p 368) on the other. The thesis advanced by Mr Lewis was that the retributive theory of punishment — punishing an offender 'because he deserves it' — prevents the injustices which may be involved in detaining an offender in order, for example, to protect society or to reform the offender. The controversy, the light of which has not been dimmed by later literature, ended with C S Lewis' 'On Punishment: A Reply' (at p 519) in which he acknowledged the importance of protecting society but in this way (at pp 522–523):

> All I plead for is the prior condition of ill desert; loss of liberty justified on retributive grounds before we begin considering the other factors. After that, as you please. Till that, there is really no question of 'punishment'. We are not such poltroons that we want to be protected unconditionally, though when a man has deserved punishment we shall very properly look to our protection in devising it.

10 The plea has been heard by the courts of this country, by adopting the principle of proportionality and by having regard to the protection of society as a factor in determining a proportionate sentence. It must be acknowledged, however, that the practical observance of a distinction between extending a sentence merely to protect society and properly looking to society's protection in determining the sentence calls for a judgment of experience and discernment.

…

13 There is an anomaly, however, in the way in which the mental abnormality which would make an offender a danger if he were at large is regarded when it reduces the crime of murder to manslaughter pursuant to s 23A. Prima facie, a mental abnormality which exonerates an

offender from liability to conviction for a more serious offence is regarded as a mitigating circumstance affecting the appropriate level of punishment. Historically, that was the effect of the provision on which s 23A was modelled, that is, s 2 of the Homicide Act 1957 (UK). That section affected the operation of the existing law in two respects: first, by providing a defence to the crime of capital murder, it protected a qualified offender from the death penalty and, secondly, it provided a modified defence to many mentally abnormal offenders (especially the 'uncontrollable impulse' offenders) who were not entitled to the more restricted defence of insanity according to the *M'Naghten* Rules: see Windlesham, *Responses to Crime* (1987), pp 122–124. But that provision has never been regarded as requiring in all instances the imposition of a penalty less than life imprisonment, as Baroness Wootton of Abinger pointed out in 'Diminished Responsibility: A Layman's View' (1960) 76 *Law Quarterly Review* 224, at p 237:

> In practice it seems likely that the courts do have in mind in passing sentences the probable risk involved in relatively short periods of imprisonment for irresponsible people; and that the heavier sentences are imposed upon those who are thought to be the more dangerous criminals.

She acknowledged that there is a lack of logic in imposing heavier sentences on the more dangerous criminals whose mental abnormality reduced their moral responsibility for the unlawful homicide, and she concluded that '(t)he concept of diminished responsibility represents, in fact, an attempt to smuggle into an essentially punitive system ideas and aims which are totally incompatible with such a system'. However, sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions. And so a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter. These effects may balance out, but consideration of the danger to society cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental abnormality. In *Veen (No 1)* Murphy J alone thought it 'a distortion of the criminal law to sentence people to longer terms because they … have diminished responsibility': p 495. As Baroness Wootton points out, if that approach were adopted in culpable homicide the legally insane would be detained indefinitely, those whose responsibility was severely diminished would be released in the shortest time even though they were a grave danger to society, and those whose responsibility was diminished to a lesser extent would be longest detained even though their release would pose little danger to society. Such a theory of sentencing would prove adventitious in practice and destructive of public confidence in the processes of criminal justice. In this case, Hunt J took into account the relevant purposes of criminal punishment in determining the sentence to be imposed. He was entitled to attach great weight to the protection of society as a factor in that determination.

14 There are two subsidiary principles which should be mentioned. The first is that the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: *Director of Public Prosecutions v Ottewell* (1970) AC 642, at p 650. The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind. Counsel for the applicant submitted that antecedent criminal history was relevant only to a prisoner's claim for leniency. That is not and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties.

15 The second subsidiary principle material to this case is that the maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed: *Ibbs v The Queen* (1987) 61 ALJR 525, at p 527; 74 ALR 1, at p 5. That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognizably outside the worst category.

16 It remains to apply these principles to the instant case. The killing of Hoson was particularly horrible in the manner and violence of its execution. There was an intentional taking of his life. There was no provocation. The mental abnormality which entitled the prisoner to the verdict of manslaughter under s 23A of the Crimes Act is such that the prisoner is a danger to society when he is at large. The doubt which attended this proposition in *Veen (No 1)* has now been dramatically dispelled. The circumstances show that the case was in the worst category and that the appellant's mental abnormality makes him a grave danger to society if he goes at large. The tragedy of Veen's life, which appears from the moving testimony of his foster sister, Brother Loth and Ms Fitzwalker and which must excite sympathy for him, has to be balanced against the exigencies of the criminal law especially the protection of society. Disastrous though the consequences of the sentence of penal servitude for life are for Veen, it cannot be said that the balance was wrongly struck.

17 Although the way in which the learned trial judge considered Veen's antecedent criminal history does not correspond with the way in which we have expressed the principle, it appears that his Honour did no more than regard the relevant antecedent history as a factor which he was entitled to take into account in determining the sentence. Accordingly, there was no error of principle affecting the sentence nor was it manifestly excessive.

18 We would therefore grant special leave to appeal and dismiss the appeal.

[Wilson, Deane and **Gaudron JJ** each delivered separate dissenting judgments. They would have allowed the appeal.]

31.56C

R v Nagy

[2003] QCA 175; [2004] 1 Qd R 63
Queensland Court of Appeal

Williams JA:

1 The applicant pleaded guilty on 19 December 2002 to one count of unlawful use of a motor vehicle (3 January 1999), one count of break and enter premises and steal (19 March 2001), one count of assault occasioning bodily harm in company (25 December 2002), and two counts of assault occasioning bodily harm whilst armed and in company (11 February 2002). He was sentenced on 10 January 2003 to five years imprisonment on each of the assault counts, and four months imprisonment on each of the other counts; all the sentences were to be served concurrently and there was a recommendation for post-prison community-based release after serving two years. A declaration was made that he had spent 262 days in pre-sentence custody.

2 The application for leave to appeal against sentence is concerned primarily with the head sentence of five years imprisonment. The principal submissions advanced by counsel for the applicant were:

(i) The head sentence of five years imprisonment was outside the established range for each of the three counts of assault;
(ii) There was a manifest disparity between the sentences imposed on the applicant's co-offenders with respect to the two counts of assault occasioning bodily harm in company whilst armed and the sentence of five years imprisonment imposed on the applicant;
(iii) The learned sentencing judge failed to make an adequate reduction in the sentence for the applicant's pleas of guilty.

3 The applicant was born on 8 November 1982. He was sentenced to four months imprisonment and three years probation on 9 October 2001 for numerous break and enter offences and other offences committed as a juvenile. He was released from custody on 20 December 2001.

4 The offence of assault occasioning bodily harm in company was committed on the fourth day after his release from prison and whilst he was on probation pursuant to the order of 9 October 2001.

5 The complainant (Bulger) was a 20 year old male who was waiting on the platform of the Bald Hills station at about 10.30 pm on the night of Christmas Day. The complainant and his girlfriend (Barr) were approached by a group of five men (including the applicant) and one woman. The applicant spoke to the complainant, obviously looking for trouble, but the complainant was able to divert attention by referring to the fact that he had been at school with one of the applicant's companions. That other person shook the complainant's hand and the group walked away. Another male person entered the platform and was immediately surrounded by the applicant and his companions. The complainant became concerned for the safety of that other person and moved towards him. The other person then rode his bicycle off the platform. The applicant and his group then again approached the complainant and his girlfriend.

6 Initially there was a dispute before the learned sentencing judge as to who punched the complainant first and as to the extent of the applicant's involvement. The Crown prosecutor said:

The accused confronted the complainant and hit him. They exchanged blows until the accused's companions held the complainant's arms while the accused and others hit him in the head. The complainant attempted to cover himself up to avoid injury and was kicked in the back. This caused him to fall to the ground. He was then repeatedly kicked in the back, stomach and head areas.

7 Defence counsel put the following to the sentencing judge:

… my client's recollection again, as I said, while drunk was that Mr Bulger had called out something which he thought at the time was insulting but reflecting back now he would have to agree that his intoxication has led him into a state of belief which he would not now say was the case that he was mistaken, that then there is a bit of an argument with Mr Bulger. My instructions are that one of the others punched Mr Bulger first and that Mr Bulger retaliated and then seemed to be getting the better of the person that my client was associated with and that my client then got in, as it were, to protect his friend from what he thought at the time was Mr Bulger getting the best of him … my client would agree now that there was no basis for him to intervene. … there is a common purpose situation. … Then my client intervenes and then Bulger hits my client in that fight and then others joined in. My client says he didn't specifically deliver any kicks, but he was certainly involved in the fight.

8 The learned sentencing judge drew the attention of counsel to the differences in the versions given and indicated that there had to be some resolution. The matter was adjourned from 19 December 2002 until 10 January 2003. On the latter date the court was informed that the following facts with respect to the assault on 25 December 2001 were agreed:

The Crown does not accept that the accused merely observed the cyclist riding along and away from the platform. As contained in the statements of Bulger and Barr, the Crown case is that the accused was a member of the group that confronted the cyclist;

The Crown accepts that the accused was not the first person to hit the complainant;

The Crown does not accept that after being hit the complainant 'shaped up' or displayed an intention to fight. Rather the Crown case is that after this blow the complainant is almost immediately punched by other members of the group;

The Crown accepts that while being assaulted by the group he begins to defend himself and does strike a member of the group a couple of times. The Crown accepts that it could have been the accused that is struck that maintains that at this time the assault by the other members of the group was continuing;

The Crown accepts that the complainant was held by his arms and two members of the group while the accused punched him;

The Crown accepts that the complainant was hit from the back by another member of this group, causing him to fall to the ground;

The Crown does not accept the accused did not join other members of the group in kicking the complainant in the upper body and head while he was on the ground. Both the complainant and the witness, Barr, state that the accused kicked the complainant while he was on the ground;

The Crown accepts that the accused then approached Barr, told her not to call police and attempted to take the phone off her and that while this occurred the other members of the group kicked the complainant. However, the Crown case is that this occurred after the accused had participated in the kicking of the complainant.

9 The complainant was taken to hospital by ambulance. He had a bruised forehead, a cut on the left elbow, a swollen and broken nose, a bruised jaw and grazed knees and elbows. He also had some loss of consciousness and amnesia. The complainant was held in hospital overnight and discharged the following day.

10 The pain in the jaw persisted and subsequent x-rays showed a small fracture of the jaw. In his victim impact statement the complainant said that he was kicked in the head many times.

11 The applicant was arrested for that offence on 31 December 2001. It was then established that fingerprints implicated him in the property offences committed on 3 January 1999 and 19 March 2001. If that had been established prior to his being dealt with on 9 October 2001, those two offences would have been dealt with at that time. Following his arrest on 31 December 2001 the applicant was released on bail. That meant that as at 11 February 2002 he was subject to the probation order imposed on 9 October 2001, and also on bail with respect to a charge of assault occasioning bodily harm in company.

12 I now turn to the assaults which occurred on 11 February 2002.

13 The applicant and a number of others boarded a train at Toombul station. Members of the group were drinking and making a nuisance of themselves; defence counsel conceded before the sentencing judge that his client was drunk. A train guard, Miller, the complainant in the second of the counts, told the group to behave. Their behaviour did not improve and Miller told them to alight from the train when it reached Bald Hills station. There the train driver, Proposch, the complainant in the first of the counts, came to the carriage to assist Miller. The applicant's co-offender, Neilsen snatched from the belt of Proposch his hand-held radio. Proposch then chased Neilsen and caught him; a scuffle developed between those two and another of the group then punched Proposch in the head causing him to fall down. Thereafter Proposch was attacked by other members of the group. Miller came to the aid of Proposch and was punched in the head. Proposch and Miller were then surrounded by approximately nine persons. Bottles and rocks were thrown at them. Some of the rocks were as large as a man's fist. Miller was hit in the head with a rock and in the ear with a bottle. Proposch was restrained in a head lock and was spat on. Specifically the applicant administered three kung-fu kicks to Miller. The applicant was involved with the others in the overall assaults on the two railway employees.

14 As the group moved away others, not including the appellant, threw rocks and beer bottles at the train, smashing some windows.

15 Proposch, a man aged 43, suffered concussion, facial bruising and cuts, severe bruising to the left upper arm, and pain in his lower back that persisted for three weeks. Because of the trauma he was off work until 18 February 2002. A psychologist's report before the learned sentencing judge indicated that Proposch suffered significant levels of stress after the incident and required counselling before he could return to full duties.

16 Miller, a man aged 42, suffered a bruised chest, swelling to the left side of the head, lumps on his head and pain to his jaw, arms and legs. Miller was off work for a period of four days after the incident. A report by a psychologist tendered at the sentence established that Miller experienced a stress disorder after the assault.

17 The applicant was identified as being a participant from a video taken at the station where the group had boarded the train. He declined to be interviewed by police.

18 The learned sentencing judge began his remarks by noting that though the applicant had not previously been involved in violence, he had quite a serious criminal history. After referring to the prevalence of assaults by groups of young people going about the city, he drew attention to the fact that an assault involving punching or kicking to the head could have very serious consequences for the victim. Next he referred to the position of the railway employees, and the necessity for members of the public to be able to use the railway system with safety. He said: 'The court must impose sentences which will deter that conduct, make the transport system safe so it can be used by ordinary people'. He went on:

> … in relation to count 3, the assault occasioning bodily harm in which your friend was knocked, or your school acquaintance was knocked to the ground and you kicked him, that I regard as a very serious matter and you are sentenced to a period of five years imprisonment. In relation to the assaults in which you were involved against the railway employees — in relation to each of those you are sentenced to five years imprisonment.

19 Thereafter he noted that the applicant was still a young man and went on to make the recommendation as to eligibility for parole.

20 The first point raised by counsel for the applicant is that there was no distinction drawn by the learned trial judge between punishment for the offence which occurred on 25 December 2001, and the punishment for the offences which occurred on 11 February 2002. He submitted that, considered as distinct offences, a sentence of five years imprisonment for either was not justified by the authorities.

21 Though he did not expressly say so, the reasonably clear inference to be drawn from the way in which the learned sentencing judge approached the imposition of sentence is that he fixed upon a term of imprisonment which reflected the overall criminality of the three counts of assault, and imposed that penalty concurrently on each of the three. The first issue to be determined is whether that approach is permissible and justified by all the circumstances here.

22 The matter is of some importance because the answer may affect the way in which a sentencing judge should approach the determination of sentence where numerous offences are involved. The problem requires consideration of a number of decisions of this Court and the High Court.

23 The starting point in this Court is Kellerman v Pecko [1998] 1 Qd R 419 …

24 … The offender in *Kellerman* was dealt with on the one day for 5 discrete offences committed over a period of some months. Pincus JA said at 420–1:

> Where an offender has committed a number of distinct, unrelated offences, all of which come to be considered by the sentencing court at the same time, an appropriate total sentence may be able to be arrived at by making some of the sentences cumulative; there is no means of making them partially cumulative. Another approach which appears commonly to be taken is to fix a sentence for the most serious offence which is higher than that which would have been fixed had it stood alone; the higher sentence takes into account not only the most serious offence, but all the other offences. Sometimes the

> court will fix, in respect of each of the lesser offences, its own particular penalty, but on occasions the court does not trouble to do that and simply fixes one penalty for all the offences, although they are of varying seriousness, the penalty fixed being regarded as appropriate for the sum total of the criminality involved.

…

27 The next relevant decision of this court in point of time is *R v Crofts* [1999] 1 Qd R 386. There the court (Fitzgerald P, Davies JA, Moynihan J) held that a sentencing court has no power to impose a single sentence of imprisonment for a number of different offences. At 387 the court said that it was 'necessary to impose separate terms of imprisonment for each offence'. There was reference to *Kellerman v Pecko* as a footnote to the observation that the course adopted by the sentencing judge at first instance 'has been followed previously'. With respect, I do not regard *Kellerman* as approving of the approach to sentence as adopted at first instance in *Crofts*. Whilst applying the approach approved in *Kellerman* might result in the same term of imprisonment being imposed on each of the offences that is not the same as imposing a single sentence.

28 Those cases were then referred to in *R v Gilles; ex parte Attorney-General* [2002] 1 Qd R 404. There Pincus JA (with whom Thomas JA agreed) reiterated what he said in *Kellerman* … His Honour referred to *Crofts* but said it 'appears to deal with a rather different point'; I take that to be a reference to the distinction I have drawn above. In expressing agreement with the approach of Pincus JA, McPherson JA said at 408:

> In particular, I am firmly of the view that it has long been the practice, when confronted by a series of offences of the same or similar kind, for judges to impose a sentence on one count, chosen some times at random, that reflects the totality of the criminal conduct disclosed by all of the offending conduct considered in combination, and to impose relatively nominal sentences in respect of the other offences in the series. It is, of course, not impermissible to approach the sentencing process by assigning specific lesser sentences to each of the offences and then accumulating them. Few judges, in my experience, follow that course in circumstances of the kind described, and doing so probably only enhances the potential for error.

29 The decision in *Pearce v The Queen* (1998) 194 CLR 610 was delivered on 10 September 1998 before each of those Queensland cases was decided, yet it is not referred to therein. The indictment charged the offender (amongst other things) with maliciously inflicting grievous bodily harm with intent to do grievous bodily harm and with breaking and entering the dwelling-house of the same victim and, while there, inflicting grievous bodily harm on him. Those charges were counts 9 and 10 on the indictment. Those two charges arose out of a single episode when the appellant broke into the victim's home and beat him. The critical passage for present purposes is in the joint judgment of McHugh, Hayne and Callinan JJ at 623–4 (Gummow J at 629 appears to agree with that reasoning):

> The trial judge sentenced the appellant to identical terms of imprisonment on counts 9 and 10 and made those sentences wholly concurrent. We can only conclude that the sentence on each of those counts contained a portion which was to punish the appellant for his inflicting grievous bodily harm on his victim. Prima facie, then, he was doubly punished for the one act.

Does that matter if, as was the case here, an order was made that the sentences be served concurrently?

To an offender, the only relevant question may be 'how long', and that may suggest that a sentencing judge or appellate court should have regard only to the total effect of sentence that is to be or has been imposed on the offender. Such an approach is likely to mask error. A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality.

Sentencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision. It is, then, all the more important that proper principle be applied throughout the process.

Questions of cumulation and concurrence may well be affected by particular statutory rules. If, in fixing the appropriate sentence for each offence, proper principle is not applied, orders made for cumulation or concurrence will be made on an imperfect foundation.

Further, the need to ensure proper sentencing on each count is reinforced when it is recalled that a failure to do so may give rise to artificial claims of disparity between co-offenders or otherwise distort general sentencing practices in relation to particular offences.

30 It is of significance that none of the judges in *Pearce* referred to the earlier decision in *Griffiths v The Queen* (1989) 167 CLR 372, a decision considered by Pincus JA in *Kellerman*. McHugh J was a party to each decision, and it should not be assumed that the Court was impliedly over-ruling its earlier decision. The appellant in *Griffiths* pleaded guilty to one count of armed robbery whilst armed and wounding, five counts of armed robbery, and to nine other charges. The first four robberies occurred in December 1987, and the last two, including the most serious one in which the wounding occurred, in January 1989. On 1 January 1988 sections 20A and 21 of the Probation and Parole Act 1983 (NSW) came into force, the effect of which was that upon conviction for certain offences, including armed robbery, committed after the date the Act come into force, a non-parole period of 75% of the sentence had to be served unless exceptional circumstances were found. The sentencing judge, unaware of the legislative changes, imposed a head sentence of 12 years with a four and a half year non-parole period. The Court of Criminal Appeal overturned the sentence, and imposed a head sentence of 15 years for the most serious offence, that of armed robbery and wounding, and ordered that the lesser sentences for the other offences be served concurrently. Though the Court of Criminal Appeal held there were no special circumstances it fixed a non-parole period of 11 years and three months. The judgments in the High Court contain passages which are relevant for present purposes.

31 Brennan and Dawson JJ noted at 377 that 'counsel for the applicant accepts that the Court of Criminal Appeal was entitled to increase the head sentence to 15 years, treating the head sentence as the sentence appropriate to the totality of the offences of which the applicant was convicted'. In their joint judgment Gaudron and McHugh JJ said at 393:

> It is well established that in sentencing a person in respect of multiple offences regard must be had to the total effect of the sentence on the offender … This may be done through the imposition of consecutive sentences of reduced length with or without other sentences to be served concurrently or through the imposition of a head sentence appropriate to the total criminality with all the other offences to be served concurrently.

32 Brennan and Dawson JJ expanded on the proper approach to sentencing in the circumstances under consideration by saying at 378:

> The effective sentence which a court determines to be appropriate punishment for a series of offences can be framed, in most cases, either as sentences for the several offences to be served concurrently, or as cumulative sentences or as sentences which are in part cumulative and in part to be served concurrently. If, with full awareness that section 20A applied only to those serious offences which were committed after 1 January 1988, the Court of Criminal Appeal chose to impose the head sentence of 15 years for the armed robbery committed on 8 January 1988 and to impose lesser sentences for all the other offences to be served concurrently with the 15 year sentence, the sentences so imposed are not open to objection. …The true thrust of the applicant's argument must be that, in a case where section 20A applies to some serious offences in a series but not to others in the series, it is wrong to impose the full effective head sentence on the serious offence or offences to which section 20A applies. We would agree that the differing application of section 20A warrants consideration of the appropriateness of imposing the full effective sentence on the offence or offences to which section 20A applies, but no error of principle appears merely from the Courts having chosen that course.

33 Further passages in the joint judgment of Gaudron and McHugh JJ are also instructive. At 394 they said:

> Moreover, in most, if it not all, cases the automatic imposition of section 20A to a head sentence based on a course of conduct involving both 'serious' and non-serious offences must result in an injustice to the prisoner since it is unlikely that the judge would specify a non-parole period equivalent to three-quarters of the sentence in respect of offences which are not serious offences within the meaning of section 20A. If, on the other hand, the sentencing judge decides, because of the operation of section 20A, to impose consecutive sentences even though only one course of criminal conduct is involved, the totality principle requires that the total length of the sentences must not exceed what is appropriate for the course of criminality. This will usually mean that the sentence for the 'serious offence' will be lower than if it stood alone. Even when, in accordance with general principle, consecutive sentences are required for independent acts of criminality, the need to ensure that there is 'no overlapping of the factors brought into account in determining the length of each sentence' will often mean that the sentence for a 'serious offence' is lower than would be imposed if the 'serious offence' stood alone.

34 Because of the complications brought about by section 20A which, in the view of the High Court, had not been fully appreciated below, the matter was sent back to the Court of Criminal Appeal for re-sentencing. But the passages quoted clearly indicate, in my view, that the High Court generally approved the approach described by Pincus JA in *Kellerman v Pecko* and outlined by both Pincus JA and McPherson JA in *Gilles*.

…

36 The passage quoted above from *Pearce* has recently been considered by the Court of Criminal Appeal in New South Wales: *R v Hammoud* (2000–2001) 118 A Crim R 66. There Simpson J, with the concurrence of Mason P said at 67–8:

As a result of the decision of the High Court in *Pearce* … the question of whether to accumulate sentences for multiple offences has taken on a new dimension. Following *Pearce*, a judge is required to fix 'an appropriate sentence' for each offence, before considering questions of accumulation, concurrence or totality. I take this to mean that, except perhaps in a case of multiple offences committed as part of a single, discrete, episode of criminality, the sentence for an individual offence is to reflect the criminality involved in the offence untainted by reference to the other offences for which that offender is to be sentenced.

Pre-*Pearce* it was possible to discern two different approaches for multiple offences. The first was to select the single charge (a lead or representative count) and, in accordance with the principle of totality, on that charge impose a sentence that properly reflected the overall criminality involved in all offences. On the remaining counts, comparatively lenient sentences, frequently fixed terms, were imposed. The second approach was, again with the principle of totality in mind, to select a sentence appropriate to the overall criminality and impose that sentence in respect of all or most of the charges. Both of these approaches avoided the need for elaborate exercises in accumulation of sentences.

Neither of these approaches would survive the application of the *Pearce* principles. In the case of a judge adopting the first approach, the lengthy sentence imposed in relation to the lead or representative count would appear excessive and those imposed on the remaining counts would appear inadequate. None would represent 'an appropriate sentence' for the specific offence for which it was imposed. On the second approach, all sentences would appear excessive for the specific charges to which they related, even when the ultimate term to be served was unimpeachable.

37 The New South Wales Court of Criminal Appeal has subsequently followed that approach: *Lemene* (2001) 118 A Crim R 131.

38 In my respectful view the New South Wales Court of Criminal Appeal has placed too strict and narrow a construction on what the High Court said in *Pearce*. The construction adopted by the New South Wales Court can only be correct if it is held that *Pearce* impliedly over-ruled the approach to sentencing recognised earlier by the High Court in *Griffiths*. The strict ratio of *Pearce* is to be found in the first paragraph of the extract quoted above; the error by the judge at first instance was in doubly punishing the offender for the one act. The subsequent paragraphs in the passage quoted should, in my view, be regarded as limited to particular factual situations. What the passage does make clear is that there will from time to time be situations in which sentencing by adopting the totality approach will produce a result which cannot be supported. *Griffiths* is a good example of that. Another example, referred to by the High Court in *Pearce*, is that in certain circumstances artificial claims of disparity between co-offenders may be asserted where the totality principle is adopted.

39 In my view all the authorities to which reference has been made, with the exception of *Hammoud* and *Lemene*, can be reconciled. Where a judge is faced with the task of imposing sentences for a number of distinct, unrelated offences there are a number of options open. One of those options is to fix a sentence for the most serious (or the last in point of time) offence which is higher than that which would have been fixed had it stood alone, the higher sentence taking into account the overall criminality. But that approach should not be adopted where it would effectively mean that the offender was being doubly punished for the one act, or where there would be collateral consequences such as being required to serve a

longer period in custody before being eligible for parole, or where the imposition of such a sentence would give rise to an artificial claim of disparity between co-offenders. That list is not necessarily exhaustive. Such considerations may mean that the other option of utilising cumulative sentences should be adopted.

40 It is against that background that I turn to consider sentences imposed in this case.

41 The first question for this court to answer is whether a sentence of five years imprisonment can be justified for the offence of assault occasioning bodily harm in company committed on 25 December 2001. Counsel for the applicant relied on *R v O'Grady; ex parte Attorney-General* [2003] QCA 137, *R v Yanner & Anor; ex parte Attorney-General* [1999] QCA 515 and *R v Craske* [2002] QCA 49 in support of his contention that a sentence in the range 18 months to two years imprisonment was appropriate for this offence. The offence was a particularly serious one involving, as it did, kicks to the head; but it has to be said there was no evidence that one of the applicant's kicks made contact with the complainant's head. Further, whilst the complainant sustained significant injuries which caused him discomfort and concern for a period of time, fortunately none has lasting significance. The fact that the assault was in company, and the fact that it occurred four days after the applicant's release from prison and whilst he was still on probation, are circumstances of aggravation calling for a sentence towards the top of the appropriate range. In my view, given those aggravating circumstances, the top of the range would be somewhat in excess of two years imprisonment, and a sentence of two years imprisonment would be towards the top of the range; but a two year sentence would also contain some moderation reflecting the youth of the applicant and his plea of guilty. Given the confused nature of the attack on the complainant by a number of people this is an appropriate case in which to recognise the significance of the plea as facilitating the course of justice (*Cameron v The Queen* (2002) 76 ALJR 382). The attitude of the applicant on the first day of sentence towards the facts, and the later violent assaults again in company, indicate he has not demonstrated significant remorse such as would of itself call for any further mitigation of penalty on that ground.

42 In my view a sentence of five years imprisonment is not supportable as the appropriate sentence for the specific offence committed on 25 December 2001 looked at in isolation. The only inference open is that the learned sentencing judge inflated the sentence because of the perceived overall criminality of the applicant's conduct taking into account what occurred on that date and on 11 February 2002.

43 I now turn to the assaults committed on 11 February 2002. These were particularly serious, but one must concentrate primarily on the applicant's conduct so far as it is revealed by the material before the court. He, along with some eight others, were involved in a drunken attack on two railway officials. His pleas of guilty to the two counts establish his involvement in the common purpose of assaulting each of the two complainants. However, the only specific evidence against him is the kicking of Miller. There are, in my view, at least four features which are significant aggravating factors when it comes to the question of sentence:

(i) he was on probation at the time, and also on bail for an offence of assault occasioning bodily harm in company committed approximately six weeks earlier;
(ii) the attack was a concerted one carried out by a group of about nine people;
(iii) members of the group were armed with and used rocks and bottles in the course of the assault;

(iv) the attack was on railway officials performing their duty of ensuring the safety of passengers on a train.

44 There are on the other hand two factors in the applicant's favour. Firstly, and perhaps fortuitously, neither complainant suffered an injury of a permanent nature. Secondly, the plea of guilty did away with the necessity of a trial which would have been complex, and perhaps lengthy. The focus at any trial would have been on what each individual in the group did, or did not do, and what was the intention of the applicant. In those circumstances discounting was called for in accordance with the reasoning in *Cameron*.

45 The offences of 11 February 2002 must, in my view, be regarded as more serious than the assault on 25 December 2001. They demonstrated a persistence by the applicant in drunken, violent behaviour in a public place. The violence was also directed at persons who were obliged by their employment to confront the applicant and his companions because of their antisocial behaviour.

…

48 Bearing in mind the fact that at the time the applicant was on bail for an earlier offence of assault occasioning bodily harm whilst in company, the penalty on each of these counts could be made cumulative upon the sentence imposed for the assault committed on 25 December 2001. Rather than adopting that course the learned sentencing judge imposed a penalty based on the totality of the applicant's criminal behaviour on 21 December 2001 and 11 February 2002. It can be said however that, given the comparable sentences referred to above, a sentence of 5 years imprisonment would be above the range for the offences of 11 February 2002 looked at in isolation. Having regard to the comparable cases referred to earlier a sentence of three years imprisonment would be called for if those offences were considered in isolation.

49 Before considering further whether the sentences in fact imposed were the appropriate penalties to impose on the applicant it is necessary to deal with the submission with respect to disparity with the sentences imposed on two of his co-offenders who were dealt with subsequently to him. The reasoning of the High Court in *Lowe v The Queen* (1984) 154 CLR 606 recognises that equal justice requires that, as between co-offenders, there should not be a marked disparity which gives rise to a 'justifiable sense of grievance'. That decision, and subsequent cases applying it, establish that a sentence should be reduced where there is such a marked disparity, notwithstanding that it is otherwise appropriate and within the permissible range of sentencing options. That is confirmed by the reasoning in *Postiglione v The Queen* (1997) 189 CLR 295 especially at 301 and 313. Whilst 'equal justice requires that like should be treated alike … different sentences may reflect different degrees of culpability or their different circumstances'. Where there are sufficient factors supporting different treatment then no justifiable sense of grievance flows from the fact that one offender received a heavier sentence. The contention of the applicant here is that differences in the personal circumstances between he and his two co-offenders do not justify the disparity between the sentences imposed.

50 Neilsen and Kunde stood for sentence on 23 January 2003 before a different District Court judge. Each of them was charged with unlawfully doing bodily harm whilst armed and in company with respect to Proposch and Miller. In addition each was charged with wilful damage to a train carriage. Pleas of guilty were entered by each to those charges.

51 In addition Neilsen pleaded guilty to a series of other charges including stealing a radio; assault by spitting; several counts of wilful damage, burglary and stealing; stealing a motorcycle;

another offence of break and enter premises and steal; possession of a dangerous drug; and possession of utensils.

52 In addition to the offences committed on 11 February 2002 Kunde pleaded guilty to two counts of assault occasioning bodily harm with a circumstance of aggravation; wilful damage; burglary; four counts of stealing; attempted wilful damage; another count of burglary and stealing; two counts of entering premises and stealing; two counts of breaking and entering and stealing; one count of entering premises with intent; and one count of being in possession of a graffiti instrument.

53 Neilsen was aged between 16 and 17 when the offences were committed; he was just short of his 18th birthday when sentenced. He had 'very little in the way of criminal history'. In relation to Neilsen the sentencing judge said:

> Now, having regard to the fact that you have pleaded guilty and that you have very little by way of previous criminal history I take the view that an intensive correction order where a sentence of 12 months imprisonment would be ordered, where you would be permitted, if you complied with the order, to serve that term of imprisonment in the community and not in a prison. … On the first indictment, that is the one involving the train incidents, on the two assaults occasioning bodily harm, on each of those I sentence you to 12 months imprisonment … As I have already indicated I order that that term of imprisonment be served by way of intensive correction in the community and not in prison.

54 He then detailed the requirements of the intensive correction order.

55 The sentencing judge then dealt with Kunde. He began by saying that he was 'in a more serious category because you come before the court with a much more significant criminal history'. The criminal history contained offences of dishonesty and unlawful acts dealing with property, but there were no previous offences of violence. Kunde was aged 20 at the time of sentence. The sentencing judge said that with respect to 'the matters relating to the train incident, I propose to deal with you in similar fashion to that with which I dealt with Mr Neilsen'. Kunde was sentenced to imprisonment for twelve months but, as he had been in custody for some 251 days awaiting sentence, an order was made that the term of imprisonment be suspended after the serving of 251 days. There was an operational period of three years imposed on the suspended sentences. In addition to that, the convictions activated an 11 months suspended sentence which Kunde was ordered to serve.

56 The sentencing judge was informed by counsel for the prosecution of the sentence imposed on Nagy, but, perhaps surprisingly, there was no mention of that in the course of his sentencing remarks. The sentencing judge does not appear to have been at all concerned to deal with the issue of parity between the sentences he imposed on Neilsen and Kunde and the sentence imposed earlier on the present applicant. There has been no appeal by the Attorney-General from the sentences imposed on Neilsen and Kunde.

57 Bearing in mind the comparative sentences to which reference has been made in these reasons the sentences imposed on Neilsen and Kunde were, in my view, at the very bottom of the applicable range. The age of Neilsen undoubtedly saved him from serving an actual term of imprisonment, and the learned sentencing judge may well have been influenced by the fact that Kunde was to serve 11 months of a suspended sentence in determining that he should

not serve more than the 251 days he had already spent in custody for the offences committed on 11 February 2002.

58 Given the aggravating factors with respect to the applicant now before the court which I have discussed above, I am of the view that it was not only appropriate, but necessary, that he be dealt with more severely than Neilsen and Kunde. Particularly given the fact that a sentence of two years imprisonment would be called for with respect to the offence on 25 December 2001, a somewhat heavier sentence must be imposed for the two counts of assault occasioning bodily harm in company whilst armed committed on 11 February 2002. In my view the three year sentence referred to above would reflect the necessary relativity to the sentences imposed on the co-offenders.

59 A sentence of five years imprisonment for each of the three counts of assault to which the applicant pleaded guilty does appropriately reflect the overall total criminality of his conduct. The sentence only becomes questionable when one has regard to the sentences imposed on his co-offenders. In my view the disparity is such that it is not rationally explicable solely on the basis that the applicant's involvement in the offence of 25 December 2001 justified a significantly higher sentence if he was sentenced on a totality basis. The disparity is real, and objectively the applicant has a 'justifiable sense of grievance'. As noted above the disparity is removed if sentences of three years imprisonment are imposed with respect to the two offences committed on 11 February 2002. That sentence is higher than that imposed on each of his co-offenders, but the difference is rationally explicable by the aggravating features I have referred to.

60 If a sentence of 3 years imprisonment is imposed then it is appropriate that the court adopt the alternative option of making that sentence cumulative upon that imposed for the offence committed on 25 December 2001.

61 The court must also now have regard to the totality of the cumulative sentence, and be prepared to moderate it if necessary. Given the seriousness of the offences in question, particularly those committed on 11 February 2002, I am not persuaded that a total sentence of five years imprisonment exceeds what totality permits.

62 I have already indicated that in determining a sentence of two years imprisonment for the offence committed on 25 December 2001 there has been some discounting for a plea of guilty. In my view some further discounting is required bearing in mind the pleas of guilty to the offences committed on 11 February 2002. That discounting factor should be recognised by making a recommendation that the applicant be eligible to apply for post-prison community based release after serving 18 months of the cumulative sentence.

63 The court is substituting a sentence which would operate from the day it is imposed by this court and in consequence it is necessary to make a declaration pursuant to s 161 of the Penalties and Sentences Act 1992. It will therefore be declared that the applicant has been in custody solely in relation to these matters from 24 April 2002 until 2 May 2003 a period of 374 days and that is declared to be time already served under the sentence.

64 The orders of the court should therefore be:

(i) Grant leave to appeal and allow the appeal;
(ii) Set aside the sentences imposed below for the offences of assault occasioning bodily harm in company on 25 December 2001 and the two counts of assault occasioning bodily harm in company whilst armed on 11 February 2002;

(iii) In lieu thereof impose sentences as follows:
  (a) 2 years imprisonment on the count of assault occasioning bodily harm in company on 25 December 2001;
  (b) 3 years imprisonment on each count of assault occasioning bodily harm in company whilst armed on 11 February 2002, such sentences to be served concurrently but cumulatively with the sentence of 2 years imprisonment imposed with respect to the offence of 25 December 2001;
  (c) recommend that the applicant be eligible to apply for post-prison community based release after serving 18 months of the entire period of imprisonment.

(iv) Declare that the applicant has been in custody solely in relation to these matters from 24 April 2002 until 2 May 2003 a period of 374 days and that is declared to be time already served under the sentence.

[**Jerrard JA** and **Muir J** gave separate judgments also allowing the appeal. **Muir J** agreed with **Williams JA** on the sentences to be imposed. **Jerrard JA** considered that a sentence of 18 months was appropriate for the offence committed on 25 December.]

31.57C Cameron v R

[2002] HCA 6; (2002) 209 CLR 339; 187 ALR 65
High Court of Australia

Gaudron, Gummow and **Callinan JJ:**

1 The appellant, John Leonard Cameron, was arrested at Perth airport on 22 April 1999 after a quantity of tablets was found in his hand luggage. In a police interview conducted shortly thereafter, the appellant denied any knowledge of the contents of his luggage. He was then charged that he '[h]ad in his possession a Prohibited Drug, namely 3, 4 Methylenedioxy-n, Alpha-Dimethylphenylethyl-Amine with Intent to Sell/Supply'. The substance referred to in the charge is commonly known as 'Ecstasy'.

2 It appears that Perth airport, the location at which the appellant was said to have had the possession with which he was charged was a 'Commonwealth place' within the meaning of the definition in s 3 of the Commonwealth Places (Application of Laws) Act 1970 (Cth). The consequence was that s 4 of that statute rendered the laws of Western Australia applicable there in accordance with their tenor and s 7 invested the several courts of that State with federal jurisdiction in all matters arising under those applied provisions. The laws of Western Australia 'picked up' in this way included the Misuse of Drugs Act 1981 (WA). The charge against the appellant, set out above, alleged contravention of s 6(1)(a) of the State law.

3 When charged, the appellant was remanded in custody. He subsequently appeared on a number of occasions before the Perth Court of Petty Sessions. On one appearance, on 2 July 1999, the appellant elected to have a preliminary hearing on 19 November 1999. Thereafter, he appeared on 'cycle remand' on 30 July, 31 August, 30 September and 29 October 1999. Apparently, on a 'cycle remand', the person concerned appears by video-link from prison.

4 Analysis of the substance found in the appellant's possession established that it contained Methylamphetamine, which is commonly known as 'Speed', and not the substance charged. The analyst's certificates in that regard are dated 28 June 1999. On 10 November 1999, Legal Aid, which was then acting for the appellant, wrote to the Director of Public Prosecutions indicating

that the appellant wished 'to enter a plea of guilty to the charge of possession of a prohibited drug with intent to sell and supply'. The letter concluded with the observation 'that the complaint as it's currently drafted is incorrect and should be amended to properly reflect the drug which was in Mr Cameron's possession'. The complaint was accordingly amended on 17 November. The appellant then entered a plea of guilty and was committed to the District Court for sentence.

5 On 12 January 2000, the appellant was arraigned before the District Court where he maintained his guilty plea. It was submitted on the appellant's behalf that he should be sentenced on the basis that he pleaded at 'the earliest possible opportunity' and that he should be credited 'as if [it] were a fast-track plea of guilty'. Prosecuting counsel did not put submissions in opposition to that course.

6 It will later be necessary to say something as to the 'fast-track' plea of guilty. For the moment, it is sufficient to note that the practice in Western Australia in respect of such a plea is to substantially reduce the sentence that would otherwise be imposed, the reduction ranging 'between 20–25 per cent up to 30–35 per cent depending upon the circumstances'.1 The appellant's sentence was reduced for his plea of guilty by 10%, the sentencing judge, Blaxell DCJ, saying only that, ordinarily, the appellant 'could have expected a sentence of 10 years' imprisonment but in view of the fact that [he had] pleaded guilty [it would be reduced] to 9 years' imprisonment'.

7 The appellant sought leave to appeal to the Court of Criminal Appeal of the Supreme Court of Western Australia. The only ground argued was that insufficient credit was given for the early plea of guilty. It was submitted on the appellant's behalf that, in the circumstances, the sentence should have been reduced 'by at least 20 to 25 per cent'. In that context, a question arose as to when the appellant first knew of the contents of the analyst's certificates. That question was unresolved, the Court being informed only that the certificates were dated 28 June 1999.

8 Prosecuting counsel resisted the application for leave to appeal, arguing that '[t]he plea of guilty was entered at an early stage but not at the earliest point' and that, in all the circumstances, the sentencing judge 'did not err in giving insufficient credit for the [appellant's] plea of guilty'.

Decision of the Court of Criminal Appeal

9 The Court of Criminal Appeal granted the appellant leave to appeal to that Court but dismissed the appeal. In his reasons for judgment, Pidgeon J, with whom Ipp and Owen JJ agreed, rejected the argument that it was not possible for the appellant to plead guilty until the charge was amended. His Honour said:

> The charge when first brought had the element of being a prohibited drug and if it contained the wrong drug, it would still have been open to the applicant at a much earlier stage to indicate that he did have a prohibited drug but it was methylamphetamine and not ecstasy. It is simply that the particulars were wrong.

His Honour added:

> The particulars refer to a drug of equal seriousness so I see no difficulty to his pleading guilty earlier and it did not save the administration of justice to have the number of remands that there were and to have time set aside for the preliminary hearing.

10 A little later in his judgment, Pidgeon J said that although the plea of guilty had resulted in an important saving of time and administration in the District Court, 'there was no saving in the Magistrates Court'.

The relevance of a plea of guilty

11 It is well established that the fact that an accused person has pleaded guilty is a matter properly to be taken into account in mitigation of his or her sentence. In *Siganto v The Queen* it was said:

> a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case.[2]

It should at once be noted that remorse is not necessarily the only subjective matter revealed by a plea of guilty. The plea may also indicate acceptance of responsibility and a willingness to facilitate the course of justice.

12 Although a plea of guilty may be taken into account in mitigation, a convicted person may not be penalised for having insisted on his or her right to trial.[3] The distinction between allowing a reduction for a plea of guilty and not penalising a convicted person for not pleading guilty is not without its subtleties, but it is, nonetheless, a real distinction, albeit one the rationale for which may need some refinement in expression if the distinction is to be seen as non-discriminatory.

13 It is difficult to see that a person who has exercised his or her right to trial is not being discriminated against by reason of his or her exercising that right if, in otherwise comparable circumstances, another's plea of guilty results in a reduction of the sentence that would otherwise have been imposed on the pragmatic and objective ground that the plea has saved the community the expense of a trial. However, the same is not true if the plea is seen, subjectively, as the willingness of the offender to facilitate the course of justice.

14 Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing.

15 This treatment of the matter is consistent with what in their joint judgment in Castlemaine Tooheys Ltd v South Australia4 Gaudron and McHugh JJ identified as the general considerations which result in particular treatment being treated as discriminatory. One aspect of the legal notion of discrimination 'lies in the unequal treatment of equals'.5 The 'equals' here are those required to plead guilty or not guilty; they stand as equals before the criminal law and processes of Western Australia. But is the differential treatment of such persons and the unequal outcome with respect to sentence the product of a distinction which is appropriate and adapted to the attainment of a proper objective, here the facilitation of the course of justice by the willingness of the accused to plead in a particular fashion? The answer, as indicated above, is in the affirmative.

The 'fast-track' plea

16 So far as sentencing is concerned, the practice with respect to a 'fast-track' plea has developed in Western Australia, consistently with the Sentencing Act 1995 (WA) ('the Sentencing Act'), in parallel with the statutorily sanctioned procedure whereby, on a plea of guilty to an indictable offence, a person may be committed to a superior court for sentence without the presentation of evidence or the filing of statements.[6]

17 The Sentencing Act, which sets out sentencing principles applicable to all persons convicted of an offence,7 specifies, in s 8, mitigating factors to be taken into account on sentence. One such factor is that the offender pleaded guilty. By s 8(2) it is provided that 'the earlier in proceedings that [the guilty plea] is made, or indication is given that it will be made, the greater the mitigation'. Provision is also made in s 7 with respect to aggravating factors. The fact that the offender pleaded not guilty is expressly excluded from those aggravating factors by s 7(2)(a) of the Sentencing Act.

18 It was suggested for the respondent in this Court that the full reduction for a 'fast-track' plea of guilty is only available where the person concerned has pleaded guilty in circumstances relieving the prosecuting authorities of the necessity to present evidence or file statements. There would be force in that suggestion if s 8(2) of the Sentencing Act were to be read in isolation from s 7(2)(a) which gives effect to the common law rule that a person should not be penalised for exercising the right to trial. So, too, there would be force in the suggestion if the rationale for allowing a plea to be taken into account in mitigation were, to any extent, based on the objective consideration that the plea has resulted in the saving of court and prosecution time.

19 Once it is appreciated that s 8(2) of the Sentencing Act is to be reconciled with s 7(2)(a), which gives effect to the common law requirement that an offender not be penalised for pleading not guilty, s 8(2) must be read as allowing that a plea of guilty may be taken into account in mitigation for the reason that a guilty plea evidences a willingness to facilitate the course of justice and not simply because the plea saves the time and expense of those involved in the administration of criminal justice. That being so, the relevant question is not simply when the plea was entered but, as was accepted by the Court of Criminal Appeal in this matter, whether it was possible to enter a plea at an earlier time.

20 The question whether it was possible for a person to plead at an earlier time is not one that is answered simply by looking at the charge sheet. As was acknowledged in *Atholwood*[8] by Ipp J, in the Court of Criminal Appeal of Western Australia, the question is when it would first have been reasonable for a plea to be entered.

21 In *Atholwood*, the person concerned had been charged with several counts. After a process of negotiation, the prosecution withdrew a number of the charges and the offender pleaded guilty to one of the remaining charges. Ipp J said this:

> It is particularly important in such circumstances to establish the time when it could first be said that it was reasonably open to the offender to plead guilty to the offence of which he was convicted. Regard should be had to the forensic prejudice that the offender would have suffered were he to have pleaded guilty to counts persisted in by the prosecution while others (that were subsequently withdrawn) remained pending against him. During the period that the prosecution maintains counts that are ultimately abandoned, there is a strong incentive for a person who recognises his guilt on other counts … to persist in a not

guilty plea to all counts. In such circumstances it should not be assumed, mechanically, that the offender has delayed pleading guilty because of an absence of remorse, or that, reasonably speaking, he has not pleaded guilty at the earliest possible opportunity.[9]

22 The remarks of Ipp J in *Atholwood* reflect what has earlier been said in relation to the rationale for the rule that a plea may be taken into account in mitigation, namely, that, leaving aside remorse and acceptance of responsibility, the operative consideration is willingness to facilitate the course of justice. And once that rationale is accepted, the respondent's suggestion that the extent to which a plea of guilty may be taken into account in mitigation may vary according to whether it was or was not a 'fast-track' plea must be rejected. Rather, the issue is to what extent the plea is indicative of remorse, acceptance of responsibility and willingness to facilitate the course of justice. And a significant consideration on that issue is whether the plea was entered at the first reasonable opportunity.

First reasonable opportunity

23 Although the original charge specified the elements of the offence charged, it was not reasonable to expect the appellant to plead to an offence which wrongly particularised the substance to which the charge related. And that is so even if the identity of the substance would not have affected sentence. In this regard, it should not be assumed that the appellant knew that the sentence would be the same regardless of the nature of the substance.

24 More importantly, the appellant should not have been expected to acquiesce in procedures which might result in error in the court record or, indeed, in his own criminal record. At the very least, a plea of guilty to a charge wrongly particularising the substance he had in his possession would not necessarily provide the basis for a plea of autrefois acquit to a subsequent charge specifying the correct substance.

25 The Court of Criminal Appeal was in error in holding that the appellant could have pleaded guilty before the charge was amended to correctly specify the substance which he had in his possession. Moreover, it was in error in stating that there had been 'no saving in the Magistrates Court' for the appellant's plea of guilty rendered a preliminary hearing unnecessary.

Conclusion and orders

26 The appeal should be allowed, the order of the Court of Criminal Appeal dismissing the appeal should be set aside and the matter remitted to that Court for further hearing and determination.

Kirby J:

56 This is another appeal[27] concerning principles of sentencing. Specifically, it relates to the discount applicable to the sentence of an accused person where that person pleads guilty at the first reasonable opportunity after the charge is accurately specified by the prosecution.

...

The applicable sentencing principles

65 This Court has recognised that a plea of guilty is ordinarily a consideration to be taken into account in mitigation of punishment and reduction of the sentence that would otherwise have been imposed on a prisoner.[35] By reference to established authority, it is possible to

elaborate this principle so that it may be understood in context and more easily applied to varying circumstances:

(1) In all States and Territories,[36] and in respect of federal offences,[37] legislation addresses in various ways the approach to be adopted, and procedures to be followed, where a person is to be sentenced who has pleaded guilty to a criminal charge. It is the first obligation of the sentencing judge to conform to such legislation.[38] No rule of the common law, nor any judicial practice, may contradict valid legislative prescriptions.[39]

(2) To the extent that common law sentencing principles elaborate statutory provisions, they operate within a context that recognises the need for appellate courts to respect the discretion belonging to a sentencing judge.[40] Sentencing is not a mathematical exercise, apt to be reduced to fixed formulas and equations.[41] Unless specifically authorised by legislation, no principle or guideline could be adopted that obliged the application of a rigid approach or an unchanging discount for a plea of guilty. In each case, it is necessary for the sentencing judge to take such a plea into account but having regard to all the circumstances. It is not the law that a sentencing judge *must* exercise a discretion to provide a given reduction in sentence for a plea of guilty. If a reduction is properly available, the sentencing judge may provide for it in the course of performing the complex task of imposing criminal punishment.[42]

(3) The provision of a discount for a plea of guilty must not be, or appear to be, a judicial discouragement to an accused person against exercising rights to silence conferred by law or the right to put the prosecution to the proof of criminal accusations. An accused who insists upon such rights must not be penalised. An accused must not have the sentence increased to mark the sentencing judge's conclusion that the prisoner has wasted the court's time or the public's resources by insisting on a trial.[43] Yet, necessarily, reliance on such rights will deprive the accused of any mitigation that might otherwise have resulted from a plea of guilty.[44] Judges have acknowledged 'a certain illogicality'[45] in these distinctions. Nevertheless, such distinctions have been endorsed by this Court.[46] Although they have been said to border on the 'metaphysical',[47] they reflect a difference between permissible and impermissible judicial approaches.[48] They discourage inappropriate judicial involvement in plea bargaining that could dissuade a prisoner from exercising his or her legal rights.[49] They alert judges to the susceptibility of prisoners generally (and some categories, such as Aboriginal prisoners, in particular)[50] to pressure to induce them, even if innocent, to plead guilty. And they restrict excessive discounts for a plea of guilty that could indeed undermine the accusatorial feature of our criminal justice system.[51]

(4) The discount for a plea of guilty to the charge brought against the accused is to be distinguished from a discount for a spontaneous and immediate expression of remorse conducive to reform and for immediate cooperation with investigating police. The latter has always been treated as deserving of such recognition in the sentencing of an accused.[52] In many cases such feelings of repentance will continue and manifest themselves in an early plea of guilty that is adhered to at the trial. Obviously, the timing of any plea of guilty has a large bearing on the credit that should be given to the prisoner.[53] A plea of guilty at the last moment (as on the day set down for the trial) will ordinarily attract a smaller discount in sentence than one that is entered at the first reasonable opportunity.[54] But even a belated plea will normally attract a discount.

(5) In some of the older judicial authorities, the chief or the only basis advanced for a discount for a plea of guilty was that it evidenced contrition, repentance and remorse on the part of the prisoner.[55] The basis for affording a discount in a sentence on this footing was the oft stated belief that such a response indicated the intention of the prisoner to reform and not to re-offend.[56] To that extent, remorse could vindicate one of the basic purposes of the system of criminal justice. Cases do exist where, upon apprehension, a prisoner expresses genuine and believable regret. However, judges have lately expressed doubt as to the extent to which pleas of guilty really proceed from such motives.[57] In a prisoner who has been caught red-handed,[58] the plea of guilty may indicate regret at being caught and charged, rather than regret for involvement in the crime. In the present case, Pidgeon J correctly observed[59] that it was difficult for the appellant to be treated as truly remorseful when a considered decision had been made by him to bring such a large quantity of drugs into Western Australia. No doubt some suppliers of prohibited drugs view themselves (as suppliers of non-prohibited but regulated drugs and formerly prohibited goods and services now do) as simply serving a market that is rendered illegal by outmoded laws. At least in this context, much of judicial writing about remorse is somewhat unrealistic. The true foundation for the discount for a plea of guilty is not a reward for remorse or its anticipated consequences but acceptance that it is in the public interest to provide the discount. Nevertheless, where genuine remorse is established to the satisfaction of the sentencing judge, it may be in the public interest to mitigate punishment further as a reinforcement for the prisoner's resolve to avoid repetition of such conduct in the future and as an example to others. However, 'remorse' is not, as such, a precondition for the provision of a discount for a plea of guilty. There are other features of the public interest that need to be given weight.[60]

The consideration of the public interest

66 The main features of the public interest, relevant to the discount for a plea of guilty, are 'purely utilitarian'.[61] They include the fact that a plea of guilty saves the community the cost and inconvenience of the trial of the prisoner which must otherwise be undertaken.62 It also involves a saving in costs that must otherwise be expended upon the provision of judicial and court facilities; prosecutorial operations; the supply of legal aid to accused persons; witness fees; and the fees paid, and inconvenience caused, to any jurors summoned to perform jury service.63 Even a plea at a late stage, indeed even one offered on the day of trial or during a trial, may, to some extent, involve savings of all these kinds.

67 Given that under our criminal justice system it is the right of the accused to put the State to the proof of the crime charged; given that by pleading guilty the accused surrenders any chance of being acquitted, even undeservedly; and given some empirical evidence that sentences following contested trials are not always substantially different from sentences upon a plea,[64] it is in the public interest to facilitate pleas of guilty by those who are guilty and to conserve the trial process substantially to cases where there is a real contest about guilt. Doing this helps ease the congestion in the courts that delay the hearing of such trials as must be held.[65] It also encourages the clear-up rate for crime and so vindicates public confidence in the processes established to protect the community and uphold its laws.[66] A plea of guilty may also help the victims of crime to put their experience behind them; to

receive vindication and support from their families and friends and possibly assistance from the community for injuries they have suffered.[67] Especially in cases of homicide and sexual offences, a plea of guilty may spare the victim or the victim's family and friends the ordeal of having to give evidence.

68 All of the foregoing are reasons why it is normally in the public interest to encourage a plea of guilty to a criminal charge whilst recognising, in its 'full strength', the rule that the accused is entitled to plead not guilty, to put the prosecution to the proof and cannot be punished more severely for having exercised these rights. The considerations that I have mentioned are not separate categories, or sub-rules, of the applicable principle. They are merely illustrations of aspects of the public interest to which the law of sentencing pays regard following a plea of guilty.

Two controversial questions

69 *Transparency of the discount:* In this Court, there has been something of a controversy about whether it is appropriate, in sentencing, to proceed explicitly by way of a 'two-stage approach' or not. In Victoria, the courts have long been hostile to this notion.[68] Subject to overriding statutory obligations, they have favoured what is described as the 'instinctive synthesis' of factors resulting in a single 'appropriate sentence'.[69]

70 The latter view has been propounded in this Court on a number of occasions by Hayne J.[70] His Honour has attracted the support of McHugh J[71] and perhaps others.[72] With respect, I remain of the opinion that where a 'discount' for a particular consideration relevant to sentencing is appropriate, it is desirable that the fact and measure of the discount should be expressly identified.[73] Unless this happens, there will be a danger that the lack of transparency, effectively concealed by judicial 'instinct', will render it impossible to know whether proper sentencing principles have been applied. Moreover, if the prisoner and the prisoner's legal advisers do not know the measure of the discount, it cannot be expected that pleas of guilty will be encouraged in proper cases, although this is in the public interest as I have shown. Knowing that such a discount will be made represents one purpose of such discounts. Unless it is known it may not be possible for an appellate court to compare the sentence imposed with other sentences for like offences or to check disputed questions of parity.[74]

71 The difference that has emerged in this Court on this question may be one of semantics rather than of substance.[75] However that may be, in my view it is desirable, and certainly permissible, by the common law, for a judge to identify the measure of the discount which he or she has allowed for a plea of guilty. If that means that a 'two-stage approach' is involved, including identification of the primary and then the discounted sentence, I regard it as inherent in the provision of an identifiable discount for such a plea. No such discount can be reduced to a set formula. Elements of intuition and judgment remain to be given weight in arriving at the aggregate sentence finally imposed.

72 In the present case, it is unnecessary to explore this issue further. This is because the sentencing judge (and the Court of Criminal Appeal) clearly identified the sentence that would have been imposed but for the plea of guilty and the discount considered proper to the appellant's case. However, it is appropriate to observe that, effectively, this appeal would not have been possible (and a miscarriage of justice might have been irreparably masked) had the sentencing judge contented himself with stating generally that he had taken the plea of guilty

into account and simply announced his 'instinctive synthesis' represented by the sentence of nine years imprisonment. The appeal would have been without redress.

73 The appeal therefore reveals the need for 'two stages' and the general importance of transparency in judicial reasons for sentence. The history of administrative law in the past quarter century has seen a retreat from unaccountable decision-making. In the context of the higher duty of judges to state reasons that facilitate the judicial process,[76] considerations important to judicial orders should likewise be revealed for the scrutiny of the litigants, the public and the appellate process. They should not be hidden in judicial formulae about 'instinct'.

74 *Earliest reasonable opportunity:* Correctly, the Court of Criminal Appeal regarded it as important to the quantification of the discount that it was open to the sentencing judge to impose on the appellant, to have regard to the time that the appellant pleaded guilty in comparison with the 'much earlier stage' when it was felt he could have indicated his guilt.[77] What is the principle that applies in this regard? In my view, it was correctly stated by Ipp J in an earlier decision of the same court in *Atholwood*.[78] There, his Honour emphasised the need to examine closely the circumstances preceding the plea of guilty in order to reach a conclusion as to the credit for the plea proper to the circumstances. As the passage from Ipp J's reasons is set out in the joint reasons of Gaudron, Gummow and Callinan JJ, I will not repeat it.[79]

75 The Court of Criminal Appeal ought to have applied the approach in *Atholwood* to the present appellant's application. Nothing in the applicable legislation providing for expedited hearings of cases where the defendant pleads guilty[80] is inconsistent with that principle. Whilst the judicial practice of the 'fast-track' system adopted in Western Australia would be better known to the judges of that State, because it lacks a statutory foundation I am unconvinced that it would warrant a different approach. The test is not the time when theoretically or physically a prisoner might have pleaded. The test is when it was reasonable, in all the circumstances and as a matter of practicality, to have expected a plea of guilty to be announced. That question is to be answered in a reasonable way, not mechanically or inflexibly.

The Court of Criminal Appeal's decision miscarried

76 When the foregoing approach is applied to the circumstances of the present case, it is my opinion that the Court of Criminal Appeal fell into error in considering the appellant's application. No statute governed what the sentencing judge should do. He had a broad discretion. As he acknowledged, it was proper in the circumstances to provide a discount for the plea of guilty. The sole basis for refusing to apply what in Western Australia appears to be a fairly standard discount for an accused's plea of guilty (one involving a discount significantly larger than the 10%) was the view which the appellate judges formed about the value to be attributed to the appellant's plea in the circumstances having regard to its timing.

77 There are two errors in the reasons of the Court of Criminal Appeal. First, that Court suggested that it was open to the appellant to plead guilty although the particulars of the complaint were wrong. Whilst this was a theoretical or physical possibility, it was an unreasonable one. It involved imposing on the appellant an obligation to plead guilty to a complaint particularised by the prosecution in terms that are now accepted to have been erroneous. Although it is suggested that the offence of having in his possession a prohibited

drug remained unchanged, and that all that was altered was the identification of the drug concerned, it is no part of the function of a prisoner, or the prisoner's legal representatives, to frame the charge in the complaint or the particulars to that charge. This is something exclusively within the power and functions of the prosecution. Our criminal justice system is accusatorial. It is unreasonable to penalise an accused person for failing to plead guilty earlier to an incorrectly particularised charge.

78 From its early days, this Court has emphasised the importance of correct specification of the accusation against an accused.[81] Such particularisation is essential, amongst other reasons, so that any plea of guilty is rendered unequivocal, relates to the identified charge and thus provides the true foundation for subsequent sentencing.[82] The Court of Criminal Appeal suggested that the drugs (ecstasy and speed) were of equal seriousness. However, the applicant was not necessarily to know this. He was entitled to be informed, accurately, of the precise offence and particulars of the offence with which he was charged before being expected to plead. When this eventually occurred, he acted promptly. Indeed, it was he who, through his representatives, took the initiative to secure a change of the complaint.

79 Secondly, the suggestion by the Court of Criminal Appeal[83] that there was no saving to the administration of justice in the Court of Petty Sessions by virtue of the appellant's plea was, with respect, inaccurate. By pleading guilty before the preliminary hearing, it was possible to vacate immediately the day set aside for that purpose. Time of the magistrate was thereby saved. So was the time of the prosecutor and the Legal Aid representatives. The witnesses who would otherwise have been required at the preliminary hearing were no longer needed. Inconvenience and public cost were spared. These are all considerations which, in the public interest, it was proper for a sentencing judge to take into account in considering the discount that should be given for a plea of guilty, and in particular where such a plea has been entered as soon as it became reasonably practicable to do so.

80 There are many factors that can affect the fixing of that time when it is reasonable to expect that the accused person who intends to plead guilty will do so. They include any delay on the part of the prosecution in finalising its charges; any delay in reasonable negotiations for a plea to a lesser charge; any difficulties that arise in securing adequate instructions from the accused, especially if the accused is in custody; any limitations on the resources of Legal Aid and its lawyers representing the accused; and the absence of a clearly stated and consistently applied discount for a plea on the part of sentencing judges.[84] The repeated, peremptory video remands of the appellant's case, whilst the chemical analysis was awaited, suggests (as this Court's experience permits it to infer) that facilities of effective legal assistance to a person in custody such as the appellant were limited. When he appeared in person to argue for the grant of special leave, the appellant told the Court that this was so. To penalise the appellant in sentencing for this lack of provision of alternative legal advice whilst in custody would work a double injustice upon him. Sentencing judges, and appellate courts, should be alert to the realities that govern the access by indigent prisoners to legal advice when determining a question such as that presented by these proceedings.

…

99 I agree in the orders proposed by **Gaudron, Gummow** and **Callinan JJ**.

[McHugh J wrote a dissenting judgment.]

Footnotes

1. *Miles v The* Queen (1997) 17 WAR 518 at 521 per Malcolm CJ. See also Verschuren v The Queen (1996) 17 WAR 467; De Luce v The Queen unreported, Court of Criminal Appeal, Western Australia, 19 July 1996.
2. (1998) 194 CLR 656 at 663–664 [22] per Gleeson CJ, Gummow, Hayne and Callinan JJ.
3. Siganto v The Queen (1998) 194 CLR 656 at 663 [22] per Gleeson CJ, Gummow, Hayne and Callinan JJ. See also R v Gray [1977] VR 225 at 231.
4. (1990) 169 CLR 436 at 478–9.
5. (1990) 169 CLR 436 at 480.
6. Part V of the Justices Act 1902 (WA) sets out the procedure in respect of indictable offences. Where a charge is not dealt with summarily, s 100 requires that the prosecution serve on the defendant a statement of material facts and a copy of any statements signed by the defendant or other records of statements made by the defendant to the police, as well as notice of any tape or videotape recording of conversations between the defendant and a person in authority. Once this material has been served on the defendant, the defendant is given the opportunity to plead to the charge. If the defendant pleads guilty to the charge, he or she is committed to a court of competent jurisdiction for sentence pursuant to s 101. If there is no expedited committal, then, under s 101A, the prosecution must serve on the defendant any statements proposed to be tendered in evidence, and, if the defendant elects to have a preliminary hearing, the prosecution must then call witnesses for examination under s 102.
7. By s 4(1) of the Sentencing Act, 'offence' means an offence under a written law.
8. (1999) 109 A Crim R 465.
9. Atholwood (1999) 109 A Crim R 465 at 468.
27. From the Court of Criminal Appeal of Western Australia: Cameron v The Queen [2000] WASCA 286.
35. Siganto v The Queen (1998) 194 CLR 656 at 663–4 [22]–[23].
36. Crimes (Sentencing Procedure) Act 1999 (NSW), s 22; Sentencing Act 1991 (Vic) s 5(2)(e); Penalties and Sentences Act 1992 (Q), s 13; Criminal Law (Sentencing) Act 1988 (SA), s 10(g); Sentencing Act 1995 (WA), s 8(2); Crimes Act 1900 (ACT), s 429A(1)(u); Sentencing Act (NT), s 5(2)(j).
37. Crimes Act 1914 (Cth), s 16A(2)(g).
38. Thomson and Houlton (2000) 115 A Crim R 104 at 107 [11].
39. Wong v The Queen (2001) 76 ALJR 79 at 92–3 [67]–[73], 103–107 [118]–[140], 112 [167]; 185 ALR 233 at 250–2, 265–71, 278.
40. Ryan v The Queen (2001) 75 ALJR 815 at 826 [61]; 179 ALR 193 at 208; cf R v Shannon (1979) 21 SASR 442 at 453 per Wells J (diss).
41. Cf Pearce v The Queen (1998) 194 CLR 610 at 624 [46]; Ryan v The Queen (2001) 75 ALJR 815 at 821 [33]; 179 ALR 193 at 201.
42. R v Gray [1977] VR 225 at 229.
43. R v Richmond [1920] VLR 9 at 12, per Cussen J.
44. Shannon (1979) 21 SASR 442.
45. Shannon (1979) 21 SASR 442 at 445.
46. Siganto (1998) 194 CLR 656 at 663–4 [22].
47. JCW (2000) 112 A Crim R 466 at 468–9 [16]–[22].
48. R v Hansen [1961] NSWR 929 at 931 per Evatt CJ and Ferguson J; R v Gray [1977] VR 225 at 229; Shannon (1979) 21 SASR 442 at 449.
49. Shannon (1979) 21 SASR 442 at 447–8 citing Cross, The English Sentencing System, 2nd ed (1975) at 105.
50. Thomson and Houlton (2000) 115 A Crim R 104 at 107–08 [12].
51. Shannon (1979) 21 SASR 442 at 449.

52. Eg James and Sharman (1913) 9 Cr App R 142; R v Caust [1936] SASR 170; Shannon (1979) 21 SASR 442 at 450; Heferen (1999) 106 A Crim R 89 at 92 [12].
53. R v Holder [1983] 3 NSWLR 245; R v Bulger [1990] 2 Qd R 559.
54. Cf Dodge (1988) 34 A Crim R 325 at 331; Heferen (1999) 106 A Crim R 89 at 92 [12]; Thomson and Houlton (2000) 115 A Crim R 104 at 134 [132].
55. See eg Shannon (1979) 21 SASR 442 at 454 per Wells J (diss); see eg R v Tiddy [1969] SASR 575 at 579.
56. Cf Atholwood (1999) 109 A Crim R 465 at 467 [9].
57. Shannon (1979) 21 SASR 442 at 452.
58. Heryadi (1998) 98 A Crim R 578 at 584.
59. [2000] WASCA 286 [17].
60. R v Perry [1969] QWN 17; Shannon (1979) 21 SASR 442 at 445–6; R v Gray [1977] VR 225; Verschuren (1996) 17 WAR 467 at 473.
61. Winchester (1992) 58 A Crim R 345 at 350.
62. Shannon (1979) 21 SASR 442 at 447; Atholwood (1999) 109 A Crim R 465 at 467 [9].
63. *Thomson and Ho*ulton (2000) 115 A Crim R 104 at 134 [131].
64. Thomson and Houlton (2000) 115 A Crim R 104 at 112–13 [33]–[39].
65. Shannon (1979) 21 SASR 442 at 448.
66. Ryan (2001) 75 ALJR 851 at 831 [93]; 179 ALR 193 at 215; Simpson (1993) 68 A Crim R 439; Doyle (1994) 71 A Crim R 360.
67. Ryan (2001) 75 ALJR 815 at 831 [93]; 179 ALR 193 at 215.
68. O'Brien (1991) 55 A Crim R 410; R v Williscroft [1975] VR 292 at 300.
69. Tierney (1990) 51 A Crim R 446 at 448.
70. See eg AB v The Queen (1999) 198 CLR 111 at 156 [115]–[116].
71. AB v The Queen (1999) 198 CLR 111 at 121–2 [15]–[18]. See also the other cases referred to in the reasons of McHugh J at [41].
72. Cf Pearce v The Queen (1998) 194 CLR 610 at 624 [46]; Wong v The Queen (2001) 76 ALJR 79 at 93–94 [76]; cf at 99 [101]; 185 ALR 233 at 252–3; 260–1.
73. AB v The Queen (1999) 198 CLR 111 at 148–9 [99]–[100]; Wong v The Queen (2001) 76 ALJR 79 at 99–100 [101]–[103]; 185 ALR 233 at 260–261; cf R v McDonnell [1997] 1 SCR 948 at 986–8 [57]–[61] cited by Gleeson CJ in Wong v The Queen (2001) 76 ALJR 79 at 83 [11]; 185 ALR 233 at 237.
74. Cf Thomson and Houlton (2000) 115 A Crim R 104 at 128 [99] citing R v Gallagher (1991) 23 NSWLR 220 at 227–8.
75. Tierney (1990) 51 A Crim R 446 at 448; R v Nagy [1992] 1 VR 637 at 645–6.
76. Public Service Board of NSW v Osmond (1986) 159 CLR 656 at 666–7; Pettitt v Dunkley [1971] 1 NSWLR 376 at 382; Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247 at 277–81; Thomson and Houlton (2000) 115 A Crim R 104 at 113–14 [42].
77. [2000] WASCA 286 [14].
78. (1999) 109 A Crim R 465 at 467–8 [8]–[11].
79. Joint reasons at [21].
80. Justices Act 1902 (WA), ss 100, 101.
81. Johnson v Miller (1937) 59 CLR 467 at 488–9, 495–7.
82. Maxwell v The Queen (1996) 184 CLR 501 at 510–11.
83. [2000] WASCA 286 [15].
84. Thomson and *Houlton* (2000) 115 A Crim R 104 at 109 [19]–[22] citing Weatherburn and Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court* (2000) and Mack and Anleu, *Pleading Guilty: Issues and Practices* (1995) at 34.

31.58C

Markarian v R

[2005] HCA 25; (2005) 215 ALR 213
High Court of Australia

Gleeson CJ, Gummow, Hayne and **Callinan JJ:**

1 The question in this case is whether the Court of Criminal Appeal of New South Wales failed to apply or misapplied orthodox sentencing principles in upholding an appeal against sentence by the Crown.

Facts

2 At his arraignment on 3 May 2002, the appellant pleaded guilty to a charge that between 18 April and 10 October 2000 he did knowingly take part in the supply of a prohibited drug, namely heroin, in an amount not less than the commercial quantity for that drug — 415 grams pursuant to s 33(2) of the Drug Misuse and Trafficking Act 1985 (NSW) ('the Act') ('the principal offence'). He asked that in sentencing him for the principal offence four other matters ('the further offences') be taken into account by the sentencing judge. The way in which the further offences should be dealt with is governed by a special statutory regime to which some detailed reference is necessary and will be made later.

...

4 The most serious of the further offences were the supply of in excess of 5 grams of heroin between 25 September and 1 October 2001, and of 232.5 grams of cannabis leaf, another prohibited drug, on 29 September 2000.

5 On 18 July 2002 Hosking DCJ sentenced the appellant to a term of imprisonment of 2 years and 6 months from 18 July 2002 with a non-parole period of 15 months. His Honour was of the opinion that the appellant's plea of guilty had utilitarian value. He accordingly discounted the sentence by 25%. The appellant was therefore eligible for release on parole on 17 October 2003. His head sentence was to expire on 17 January 2005. In August 2002 however the respondent appealed.

6 The facts constituting the principal offence consisted of the appellant's acting over a period of 5 months as a driver for Vincent Caccamo, a dealer in heroin. The appellant, who was himself a heroin addict, was paid in heroin for his services. The material before the sentencing court emphasized the different degree of criminality of the appellant from Caccamo's. Caccamo had previously been sentenced to 8 years imprisonment with a non-parole period of 5 years for a number of offences of supply in the course of an illicit business of handling and selling drugs. The relative brevity in all of the circumstances of his sentence is explained by the significant value that the judge who sentenced him attached to his cooperation with the police. Another of Caccamo's drivers, Chung, was sentenced to periodic detention of 3 years with a 2 years period of non-parole. Chung did not have a criminal record. He had fewer other matters to be taken into account, and he had driven less frequently for Caccamo than had the appellant.

7 The appellant gave evidence at the sentence hearing. This, in summary, was that he was born in December 1963 and started to use heroin soon after his mother's death in August 1996. Caccamo became his source for the drug. In April 1998, he was sent to prison. By the time of his release in October 1999 he had taken himself off both heroin and methadone. He however resumed contact with Caccamo in about July 2000. He regarded himself as

indebted to Caccamo for the latter's kindness to his father when he was in prison. At this point the appellant resumed drug taking. Caccamo, who did not have a valid driver's licence, used the appellant as his driver in return for drugs. Before he was charged the appellant had dissipated, largely on illegal drugs, an inheritance from his father of $200,000. He claimed that his own criminal activities had been done out of desperation and in despair at the loss of his parents.

8 The appellant has a criminal history. He was placed on recognisance of 3 years for cultivating a prohibited plant and fined for possessing a prohibited imported drug in 1991. In May 1998 he was sentenced to imprisonment for supplying a prohibited drug. For that offence he spent 18 months in prison and an additional 18 months on parole. He was on parole at the time of the commission of the principal offence and one of the further offences.

9 The sentencing judge had before him an optimistic pre-sentence report indicating that the appellant had been in regular employment until about 1990. He had apparently made genuine progress towards drug rehabilitation by the time of sentence.

10 The appeal to the Court of Criminal Appeal was upheld[2] (Hulme J with whom Heydon JA and Carruthers AJ agreed). A sentence of 8 years imprisonment with a non-parole period of 4 years and 6 months was imposed in lieu of the earlier sentence of 2 years and 6 months with a 15 month non-parole period. The appellant is now eligible for release on parole on 18 January 2007. His sentence will expire on 17 July 2010.

11 In his reasons for judgment Hulme J referred to relevant penalties imposed under the Act:[3]

> The Drug Misuse and Trafficking Act provides for a variety of maximum periods of imprisonment, depending on the quantity and type of drug involved. In the case of the supply, or knowingly take part in the supply, of heroin, the periods are:
> (i) where the quantity is not more than 1g (a 'small quantity'), and the matter is dealt with summarily, two years imprisonment (s 30);
> (ii) where the quantity is not more than 5g (an indictable quantity), and the matter is dealt with summarily, two years imprisonment (s 31);
> (iii) where the quantity is less than 250g and the matter is dealt with on indictment, 15 years imprisonment (s 32);
> (iv) where the quantity is not less than 250g but not as much as 1,000g (a 'commercial quantity'), 20 years imprisonment (s 33(2)); and
> (v) where the quantity is not less than 1,000g (a 'large commercial quantity'), life imprisonment (s 33(3)).

As to these his Honour observed:[4]

> Although this summary makes it clear that the maximum sentences prescribed are not proportional to quantities, it is clear that, all other things being equal, Parliament intended that the greater the quantity, the higher the sentence should be. Of course, that is not to say that all other matters relevant to sentence should not also have their proper weight.[5]

His Honour then referred to other judgments[6] of the Court of Criminal Appeal of New South Wales in which statements drawing attention to the need in sentencing to deter criminal conduct, and to protect the public, without losing sight of tailoring the sentence to the particular

circumstances of the offence charged, and to the ensuring of 'reasonable proportionality' in that regard, have been made.

12 Hulme J was of the opinion that not one of the principles reflected in the statements to which we have referred was applied by the sentencing judge. He was influenced by his own experience as a trial judge. He said:[7]

> Much, if not most of the work of the courts is taken up with the consequences of the ravages drugs, particularly heroin, inflict on those who take it and, by them, on society. The survey of imprisoned burglars reported in 'The Stolen Goods Market in New South Wales' conducted by the New South Wales Bureau of Crime Statistics and Research indicated a median expenditure by heroin users of $1,500 per week and the need to steal goods worth a number of times this amount to feed their habit. On average each such offender is thus costing the community through property losses and the like $200,000 per year. And that says nothing about the violence other offenders resort to, or the waste of life and degradation heroin inflicts on the lives of the tens of thousands of persons it comes to dominate. To punish those who help to perpetuate such consequences by sentences such as was imposed in this case is to fail to adhere to the dictates of Parliament, to fail to adhere to basic principles of sentencing, to fail to provide much disincentive to others tempted to offend in the same way, and to fail the community's entitlement to retribution or, as I think is encompassed within that expression, to feel justice has been done.

His Honour then turned his mind to the particular circumstances of the offence:[8]

> The degree by which, having regard to the maximum penalties provided by the Act in question, the [appellant's] conduct … offend[ed] against the legislative objective of suppressing the illicit traffic in the prohibited drug' was substantial. Albeit it was a long way short of the 999.9g maximum for a commercial quantity, the 415g the distribution of which he assisted well exceeded the 250g upper limit for an indictable quantity for the supply of which Parliament had seen fit to prescribe a maximum penalty of 15 years. The [appellant's] activities extended over a period of almost six months. They amounted to conscious deliberate criminality, day after day, for reward, even if that reward was in the form of drugs. At the time he was on parole — a seriously aggravating feature — and had previously been convicted of supplying prohibited drugs and imprisoned. By his repeated offending the [appellant] 'manifested … a continuing attitude of disobedience of the law'.[9]
>
> …
>
> There were also the offences on the Form 1. The second, involving cannabis, carried a penalty of two or 10 years also depending on whether it was prosecuted summarily or on indictment. In that this offence may have been part of the [appellant's] active assistance to Mr Caccamo in the latter's drug dealing activities, it is proper to regard it as part of the same criminal activity. However, in that a different drug was involved, the criminal activity covered a broader spectrum and merited an increase in punishment.
>
> It seems likely that the third of the offences in the Form 1 — which being of possession rather than supply, carried a maximum period of imprisonment of two years — was associated with either the operation which was the subject of the first Form 1 offence or the [appellant's] own heroin addiction. It seems very likely that the fourth of these offences, which, under s 527C of the Crimes Act 1900 (NSW) carried a maximum

period of imprisonment of six months — was also an incident of the [appellant's] own commercial dealing. It does not disadvantage the [appellant] to so regard both of these offences.

13 Hulme J did not overlook the subjective matters to which regard should be had, the first of which was the appellant's pleas to the principal offence and the further offences. He pointed out however that these were only entered after the committal, and that the evidence against the appellant which included the results of surveillance and taped records of conversations, was strong. His Honour then had regard to the appellant's apparent contrition, his addiction and his attempts to rehabilitate himself. All of these had to be weighed, his Honour said, with the compelling counter consideration, of two previous offences of supplying heroin. And, despite his reservations about the correctness of an earlier line of authority in the New South Wales Court of Criminal Appeal[10] holding that there should be a significant discount in any additional penalty on account of further offences which were admitted, Hulme J accepted that he must give effect to those authorities in this case. His Honour also had regard to the need to apply the totality principle.

14 Later in his judgment his Honour again referred to his personal experience as a trial judge:[11]

> There is some weight of authority in favour of sentences being determined by instinctive synthesis.[12] However, as one who has had to carry out the sentencing task both in this Court and at first instance, and to examine innumerable sentences imposed by others, my experience is that there are far more advantages in reasoning to a conclusion. I confess that in a significant number of the cases which come to this Court, the instinctive synthesis approach adopted in the cases under appeal have made me wonder whether figures have not just been plucked out of the air. Indeed that is what seems to have occurred in this case. His Honour, having referred to the objective and subjective features, including the [appellant's] addiction and efforts towards rehabilitation, having expressed the opinion that the [appellant] was entitled to a discount of 25% for his plea of guilty, and that he proposed to extend some leniency because Chung was treated very leniently, said simply 'In my view, the starting point for this sentence would have been a sentence in the order of three and a half years but with the offender's plea of guilty, that translates to a sentence of 30 months, namely, two and a half years'.
>
> No reasons were advanced in support of the three and a half years figure or to explain why it was not five, or seven or 10 years. I acknowledge that, in many sentencing exercises, there will be an element of subjective choice or value judgment which it may be impossible to avoid but it seems to me far preferable that reasoning be apparent in respect of the more significant features than occurred in relation to what was his Honour's fundamental starting point.
>
> Neither does it seem very satisfactory for me, sitting on appeal, simply to say 'His Honour's instinctive synthesis was manifestly wrong. My instinctive synthesis leads to the view his starting point should have been five (or seven or 10) years.'

15 Intervention by the Court of Criminal Appeal was warranted, his Honour said,[13] for these reasons:

> Had the [appellant's] offence and circumstances fallen within the category of a worst case falling within the statutory provisions, the sentence should have been not less than the

> 15 years maximum for the offence of supplying an indictable quantity. I appreciate that the charge specified a commercial quantity, that the maximum period of imprisonment prescribed for that offence is 20 years and that the quantity involved in this offence was only a little more than 40% of the maximum commercial quantity. However, Parliament cannot have intended that, other things being equal, the penalty for supplying more than 250g should be less than for supplying that quantity. The absence of proportionality in the maximum sentences prescribed is perhaps partly explicable upon the basis that the severity of imprisonment is not simply proportional to its length. Having regard to the sorts of terms under consideration for drug dealing a sentence of one of the longer periods is liable to have an impact on an offender's life in terms of wife, children, job prospects and the like far greater than a sentence, say half as long.
>
> But be that as it may, in face of the totality of the statutory provisions and the principles for which I have cited *Veen v The Queen (No 2)*[14] and *R v Peel*[15], it seems to me that the maximum prescribed for the supply of 250g is not too high a starting point. In *R v Perrier (No 2)*,[16] the Victorian Court of Criminal Appeal thought the sentences prescribed for lesser quantities relevant to the sentence appropriate for higher quantities.

16 After referring again to the subjective factors which he had earlier noted in his judgment his Honour said this:[17]

> So far as the [appellant's] role is concerned, he was of course not the principal and the charge was not to supply but only of being knowingly involved in supply. While at times he seems to have been no more than a chauffeur, on other occasions his role was substantially more significant. In light of the matters referred to in this paragraph, I would reduce my 15 year starting point by about one-third. A number of factors lead me to the view that the reduction on this account should not be greater. These include the sorts of considerations spoken of in *Le Cerf*.[18] They include also my view that the severity of sentences is not simply proportionate to length. They include the nature of the [appellant's] activities and the fact that they extended over a much longer period than that during which a courier is normally involved. The conclusion derives some support also from the relativity between the maximum sentences available for importing heroin and the pattern of sentences imposed on couriers involved in the importation of quantities in the top part of trafficable quantities of that drug. Based on the decisions to which I referred, I concluded in *R v Spiteri*[19] that nine years out of a maximum of 16.5 or 17 years seemed to be the pattern. Of course those figures show a greater difference than one-third and if the comparison is to be made between the circumstances here and those in the cases to which I referred it is necessary to recognise the differences. I need not detail these but they include that most of those cases included a plea of guilty and I am not at this stage taking any account of such a plea of guilty. One must recognise also the difference in nature and extent of the [appellant's] activities compared with those of persons regarded as couriers.

17 Despite his reservations about the appropriateness of a discount of as much as 25%, Hulme J was disposed to allow such a discount to any sentence that he concluded should be imposed, in part at least because the appeal was a Crown appeal. That discount should, he said, be regarded however as the sum of all discounts which might otherwise be made in consequence of the plea and the appellant's admission of guilt to the further offences.

18 In dealing with those offences his Honour said:[20]

> Operating in the other direction are the offences on the Form 1. I have said sufficient to indicate my view about them save and except that principles of totality have also to be taken into account. On account of the matters on the Form 1, particularly the first and second of these, I would increase the sentence otherwise appropriate by between 18 months and two years.

19 Because of the great disparity in criminality between Chung and the appellant, his Honour did not think that any question of parity of penalties arose. His Honour was however conscious that the sentence that he would substitute was a high one:[21]

> The second of these further topics to which I should refer arises from the statistics kept by the Judicial Commission. By comparison with those statistics, the sentence I propose is a high one. Those statistics show that, in the period from July 1995 to December 2001, there were 22 offenders sentenced in respect of the offence of being knowingly concerned in the supply of (not less than) a commercial quantity of heroin. Twenty one were sent to prison. The longest full term of imprisonment was eight years, imposed on two offenders, and only seven offenders received full terms of six years or more. The statistics indicate that all the persons referred to in the last sentence pleaded guilty and, except for one of the seven, had matters on a Form 1.
>
> This comparison raises the question whether the sentence I propose is the lowest which should properly be imposed for the [appellant's] offending but, having reflected on the question, I am satisfied that nothing less will properly reflect the considerations to which I have referred.

The appeal to this Court

20 In this Court the appellant argues that the Court of Criminal Appeal erred by adopting a staged approach to the calculation of the sentence, in taking a maximum penalty as a starting point for that calculation, and, by, in reality impermissibly imposing a separate penalty for the other offences. Further, the appellant contends that the sentence was, in any event, so plainly unjust that an error in the sentencing discretion was to be inferred.

21 The respondent argued that if at all, it was only in form and not in substance, that Hulme J embarked upon an approach of a two-tiered or sequential kind. This, the respondent accepted, appeared from the order and way in which his Honour dealt with the relevant matters: the statutory provisions and the purposes of them; the worst category of cases; deterrence and public security; proportionality; subjective matters; the circumstances of the offences; criminal history; double jeopardy on a Crown appeal; and the need or otherwise for parity and comparable sentences. Nonetheless, the respondent submitted, his Honour, having taken all possible relevant issues and matters into account, had not been shown to have erred.

22 The appellant submitted that Hulme J fell into error in taking as his starting point, the quantity of heroin the subject of the principal offence. He acknowledged that quantity was clearly a relevant, but contended that it was not *the* determinative factor. In this connexion he cited the joint judgment of Gaudron, Gummow and Hayne JJ in *Wong v The Queen*:[22]

> These are reasons enough for concluding that the Court of Criminal Appeal was in error in attributing chief importance to the weight of narcotic in fixing sentences for the offence. The error of the Court is, however, more deep seated than the factual difficulties to which

reference has been made. The selection of weight of narcotic as the chief factor to be taken into account in fixing a sentence represents a departure from fundamental principle.

23 Hulme J, the appellant argued, then engaged in an impermissible arithmetical process after rejecting what has been called an approach by way of instinctive synthesis. His Honour proceeded by referring to a maximum penalty of 15 years, reducing that period by a third because the appellant's role was of a lesser kind than that of Caccamo, making a further reduction of 25% on account of the utilitarian value of the plea and contrition, increasing the sentence by 18 months to 2 years because of the further offences, and taking into account various other factors pointing in different directions, the prospects of rehabilitation, deterrence, the security of the community, and the double jeopardy arising by reason of a Crown appeal.

The decision

24 It is not useful to begin by asking a general question like was a 'staged sentencing process' followed. That is not useful because the expression 'staged sentencing process' may mean no more than that the reasoning adopted by the sentencer can be seen to have proceeded sequentially. Or it may mean only that some specific numerical or proportional allowance has been made by the sentencer in arriving at an ultimate sentence on some account such as assistance to authorities or a plea of guilty. Neither the conclusion that a sentencer has reasoned sequentially, nor the observation that a sentencer has quantified the allowance made, for example, on account of the offender's plea of guilty, or the offender's assistance to authorities, of itself, reveals error. Indeed provisions like s 21E of the Crimes Act 1914 (Cth) may require the sentencer, in some circumstances, to identify the amount by which a sentence has been reduced on some account.

25 As with other discretionary judgments, the inquiry on an appeal against sentence is identified in the well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King*,[23] itself an appeal against sentence. Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender's appeal, as 'manifest excess', or in a prosecution appeal, as 'manifest inadequacy'.

26 Any consideration of alleged error of principle must now begin in any applicable legislation governing sentencing either generally or in the particular case. In sentencing for a federal offence, it must begin by considering Pt 1B of the Crimes Act. In the present case, it must begin with the provisions of the Sentencing Act.

27 Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence.[24] And judges at first instance are to be allowed as much flexibility in sentencing

as is consonant with consistency of approach and as accords with the statutory regime that applies.[25]

28 The proceedings in the Court of Criminal Appeal being a prosecution appeal, brought pursuant to s 5D of the Criminal Appeal Act 1912 (NSW), it was, of course, necessary for the prosecution to show error in the sentence passed below — either specific error or manifest inadequacy. As the whole Court pointed out in *Lowndes v The Queen*,[26] a court of criminal appeal may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing judge exercised his or her discretion.

29 In the present case, contrary to what ordinarily would be expected, the Court of Criminal Appeal did not state explicitly that it was of the view that the sentence below was manifestly inadequate. It was nonetheless apparent from the order ultimately made by the Court that it had reached this conclusion. The appellant submitted in this Court that the Court of Criminal Appeal was wrong to find that the sentence originally passed was manifestly inadequate. Because, for the reasons that follow, the re-sentencing discretion of the Court of Criminal Appeal miscarried, it will be necessary for the matter to be remitted to the Court of Criminal Appeal. It is not necessary in those circumstances to decide whether the original sentence was manifestly inadequate. That will be a matter for the Court of Criminal Appeal to consider afresh in the further hearing of the prosecution appeal.

30 Legislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks. It is well accepted that the maximum sentence available may in some cases be a matter of great relevance. In their book *Sentencing*, Stockdale and Devlin[27] observe that:

> A maximum sentence fixed by Parliament may have little relevance in a given case, either because it was fixed at a very high level in the last century … or because it has more recently been set at a high catch-all level … At other times the maximum may be highly relevant and sometimes may create real difficulties …
>
> A change in a maximum sentence by Parliament will sometimes be helpful [where it is thought that the Parliament regarded the previous penalties as inadequate].

31 It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick. That having been said, in our opinion, it will rarely be, and was not appropriate for Hulme J here to look first to a maximum penalty,[28] and to proceed by making a proportional deduction from it. That was to use a prescribed maximum erroneously, as neither a yardstick, nor as a basis for comparison of this case with the worst possible case. That he used the maximum penalty impermissibly appears from his Honour's particular deference to it in this passage:[29]

> Parliament cannot have intended that, other things being equal, the penalty for supplying more than 250g should be less than for supplying that quantity.

The form of the statement is explained by the fact that his Honour did not start with the maximum penalty for an offence involving the quantity in question, but used another maximum

penalty as his starting point, that is, the maximum for an offence in the category of seriousness immediately below that of the principal offence.

32 The appellant's submission that the passage just quoted involved too great an emphasis upon quantity without regard to the facts of the case, should be accepted. True it is that his Honour did not overlook the objective facts, or indeed any other matters relating to penalty, but having started where he did, at a maximum, and then making deductions from it, he did not make, even in a provisional way, an assessment of the sentence called for by the objective facts. It might or might not be appropriate for a trial judge to state such a provisional view. A judge would rarely be in error in not doing so. It is, after all, a provisional position only.

33 A serious fallacy in his Honour's reasoning is that it assumes that any case involving more than 250 grams of heroin is likely to be a worse case than any case involving only 250 grams or less. That cannot be so in the virtually absolute terms in which his Honour puts it. Little imagination is required to envisage a case involving a relatively small quantity of heroin, as being of very great seriousness, for example, supply to create an addiction in an infant. The qualification which his Honour did make of 'other things being equal' was not one to which he gave effect, for in adopting his starting point of 15 years he had no regard to the sorts of matters which could have had any equalising effect. The further defect in the reasoning is a related one. Having started with a penalty which would have been appropriate for the worst possible kind of offence of supply involving up to 250 grams of heroin, Hulme J made no attempt to identify the nature of such a case and to make a comparison of the facts of the principal offence with it.

34 For these reasons the appellant's first ground of appeal succeeds.

35 The appellant's next submission invited the Court to reject sequential or two-tiered approaches to sentencing taking as their starting point the maximum penalty available, and to state as a universal rule to the extent that legislation does not otherwise dictate, that a process of instinctive synthesis is the one which sentencing courts should adopt.

36 No universal rules can be stated in those terms. As was pointed out earlier, much turns on what is meant by a 'sequential or two-tiered' approach and, likewise, the 'process of instinctive synthesis' may wrongly be understood as denying the requirement that a sentencer give reasons for the sentence passed. So, too, identifying 'instinctive synthesis' and 'transparency' as antonyms in this debate misdescribes the area for debate.

37 In general, a sentencing court will, after weighing all of the relevant factors, reach a conclusion that a particular penalty is the one that should be imposed. As Gaudron, Gummow and Hayne JJ said in *Wong*:[30]

> Secondly, and no less importantly, the reasons of the Court of Criminal Appeal suggest a mathematical approach to sentencing in which there are to be 'increment[s]' to, or decrements from, a predetermined range of sentences. That kind of approach, usually referred to as a 'two-stage approach' to sentencing, not only is apt to give rise to error, it is an approach that departs from principle. It should not be adopted.
>
> It departs from principle because it does not take account of the fact that there are many conflicting and contradictory elements which bear upon sentencing an offender. Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong. We say 'may be' quite wrong because

the task of the sentencer is to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an 'instinctive synthesis'. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features.

In *R v Thomson*,[31] Spigelman CJ reviewed the state of the authorities in Australia that deal with the 'two-stage' approach of arriving at a sentence, in which an 'objective' sentence is first determined and then 'adjusted' by some mathematical value given to one or more features of the case, such as a plea of guilty or assistance to authorities. As the reasons in *Thomson* reveal, the weight of authority in the intermediate appellate courts of this country is clearly against adopting two-stage sentencing and favours the instinctive synthesis approach. In this Court, McHugh and Hayne JJ, in dissenting opinions in *AB v The Queen*[32] expressed the view that the adoption of a two-stage approach to sentencing was wrong. Kirby J expressed a contrary view. We consider that it is wrong in principle. The nature of the error can be illustrated by the approach adopted by the Court of Criminal Appeal in these matters. Under that approach, the Court takes, for example, the offender's place in the hierarchy and gives that a particular significance in fixing a sentence but gives the sentencer no guidance, whatever, about whether or how that is to have some effect on other elements which either are to be taken into account or may have already been taken into account in fixing the guideline range of sentences. To take another example, to 'discount' a sentence by a nominated amount, on account of a plea of guilty, ignores difficulties of the kind to which Gleeson CJ referred in *R v Gallagher*[33] when he said that:

It must often be the case that an offender's conduct in pleading guilty, his expressions of contrition, his willingness to co-operate with the authorities, and the personal risks to which he thereby exposes himself, will form a complex of inter-related considerations, and an attempt to separate out one or more of those considerations will not only be artificial and contrived, but will also be illogical.

So long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform.' (emphasis in original)

38 Following *Wong* benches of five judges in New South Wales in *R v Sharma*[34] and *R v Whyte*[35] and in South Australia in *R v Place*,[36] have sought to state general sentencing principles to be applied in those States. In the first two of these cases the Court of Criminal Appeal of New South Wales endorsed an approach of instinctive synthesis as a general rule but also accepted as a qualification that departure from it may be justified to allow for separate consideration of the objective circumstances of the crime. On occasions intermediate courts of appeal have however refused to find error where a staged approach has been undertaken. In *Place*[37] the Court of Criminal Appeal of South Australia (Doyle CJ, Prior, Lander, Martin and Gray JJ) although it rejected a staged approach in general, made it clear that a reduction of penalty for a plea of guilty should be identified. This approach, their Honours held, was in conformity with the relevant sentencing legislation of South Australia.

39 Following the decision of this Court in *Wong* it cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison. That

is not to say that in a simple case, in which, for example, the circumstances of the crime have to be weighed against one or a small number of other important matters, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden. An invitation to a sentencing judge to engage in a process of 'instinctive synthesis', as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood about what that means. The expression 'instinctive synthesis' may then be understood to suggest an arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. There may be occasions when some indulgence in an arithmetical process will better serve these ends. This case was not however one of them because of the number and complexity of the considerations which had to be weighed by the trial judge.

...

46 The appellant submitted that the sentence of the sentencing judge should be restored. One arguable ground for doing so is that the appeal to the Court of Criminal Appeal was a Crown appeal and that it would be unfair to subject the appellant to a further hearing of it. We do not think that the argument should however be accepted. True it is that in Crown appeals different considerations from those arising on an offender's appeal arise and have to be taken into account. Nonetheless the Crown is entitled to proper consideration of an appeal duly made. That has not happened here. This Court is not, as we have said, in general a sentencing court. We are unable to say whether, having regard to comparable sentences in New South Wales and other relevant matters, the sentence of the sentencing judge is correct or not.

47 We would therefore order that the appeal be upheld, the sentence and orders of the Court of Criminal Appeal of New South Wales be quashed and that the matter be remitted to the Court of Criminal Appeal for disposition of the appeal in accordance with these reasons.

McHugh J: ...

51 By two-tier sentencing, I mean the method of sentencing by which a judge first determines a sentence by reference to the 'objective circumstances' of the case. This is the first tier of the process. The judge then increases or reduces this hypothetical sentence incrementally or decrementally by reference to other factors, usually, but not always, personal to the accused. This is the second tier. By instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.

...

71 The belief that two-tier sentencing is the preferable method is principally based on the idea that it promotes transparency of sentencing. Certainly, it shows a series of numbers. But they are more likely than not to be erroneous numbers. Each time the judge adds or subtracts another number the chance of ultimate error increases exponentially. In so far as its proponents claim that two-tier sentencing also promotes predictability, they mistake the illusion for the reality. Its proponents also contend that it makes sentencing more scientific. But if two-tier sentencing is science, its results, as in this case, suggest it is junk science. Belief in the advantages of two-tier sentencing is reminiscent of the once popular belief that judges do not make law. Like that belief, it belongs in Lord Reid's fairytales. There is no Aladdin's Cave

of accurate sentencing methodology, the door to which can be opened by chanting the magic words, 'two-tier sentencing'. There is only human judgment based on all the facts of the case, the judge's experience, the data derived from comparable sentences and the guidelines and principles authoritatively laid down in statutes and authoritative judgments.

72 The flaws in the two-tier method do not mean that the instinctive synthesis approach is perfect. Far from it. Any assessment, based on indeterminate standards and human judgment — whether it is negligence, damages or sentences — is unsatisfactory. That is why I have always preferred the use of rules and principles to standards. And the instinctive synthesis method is open to the criticism that, in arriving at the sentence, the judge has unconsciously over-emphasised or under-emphasised the weight to be given to various factors in the synthesis. But unless we adopt fixed sentences or provisions similar to the United States Federal Sentencing Guidelines with their requirements that courts must impose a sentence of the kind and within the range mandated,[74] it is the best we can do.

73 Critics of the instinctive synthesis method place too much emphasis on the 'instinct' and too little on the 'synthesis'. The use of the word 'synthesis' in the context of sentencing identifies the very last part of the process. It recognises that, where a variety of considerations, often tending in opposing directions, operate in the context of a statutory maximum, there must finally be a quantification of the sentence to be imposed. There must be a synthesising of the relevant factors. In that process, greater and lesser weight will be allocated to some factors depending on their relevance to the person convicted and his or her crime. Ultimately, community and legal values are translated into a number of years, months and days. That process must involve an instinctive judgment. As **Mason CJ, Brennan, Dawson** and **Toohey JJ** said in their joint judgment in *Veen (No 2)*:[75]

> [S]entencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and *none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case*. They are guideposts to the appropriate sentence but sometimes they point in different directions. (Emphasis added)

74 Nor is the instinctive synthesis approach inconsistent with awarding a discount for some factor, provided that discount relates to a purpose distinct from a sentencing purpose. The distinction between permissible and impermissible quantification of 'discounts' on a sentence will usually be found in whether the quantification relates to a sentencing purpose rather than some other purpose. So, the quantification of the discount commonly applied for an early plea of guilty or assistance to authorities is offered as an incentive for specific outcomes in the administration of criminal justice and is not related to sentencing purposes. The non-sentencing purpose of the discount for an early guilty plea or assistance is demonstrated by the fact that offenders are ordinarily entitled to additional mitigation for any remorse or contrition demonstrated with the plea or assistance, aside from the discount for willingness to facilitate the course of justice.[76] That said, I think the use of discounts should be reserved for only one — maybe two — factors in a particular sentence that serve some goal other than a sentencing goal.

75 In this case, Hulme J, having commenced from an erroneous premise, applied a fractional reduction that reflected the lesser gravity of the appellant's role in the offences, the lengthy period of offending, and some reference to proportionality with sentences for related offences. In so doing, Hulme J was selecting matters related to retribution and general and specific deterrence. His Honour was giving a mathematical value to these purposes separated from the other purposes that were to be synthesised in the sentencing outcome. These were not appropriate matters for separate quantification and caused his Honour to fall into error.

76 One reason why the idea of instinctive synthesis is apparently abhorrent to lawyers who value predictability and transparency in sentencing is that they see the instinct of a sentencing judge as entirely subjective, personal, arbitrary and unconfined. In fact, although a sentencing judge does ultimately select a number, it is not from thin air that the judge selects it. The judicial air is thick with trends, statistics, appellate guidance and, often enough these days, statutory guidance.

77 First, the sentencing judge almost never imposes a sentence for an offence that has been committed for the first time. A sentencing judge may have seen dozens or scores of such cases and develops, through experience, a sense of the relative gravity of offences and the relative circumstances of offenders that dictate the weighting of different factors in the sentencing process. The need to give greater weight to general or specific deterrence in response to crime trends is one factor to which a sentencing judge has special sensitivity. A sentencing judge also has the benefit of collegiate knowledge, both formally through reading the judgments of other judges and informally through interaction with other judges.

78 No one suggests that the judicial robe carries in its seams the wisdom of Solomon, but judicial experience in sentencing is a skill to be respected by the community and other judges. Repeated exercise in synthesising sentencing factors can only hone the instinct required to translate such factors into just numerical outcomes. That experience, combined with the special advantages of receiving sentencing material, including oral material, first hand, are the two most important reasons why appellate courts, and especially an ultimate appellate court which is national rather than local to the sentencing jurisdiction, must exercise restraint in reviewing sentencing decisions, especially on the basis of manifest excess or leniency.

79 A further source of information about the sentences imposed by other judges is the sentencing statistics produced by (in New South Wales) the Judicial Commission. Hulme J referred to these statistics towards the end of his judgment in this case.[77] It is surprising that they did not cause the Court of Criminal Appeal to see that the sentence of eight years that it was imposing was disproportionate. Those statistics showed that the Court was imposing a sentence as high as any that had been imposed during a six year period dealing with 22 cases concerning the same offence, despite the subordinate role played by this offender and the context of a Crown appeal. The failure of the Court to act on those statistics suggests that its belief in the 'logic' of its numbers caused it to overlook the significance of the statistics. If so, it shows the dangers lurking in an approach that concentrates on numerical components.

80 Second, a judge is sensitive to legislative trends. A change in the maximum penalty for an offence or in the elements of an offence may indicate a shift in the values to be applied when sentencing for that offence. In New South Wales there is also a statutory system of guideline

judgments and standard minimum non-parole periods that give more specific guidance in common offences and operate as a starting point from which departure is intended to be the exception or at least require explanation. In recent times, both methods have been used to increase the prevailing median sentence for particular classes of offences. That does not mean that the judge must start with a specific number but knowledge of the median or the extent of the range guides the judicial 'instinct'.

81 Third, a sentencing judge always knows that the sentence imposed is subject to judicial review by an appellate court. Whether or not that review takes place, he or she is conscious that the sentencing discretion and the reasons for arriving at a particular sentence will be considered by the advisers to the Crown and the offender. Error will be the subject of appeal. To avoid appealable error, a judge pays close attention to the guidance provided by appellate courts as to the impermissible paths of reasoning and the permissible factors which will be relevant to the sentencing process in a particular case.

82 Fourth, the role of open justice is also important. A judge's sentence and reasons are usually exposed to public scrutiny through publication or media reporting. Public responses to sentencing, although not entitled to influence any particular case, have a legitimate impact on the democratic legislative process. Judges are aware that, if they consistently impose sentences that are too lenient or too severe, they risk undermining public confidence in the administration of justice and invite legislative interference in the exercise of judicial discretion. For the sake of criminal justice generally, judges attempt to impose sentences that accord with legitimate community expectations.

83 Finally, in *Veen (No 2)*,[78] as I have indicated, this Court affirmed that the ultimate control on the judicial sentencing discretion is the requirement that the sentence be proportionate to the gravity of the offence committed. In pursuit of other sentencing purposes, a judge may not impose a sentence that is greater than is warranted by the objective circumstances of the crime. Both proportionality and consistency commonly operate as final checks on a sentence proposed by a judge. They guard against hidden errors in the process, the kind later identified on appeal as manifest excess or leniency in accordance with the principles in *House v The King*.[79]

84 The acceptance of the role of instinctive synthesis in the judicial sentencing process is not opposed to the concern for predictability and consistency in sentencing that underpins the rule of law and public confidence in the administration of criminal justice. The synthesising task is conducted after a full and transparent articulation of the relevant considerations including an indication of the relative weight to be given to those considerations in the circumstances of the particular case. The instinctive synthesis approach does not prevent the use of adjectives or adverbs or indications that this or these factors makes or make the case more or less serious than other cases or are the critical features of the case. And judicial instinct does not operate in a vacuum of random selection. On the contrary, instinctive synthesis involves the exercise of a discretion controlled by judicial practice, appellate review, legislative indicators and public opinion. Statute, legal principle and community values all confine the scope in which instinct may operate. The judicial wisdom involved in the instinctive synthesis approach is therefore likely to lead to better outcomes than the pseudo-science of two-tier sentencing. At all events, I am not satisfied that two-tier sentencing is a better method or process than the instinctive synthesis method that has been the traditional approach of common law judges.

Order

85 The appeal must be allowed.

Kirby J: …

128 *Considerations of function and principle*: Whilst I recognise that the modified version of the prohibition against two-tiered sentencing, now adopted in the joint reasons in this appeal, permits exceptions and acknowledges, in effect, that instances will exist where 'some indulgence in an arithmetical process' will pass muster,[147] the continued endorsement of the discredited view of sentencing as an 'instinctive synthesis' remains to undermine this ultimate acknowledgment of the inescapable reality.

129 With all respect to those of the different opinion, the phrase 'instinctive synthesis' sends quite the wrong signals for the law of sentencing in Australia. Who are those who have the 'instincts' in question? Only the judges. This is therefore a formula that risks endorsement of the deployment of purely personal legal power. It runs contrary to the tendency in other areas of the law, notably administrative law, to expose to subsequent scrutiny the use of public power by public officials.[148] It is contrary to the insistence of Australian courts,[149] including this Court,[150] that judicial officers must give reasons for their decisions. At this stage in the development of the Australian law of sentencing, this Court should be encouraging, not impeding, transparency and accountability of judicial decision-making.[151] I remain of the view that '[i]t is too late (and undesirable) to return to unexplained judicial intuition'.[152] Talk of 'instinctive synthesis' is like the breath of a bygone legal age. It resonates with a claim, effectively, to unexplainable and unreviewable power.

130 It is for these reasons that the supposed 'instinctive synthesis', as an explanation of the judicial task in sentencing, has been criticised by knowledgeable experts in criminal law and sentencing.[153] All of those experts know, and recognise, that there are limits to the explanation of reasons for a given sentence. Ultimately, unless the law itself fixes the sentence, judgment is invoked. However, as the present appeal demonstrates, appellate courts expounding general principles should encourage revelation at least of the important adjustments that are made by a sentencing judge. They should not be encouraging the thought that there descends upon a judicial officer, following appointment, a mystical 'instinct' or 'intuition' that ensures that he or she will get the sentence right 'instinctively'. That approach discourages explanation of the logical and rational process that led to the sentence, so far as it can reasonably be given and is useful.

131 Functional analysis also suggests that talk of judicial 'instinct' is ill-advised. If, in reasoning, the judicial officer does make a significant adjustment for a particular factor — measurable in the judge's opinion in quantitative or percentage terms — the choice before the law is whether that factor should be specifically exposed in the reasons or not. There are many grounds of policy and principle, in such circumstances, why it should be.[154] If it is not identified, the risk that arises is that identified by Hulme J in the Court of Criminal Appeal in this case. Some judges will feel that it is safer, wiser or even essential to keep the process of reasoning secret. That course is good neither for the parties, nor for the community, nor for the discharge of the functions of sentencing, nor for appellate review.[155] With some judicial officers, talk of 'instinct' and pure 'intuition' might be understood as endorsing a process of sentencing that involves little more than plucking a figure from the air, to use Hulme J's telling expression.[156] Such an arbitrary exercise of public power is

to be discouraged, not endorsed by the use by this Court of phrases such as 'instinctive synthesis'.

132 *Semantics and substance*: I have previously suggested that some of the debates over the two-stage approach and instinctive or intuitive synthesis may be semantic, not substantive.[157] That remains my view. To this extent, I agree with what is said in that part of the joint reasons.[158] But a sticking point remains, for I cannot accept a *Williscroft* 'instinct' or a *Young* prohibition on two-stage reasoning as sentencing principles, where a more transparent course is available, appropriate and more conformable with modern legal principles governing the deployment of public power. To say the least, there have been important developments in the subjection of uncontrolled discretions to judicial analysis since *R v Geddes*[159] was written.[160] Fundamentally, such developments derive from a principle that lies at the heart of the Australian Constitution and its system of democratic and accountable government. Intuitive and instinctive power is not now in favour. The rule of law stands in its place.[161]

133 I agree that there is no single correct sentence (unless it is lawfully fixed by Parliament). I also agree that sentencing is not a mechanical, numerical, arithmetical or rigid activity in which one starts from the maximum fixed by Parliament and works down in mathematical steps.[162] The process is not so scientific. Because there are a multitude of factors to be taken into account, many of them pulling successively in opposite directions, the evaluation, in terms of time of imprisonment, quantity of fine or other sanction, is necessarily imprecise.[163] Human judgment is inevitably invoked. In sentencing there is sometimes a legitimate role for differences of judicial view. These may occasionally favour the extension of leniency, as *Osenkowski*[164] shows. Necessarily, there must also be room for the views of a judicial officer who takes a more punitive view of all of the relevant considerations in the case. So long as all relevant considerations are given due attention, the discretionary character of sentencing will inhibit appellate interference.

134 This said, there are outer boundaries. They control the scope for judicial officers to indulge individual idiosyncrasies. Sentencing appeals afford a protection against miscarriages of justice that weigh heavily on the liberty of the individual affected. The appellate court should be attentive to the possibility of error. But it is not, in my view, an error of sentencing principle for the sentencing judge to proceed in two or more stages. Exposure of particular discounts — for a plea of guilty, the provision of assistance to authorities or other considerations that seem most significant — is not compulsory unless statute makes it so. But neither does it constitute an error of sentencing principle as such.

135 Judicial officers engaged in sentencing should be encouraged to reveal their processes of reasoning. Simply to assert that they have considered a list of relevant matters, without identifying, in general terms, the weight that has been given to the most important of them, may represent an error in sentencing. The generalised assertion by the sentencer that he or she has acted on 'instinct', 'intuition' or personal experience or the experience in the courts, is not now enough, in my opinion, to meet the standards of reasoning in sentencing that we have come to expect in Australia. Honesty and transparency in the provision of reasons is the hallmark of modern judicial administration. Not judicial 'instinct'.

Conclusion: a needless diversion

136 *Limited residue of the prohibition*: Where, then, have we arrived at the end of this judicial journey? The joint reasons continue to chastise the 'two-tiered approach'.[165] Yet if it is merely

a 'sequential' approach, involving distinct factors, it is apparently unobjectionable. The difference will usually be illusory. Moreover, there are now '[n]o universal rules'.[166] This is at least an advance on *Young* and the earlier unyielding prohibition upon a staged explanation of the ultimate sentence imposed by a judge. However, there is still talk of 'instinctive synthesis'.[167] Yet this too must apparently be reconciled with the obligation of public decision-makers to transparency and also with the specific judicial duty to provide proper reasons.[168]

137 In the end, even the postulated process of 'instinctive synthesis' to the judicial outcome is not apparently to be confused with 'mysterious' and 'arcane' activities limited to judges.[169] Perhaps, in the end, the 'instinctive synthesis' means nothing more than that the sentencing judge is to take everything relevant into account and to reach a final judgment. But this is what judges have always had to do. So what does the reference to 'instinctive' add, except to distract?

138 All that seems to be left from the original imperatives, traced to the decisions in *Williscroft* and *Young*, is a prohibition on mathematical adjustment in deriving the ultimate sentence imposed on an offender. Yet even this is not now absolute. Specification, in a staged or sequential approach, of the degree of reduction of what would otherwise have been the penalty for a plea of guilty is, it seems, sometimes permissible.[170] So presumably is re-adjustment for any assistance to authorities. So indeed, by statutes in many parts of Australia, must now be specific reductions and adjustments expressed in terms of identified quantification or percentages. Even occasionally (albeit in unexplained circumstances) arithmetical indulgence will now, it seems, be overlooked. However, preferably that will happen only where the factors adjusted are comparatively few and the case is 'simple'.[171]

139 So analysed, the residue of this judicial debate over twenty years — in this Court over the past five years — is revealed for what it is. Australian judges must now express their obeisance to an 'instinctive synthesis' as the explanation of their sentencing outcomes. It might be prudent for them to avoid mention of 'two stages' or of mathematics. Yet in many instances (and increasingly by statutory prescription) if judges do so, no error of sentencing principle will have occurred. Such mention may, in fact, sometimes even be required.[172] The lofty and absolute prescriptions of *Williscroft* and *Young* remain in place like the two vast and trunkless legs of stone of Ozymandias.[173] But, with all respect, they are now beginning to look just as lifeless. One day, I expect that travellers to the antique land of this part of the law of sentencing will walk this way without knowing that the two proscriptions once were there.

140 *The ironic disclosure of error*: By virtue of the transparent approach taken correctly, in my view, by the Court of Criminal Appeal, it is apparent that that Court erred in adopting the wrong starting point for consideration of the appellant's sentence for the principal offence. That error warrants correction. For this reason, the appeal must succeed and the matter must be remitted to the Court of Criminal Appeal for disposition of the appeal in light of these reasons.

141 However, the appellant's specific complaint that the Court of Criminal Appeal erred in adopting the 'staged approach' in my view fails. But for that approach, the appellant's appeal to this Court would probably never have been heard, and the errors that now occasion the appellant's success would not have been revealed.

Orders

142 For the foregoing reasons, I agree in the orders proposed in the joint reasons.

Footnotes

2. *R v Markarian* (2003) 137 A Crim R 497.
3. (2003) 137 A Crim R 497 at 501 [17].
4. (2003) 137 A Crim R 497 at 501 [18].
5. See Wong v The Queen (2001) 207 CLR 584.
6. R v Rushby [1977] 1 NSWLR 594; Dodd (1991) 57 A Crim R 349; Bimahendali (1999) 109 A Crim R 355; R v Whyte (2002) 55 NSWLR 252.
7. (2003) 137 A Crim R 497 at 502–03 [23].
8. (2003) 137 A Crim R 497 at 503–04 [24]–[28].
9. Veen v The Queen [No 2] (1988) 164 CLR 465 at 477.
10. Perese (2001) 126 A Crim R 508; Kay (2002) 132 A Crim R 72; R v AEM [2002] NSWCCA 58.
11. (2003) 137 A Crim R 497 at 505 [33]–[35].
12. See R v Whyte (2002) 55 NSWLR 252 and the cases therein cited.
13. (2003) 137 A Crim R 497 at 505–06 [37]–[38].
14. (1988) 164 CLR 465.
15. [1971] 1 NSWLR 247.
16. [1991] 1 VR 717 at 722.
17. (2003) 137 A Crim R 497 at 506 [40].
18. R v Le Cerf (1975) 13 SASR 237
19. [1999] NSWCCA 3 at [33].
20. (2003) 137 A Crim R 497 at 507 [45].
21. (2003) 137 A Crim R 497 at 509 [55]–[56].
22. (2001) 207 CLR 584 at 609 [70].
23. (1936) 55 CLR 499 at 504–05.
24. Pearce v The Queen (1998) 194 CLR 610 at 624 [46].
25. Johnson v The Queen (2004) 78 ALJR 616 at 618 [5] per Gleeson CJ, 624 [26] per Gummow, Callinan and Heydon JJ; 205 ALR 346 at 348, 356.
26. (1999) 195 CLR 665 at 671–2 [15].
27. Stockdale and Devlin, Sentencing, (1987), pars 1.16–1.18.
28. The maximum selected by his Honour was not, as will appear, the maximum available in respect of the principal offence.
29. (2003) 137 A Crim R 497 at 506 [37].
30. (2001) 207 CLR 584 at 611–12 [74]–[76] (some footnotes omitted).
31. (2000) 49 NSWLR 383.
32. (1999) 198 CLR 111.
33 (1991) 23 NSWLR 220.
34. (2002) 54 NSWLR 300.
35. (2002) 55 NSWLR 252.
36. (2002) 81 SASR 395.
37. (2002) 81 SASR 395 at 424–5 [80]–[83].

…

74. The Supreme Court recently considered the constitutionality of these Guidelines in United States v Booker 73 USLW 4056 (2005).
75. (1988) 164 CLR 465 at 476.
76. Cameron v The Queen (2002) 209 CLR 339 at 345–6 [22] per Gaudron, Gummow and Callinan JJ.
77. (2003) 137 A Crim R 497 at 509 [55].
78. (1988) 164 CLR 465 at 472.
79. (1936) 55 CLR 499 at 505 (referred to in the joint judgment at [25]).

…

147. Joint reasons at [39].
148. Davis, Discretionary Justice: A Preliminary Inquiry, (1971) at 31; Dworkin, Taking Rights Seriously, (1978) at 31–33; Galligan, Discretionary Powers: A Legal Study of Official Discretion, (1986) at 17–22; cf Osmond v Public Service Board of New South Wales [1984] 3 NSWLR 447 at 462–4 citing Wade, Administrative Law, 5th ed (1982) at 486.
149. Pettitt v Dunkley [1971] 1 NSWLR 376 at 387–8 per Moffitt JA.
150. Public Ser*vice Board of NSW v Osmond* (1986) 159 CLR 656 at 666–7.
151. *Pearce v The Quee*n (1998) 194 CLR 610 at 624 [46]; Wong (2001) 207 CLR 584 at 621–2 [101]–[102]; Weininger v The Queen (2003) 212 CLR 629 at 652 [75].
152. AB (1999) 198 CLR 111 at 150 [102].
153. Eg Leader-Elliott, 'Instinctive synthesisers in the High Court', (2002) 26 Criminal Law Journal 5; Bagaric, 'Sentencing: The Road to Nowhere', (1999) 21 Sydney Law Review 597; Bagaric and Edney, 'What's instinct got to do with it? A blueprint for a coherent approach to punishing criminals', (2003) 27 Criminal Law Journal 119; cf Fox and Freiberg, Sentencing: State and Federal Law in Victoria, 2nd ed (1999) at 195–6 [3.302], 202 [3.307]. The objection to the two-stage approach is also inconsistent with approaches of final courts overseas. See eg R v McDonnell [1997] 1 SCR 948 at 986–9 [57]–[61].
154. Cameron (2002) 209 CLR 339 at 362 [70].
155. See above these reasons at [96]–[98].
156. Markarian (2003) 137 A Crim R 497 at 505 [33].
157. Cameron (2002) 209 CLR 339 at 362 [71]; see also Punch (1993) 9 WAR 486 at 494.
158. Joint reasons at [36].
159. (1936) 36 SR (NSW) 554 at 555–6.
160. See reasons of McHugh J at [65].
161. Australian Communist Party v The Commonwealth (1951) 83 CLR 1 at 193; Kartinyeri v The Commonwealth (1998) 195 CLR 337 at 381 [89]; Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476 at 513–14 [103]–[104] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
162. AB (1999) 198 CLR 111 at 121–122 [16]; Wong (2001) 207 CLR 584 at 611 [74]–[75], 612 [77]; R v Whyte (2002) 55 NSWLR 252 at 278 [160]–[166].
163. Weininger (2003) 212 CLR 629 at 645 [50].
164. (1982) 30 SASR 212 at 212–13 per King CJ.
165. Joint reasons at [37].
166. Joint reasons at [36].
167. Joint reasons at [35]–[39].
168. Joint reasons at [39].
169. Joint reasons at [39].
170. Joint reasons at [38].
171. Joint reasons at [39].
172. When prescribed by statute.

Proceeds of Crime

CHAPTER 32

32.1 In recent years Australian jurisdictions have revitalised the concept of restitution and compensation for victims of crime. They have also moved to strip offenders of the proceeds of criminal activity, especially where that activity takes on the flavour of organised crime and drug trafficking.

Proceeds of crime legislation is a modern emanation of an ancient remedy. Their enactments signal a return to the earliest days of English common law. Then, pleas of the Crown, the distinction between felonies and misdemeanours, and the ancient doctrines of deodand and attainder, emphasised the right of the Crown to the forfeiture of a felon's estate and, in other circumstances, the right of the victim of a crime to substantial payment for the wrong suffered. These ancient principles and remedies were abolished in the nineteenth century. They have been revived in their effects and given modern expression.

REPARATION FOR VICTIMS

32.2 Modern statutes recognise the rights of victims of crime to have a speedy method for restitution of property or compensation for loss or injury: Penalties and Sentences Act 1992 (Qld) s 35; Sentencing Act 1995 (WA) ss 110–114; Crimes Act 1914 (Cth) s 21B. A restitution or compensation order (termed a 'reparation order' in Western Australia) can be made as part of the sentencing process. The intention is to provide a simple and inexpensive method for victims of crime to receive reparation.

An order is not a punishment and cannot be imposed for the purpose of punishment: *Ferrari* (32.9C). An order is, however, part of the sentence for some purposes including the right to appeal.

32.3 The power of a court to make a restitution or compensation order is discretionary. Questions can arise as to the hardship which may be suffered if an order is made, particularly if the offender is also sentenced to imprisonment or a heavy fine at the time of the order: see *Oddy* (1974) 2 All ER 666; *Tarzia* (1991) 5 WAR 222. The behaviour of the victim of the crime is also relevant: *Mine Exc Pty Ltd v Scott* (1990) 4 WAR 404; Sentencing Act 1995 (WA) s 113.

32.4 A victim of an offence has the right to be treated fairly and to be heard in the sentencing process. A victim may also have recourse to a payment under legislation respecting

compensation for criminal injuries: Victims of Crime Assistance Act (2009) (Qld); Criminal Injuries Compensation Act 2003 (WA); Victims of Crime Act (1994) (WA). Awards under these Acts are paid by the State in the first instance.

CONFISCATION OF PROCEEDS

32.5 Queensland, Western Australia and the Commonwealth all have schemes authorising confiscation of proceeds of crime: Criminal Proceeds Confiscation Act 2002 (Qld); Criminal Property Confiscation Act 2000 (WA); Proceeds of Crime Act 2002 (Cth). Confiscation or likely confiscation of the property of an offender is not a mitigatory factor that can reduce a sentence: Criminal Proceeds Confiscation Act (Qld) s 9; Sentencing Act (WA) s 8 (3).

The Commonwealth and Western Australian schemes are administered by the Directors of Public Prosecutions. In Queensland, the DPP administers the scheme when a person is charged and convicted and the Crime and Misconduct Commission administers the scheme for proceedings that do not depend on a charge or conviction although, even then, the DPP is the solicitor on the record.

32.6 In 1998 Australia acceded to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and subsequently to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime. This imposed on Australia certain obligations to make laws dealing with money laundering and the confiscation of proceeds of crime. This obligation has been satisfied by the enactment of the various confiscation schemes. On the history of the legislation, see *Permanent Trustee Ltd v WA* (32.10C).

32.7 The confiscation schemes under each Act have common features.

The schemes provide for restraining orders over property and automatic confiscation of property after conviction or after proof of serious illegal activity. In the latter case, even death may not prevent an order being made: see *Silbert v Director of Public Prosecutions* (WA) [2004] HCA 9; 217 CLR 181; 205 ALR 43. It may not be necessary for a person to be convicted of any offence before forfeiture is ordered, provided there is proof that the person has derived property from illegal activity. The DPP can apply for a freezing order without prior notice to the affected person. Such an application has been held to be constitutional: *DPP (Cwth) v Kamal* [2011] WASCA 55; 248 FLR 64.

Issues can arise as to forfeiture of property used in a crime. Such property is called 'tainted property' (Criminal Proceeds Confiscation Act (Qld) s 104 (1)(a)); 'crime used property' (Criminal Property Confiscation Act (WA)); 'instrument of an offence' (Proceeds of Crime Act (Cth) s 329(2)). In *White v DPP* (WA) [2011] HCA 20; 277 ALR 405 (32.11C) the High Court dismissed an appeal against a crime used property substitution order where an enclosed yard had been used to detain a person before he was shot while attempting to escape.

Property liable to be forfeited extends not only to property used in the commission of an offence or derived from the commission of an offence but also, in some circumstances, to all property that may be tainted or is unexplained wealth. An offender who seeks to profit from a crime by selling his or her story to the media or writing a book may find the proceeds confiscated. Confiscation can extend to the offender's own property in substitution of property when an offence is committed somewhere else. In *DPP (WA) v Bowers* [2010] WASCA 46, an

offender sexually penetrated a child in a shed on the complainant's father's property. The Court of Appeal made a crime use substitution order in respect of the offender's own home.

There are broad definitions of property deemed to be under the effective control of a person to prevent the hiding of assets. If property cannot be identified, a pecuniary penalty order may be made.

The possibility of confiscation of an offender's assets is likely to be a significant deterrent. In some cases, even property innocently acquired may be confiscated. For example, a declared drug trafficker in Western Australia will lose all property owned or effectively controlled at the time of the declaration: Misuse of Drugs Act (1981) s 23A (WA); Criminal Property Confiscation Act (2000) s 8 (WA). The schemes may cause hardship to innocent persons whose property is intertwined with that of a person liable to forfeiture: see *Permanent Trustee Ltd* v WA (32.10C). In *Smith v The State of Western Australia* [2009] WASC 189, a mother and sister who each loaned money to a drug trafficker so that he and his wife could continue to pay their mortgage were unable to recover the monies lent because the property was automatically confiscated when he was declared to be a drug trafficker.

32.8 Extensive powers are given to police and other authorities for search and seizure and for gathering information and evidence, including by holding compulsory examinations of persons who may have knowledge of property. Monitoring orders may require financial institutions to give information about accounts and customers secretly to authorities.

Because of the nature of the powers and the drastic results of their exercise, general jurisdiction to make various investigative orders contemplated under the schemes is given to the Supreme Courts. District Courts are given jurisdiction with the Supreme Courts to make orders following conviction.

32.9C **Ferrari**
[1997] QCA 73, 2 Qd R 472
Queensland Court of Appeal

The applicant and another man pleaded guilty to unlawfully using a motor vehicle. After the vehicle had been taken from its owner, it was seen briefly by police and later located in a damaged condition. The applicant was placed on a two-year good behaviour bond without record of a conviction. A condition of the recognisance was that within six months the applicant pay $1100 restitution to the Clerk of the Court for the complainant, that figure being half the total for which the complainant's insurance company was said to have settled the insurance claim. The other half was made the subject of a similar order in relation to the other offender.

McPherson JA:

…

In the present case the damage (or some of it) to the vehicle, for the loss sustained as a result, can, at least remotely, be connected with the unlawful use of the motor vehicle by Jarrett who was seen painting the bumper bars of the cars, and there is some reason to suppose that Jarrett was responsible for the other damage done to the vehicle. But on the material before the court, it is difficult to connect the offence committed by the applicant with that or any other damage to the car or the loss sustained by the owner. The most that the applicant is shown to have done was to ride as a passenger in the vehicle driven by Jarrett.

To my mind the application raises the much wider question of the proper basis of liability for the purpose of s 35(1)(b). The Act provides little or no assistance on the question. However, if one thing is clear about a compensation provision like s 35(1), it is that an order under it, although part of the 'sentence' or judgment, is not a form of punishment. See *R v Lovett* (1870) 11 Cox CC 602; *R v Muckan* [1975] Qd R 393; *R v Braham* [1977] VR 104; *R v Civoniceva, ex parte Attorney-General* [1983] 2 Qd R 633; *R v Stieler* [1983] 2 Qd R 573. Although none of those decisions was given under s 35(1) of the Penalties and Sentences Act and some of them related to compensation for personal injury not property damage, the similarities in the relevant legislation are sufficiently close for the same principle to apply to that provision. Section 35(1)(b) is, for the most part, a rescript of s 685A of the Criminal Code, which was the provision considered in the Queensland authorities referred to.

The general purpose of the legislation is to provide a summary and inexpensive method of compensating a person for injury or damage to person or property. See *R v Braham* [1977] VR 104, 108. It is not intended to cater for cases involving complicated or extensive inquiry or investigation; but, with that qualification, it provides a useful means of avoiding the need to institute separate proceedings to establish civil liability: *R v Braham*, at 107, 110; *R v McDonald* [1979] 1 NSWLR 451, 459. The authorities are almost uniformly at one in holding that criminal compensation awards are, subject necessarily to any legislative provisions to the contrary, governed generally by the ordinary legal principles of civil liability and assessment for loss or damage of that kind: see *R v McDonald* [1979] 1 NSWLR 451, 459–461; *R v Stieler* [1983] 2 Qd R 573, 575; *R v Jones, ex parte McClintock* [1996] 1 Qd R 524; *R v Webb-Myer, ex parte Stimson* [1996] 2 Qd R 207. These were all cases of compensation for personal injuries; but in *R v Braham* [1977] VR 104, 108, 112–113, the Full Court of Victoria appears to have regarded civil liability principles as equally applicable to compensation for property loss. The court left open the question whether contribution between tortfeasors was available under the equivalent of s 5 of the Law Reform Act 1952 (Qld), while inclining to the view that an order for contribution could be made in respect of compensation awarded in criminal proceedings. It is, in any event, difficult to imagine what principles would or could be adopted if, apart from any relevant statutory provision, ordinary principles of civil liability were not applied. It would presumably be necessary to develop a completely new system of law or principles for determining claims for compensation under provisions like s 35(1)(b).

If, on the other hand, those principles are applied here, it is difficult to say that the magistrate had sufficient material before him to require the applicant to pay compensation. By travelling as a passenger in the car without the consent of the owner, the applicant committed the tort of trespass to goods and would, to that extent but no more, be liable to the complainant for the damage to the car. A case that in some ways bears comparison to this is *Schemmell v Pomeroy* (1989) 50 SASR 450, where a 14-year-old boy was held liable for the consequences of careless driving by another 14-year-old boy, who illegally used his mother's car and damaged it in doing so. However, in that instance the damage was held to be a foreseeable result of the illegal use of the vehicle by a 14-year-old driver which was a joint enterprise and in which the defendant passenger was a participant and so liable as a joint tortfeasor. White J observed (50 SASR 450, 452) that illegally using a car might also attract liability for the tort of conversion; for example, if there was an intention to abandon or destroy the vehicle, or strip it for parts.

...

[**Davies JA** and **White J** agreed with **McPherson JA** that the appeal should be allowed.]

32.10C Permanent Trustee Co Ltd v The State of Western Australia

[2002] WASC 22, 26 WAR 1
Western Australia Supreme Court

McKechnie J:

Introduction

1 These summonses, one brought by a mortgagee in respect of property frozen under the Criminal Property Confiscation Act 2000 (WA) ('the CPCA'), the other by an innocent joint proprietor, highlight the potential for injustice that may be created by the operation of that Act.

Background to the application

2 On 23 January 2000, the second respondent Colin James Ritchie and Margaret Elizabeth Ritchie, his wife, decided to borrow $200,000 from Permanent Trustee Co Ltd. For this purpose they entered into a written Loan Agreement.

3 On 3 February 2000, the Ritchies became the joint registered proprietors of the land comprised in Certificate of Title Volume 1487 folio 502, commonly known as 213 Riseley Street, Booragoon. At the same time as the transfer, mortgage No H 353853M was lodged by Permanent Trustee Co Ltd to secure its loan. The Memorandum of Mortgage provided for the event of possible default by the mortgagors by Part 4.1(h): 'The land is resumed or taken out of Your control in any way.' When that event occurs, the mortgagee may decide default has occurred.

4 In September 2001, Mrs Ritchie was charged with an offence contrary to the Misuse of Drugs Act 1981 s 7(1) in circumstances which the DPP asserts could render her liable to being declared a drug trafficker under the Misuse of Drugs Act s 32A if she is eventually convicted.

5 On 18 September 2001, a freezing notice was issued under the provisions of the CPCA, s 34. The affected property is described in a schedule to the freezing notice and includes the Riseley Street property.

6 The mortgagee, Permanent Trustee Co Ltd, contends that the issuance of the freezing notice is an event of default under Part 4.1(h) of the mortgage. Upon default Permanent Trustee Co Ltd is entitled to 'Demand and require immediate payment of the Debt': Part 4.2(a).

7 Under the Loan Agreement, the lender may give notice by personal delivery, pre-paid ordinary post or facsimile sent to the address shown on the Loan Agreement or sent to the last address known to the lender. The Loan Agreement provided:

> … The notice will be deemed to be validly served even if not received by You.

8 The mortgage, by Part 6.11, reproduces in substance the terms of the Loan Agreement as to how notices may be given by the mortgagee to the mortgagors.

9 On 25 October 2001, a Demand for immediate payment of all principal, interest, fees and charges outstanding to the bank was said to have been served on Mr and Mrs Ritchie at 134 Hebble Loop, Banjup, WA, which had been their address as shown in the Loan Agreement. The Demand delivered to 134 Hebble Loop, Banjup, correctly referred to the mortgage number

and the date, but incorrectly referred to the mortgagors as Colin James Ritchie and Elizabeth Ann Ritchie, not Colin James Ritchie and Margaret Elizabeth Ritchie. Mr Ritchie says that this is a significant defect. He asserts the mortgagee has not complied strictly with requirements of the mortgage as to notice. He also complains that the nature of the default is not specified in the notice. It is unnecessary for me to resolve these issues. In any event, I doubt that these are the appropriate proceedings in which to resolve them. The fact that they are raised however does highlight the problems likely to occur when mortgagees seek to enforce their rights under a mortgage by using the provision of the CPCA to sell property.

10 Also on 25 October 2001, a process server employed by Permanent Trustee Co Ltd, Mr Gracie, attended at the Riseley Street property to serve the Demand. On approaching the property he noticed the letterbox was stuffed full of letters and was overflowing. The correspondence in the letterbox was addressed to approximately eight different people. The front garden was unkempt, overgrown and unwatered. Through the front windows of the house he observed that the premises appeared to have been vacated as there was no furniture in view. He went around the back and observed that the backyard was unkempt and unwatered, as was the front yard. The pool was black with fungus. He observed through the windows of the house facing onto the backyard that the back rooms of the house were also empty. The house itself appeared in reasonable condition. However, it was in need of a paint job and minor maintenance which had obviously not taken place for some time. He left the Demand at the front door.

11 Mr Ritchie has deposed that, since Mr Gracie's visit, the lawns have been cut, the gardens have been weeded and tidied and both the lawns and garden have been watered and the house has been repaired. The pool has been cleaned. He disputes that the property was left abandoned. It was left in a state of disrepair after the execution of a police warrant against his wife. Mr Ritchie has had a serious illness which has delayed, to a degree, any action by him in respect of the property.

12 Mr Ritchie denies receiving the Demand personally, by registered post, or otherwise. He asserts that he has brought all payments due under the mortgage up to date and has made payments in excess of those currently required. He has deposed that he will maintain this position by way of periodical payments which he has authorised his bank to make and which are in excess of those required per month pursuant to the mortgage.

The legal proceedings

(a) Permanent Trustee Co Ltd

13 On 25 October 2001 the Permanent Trustee Company Ltd commenced proceedings against the State of Western Australia in CIV No 2669 of 2001 by notice of originating motion for orders that:

1. Freezing Notice No. AISFN010088 be deferred pending the hearing of the substantial criminal charges that are currently pending against the Application (sic).

14 Filed on the same day was a notice of objection by Permanent Trustee Co Ltd as follows:

TAKE NOTICE that the Applicant hereby objects pursuant to Section 79 of the Criminal Property Confiscation Act 2000 to Freezing Notice No AISFN010088.

15 On 7 November 2001 the Permanent Trustee Co Ltd took out a chamber summons for sale of the property. The full text of the summons is set out later in these reasons.

16 This summons was adjourned for a special appointment subsequently heard on 29 January 2002.

(b) Colin James Ritchie

17 On 16 October 2001, Mr Ritchie commenced proceedings in CIV No 2602/01 by way of notice of originating motion seeking inter alia to set aside the freezing notice over the Riseley Street property. He also filed an objection to the freezing notice.

18 On 29 January 2002 he sought to be joined as a party to these proceedings. I so ordered. He also brought a chamber summons in proceedings CIV No 2602/01 for orders inter alia:

(1) Colin James Ritchie be given control and management of the property situate at and known as 213 Riseley Street Booragoon.

19 This application was heard in conjunction with the chamber summons for the sale of the Riseley Street property brought by Permanent Trustee Co Ltd.

20 Mr Ritchie opposes the application of the Permanent Trustee Co Ltd and seeks instead orders that he be given control and management of the Riseley Street property.

Position of the DPP

21 The DPP, through counsel, does not object to the making either of an order in favour of the Permanent Trustee Co Ltd for sale of the land in terms of the application or an order in favour of Mr Ritchie to control and manage the property.

Background to the CPCA

22 In 1998 Australia formally acceded to the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and subsequently to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime. These Conventions imposed on Australia certain obligations to make laws dealing with money laundering and forfeiture of the proceeds of crime.

23 Australia has met this obligation. In 1987 the Commonwealth Parliament passed the Proceeds of Crime Act 1987 (Cth). In 1988 Western Australia enacted the Crimes (Confiscation of Profits) Act 1988. Other States enacted similar legislation. The Proceeds of Crime Act 1987 (Cth) and the former Crimes (Confiscation of Profits) Act 1988 (WA) are conviction-based. In order to trigger confiscation of criminal proceeds, or crime-derived property, under each Act, there first must be recorded a conviction against a person. Each Act contained safeguards in respect of the property of innocent persons.

24 The Australian Law Reform Commission in its 1999 report 'Confiscation that counts — A review of the Proceeds of Crime Act 1987' concluded that conviction-based schemes had generally not delivered the objectives which had been set. It recommended a non-conviction based regime for Commonwealth offences. Some States (the New South Wales Criminal Assets Recovery Act 1999 is an example) have moved to a non-conviction based regime. The CPCA establishes a non-conviction based regime different from other jurisdictions, although there are some similarities. The administration of the CPCA is entrusted to the prosecuting authority, the DPP, not to a separate commission.

25 The conviction-based regimes represented a return in part to an ancient legal right of the Crown. Under the common law, conviction for a felony meant that in addition to any sentence passed, the goods of the felon were forfeit to the Crown. In times past, the distinction between a felony and a misdemeanour was crucial. Conviction for a misdemeanour did not involve forfeiture. In Western Australia, the Criminal Code does not provide for felonies. Offences are classified as crimes, misdemeanours and simple offences. The difference between crimes and misdemeanours is immaterial. The Crimes (Confiscation of Profits) Act 1988 defined a serious offence as an indictable offence, that is a crime or misdemeanour.

26 The CPCA represents a fundamental departure because it is not necessary for the Crown to establish proof of any offence beyond reasonable doubt before a person's property may be confiscated. Mere unexplained wealth may, in certain circumstances, trigger confiscation. A person may be declared a drug trafficker under the Misuse of Drugs Act, s 159. A declaration as a drug trafficker requires a conviction. If a person is so declared, the State can extend its reach over the drug trafficker's property under the CPCA beyond crime-used or crime-derived property.

27 In respect of conviction-based regimes, in *DPP for the Commonwealth v Saxon* (1992) 28 NSWLR 263, Kirby P remarked at 265:

> In virtually every jurisdiction in which such legislation has been enacted it has given rise to difficulties of construction and application. Those difficulties appear to be virtually inescapable because of the clash between the objectives of the new legislation and the basic principles of the accusatorial procedure of the criminal justice system in common law countries.

28 The difficulties are enhanced with a non-conviction based regime, such as the CPCA, when innocent owners of property can find their rights to that property curtailed or extinguished without regard to the basic principles referred to by Kirby P. Indeed the onus of proof is reversed.

29 I have briefly set out the history of confiscation legislation to explain the approach to interpretation of the CPCA which I adopt. Although the CPCA is a new regime, which has the potential to cause injustice to some people who are unconvicted of any crime, a court must give effect to the clear will of Parliament in interpreting the terms of the CPCA. However, where there is ambiguity or doubt about any of its provisions, the court should construe the CPCA in a way which has the least intrusion into the rights of citizens. Parliament cannot intend to derogate from property rights except by clear and express language. Any derogation of rights should be evidenced by an express or necessarily implied intention. There is a further observation. The CPCA must be read as a whole. Each section is part of an overall and comprehensive regime to deal with confiscation of property as a result of criminal activity and the scheme by which that is achieved must be kept in mind when construing particular sections.

The Criminal Property Confiscation Act 2000

…

31 Before going to specific provisions, I set out the scheme of the CPCA insofar as is relevant for present purposes.

32 Where a police officer suspects that particular property has been used in a crime or has been obtained from the proceeds of crime, the officer applies to a Justice of the Peace or Magistrate for a freezing notice. A police officer may also make application if a person may subsequently be declared to be a drug trafficker.

33 If the Justice of the Peace or Magistrate is satisfied that reasonable grounds exist that property falls into one of those categories or that a person may be so declared, a freezing notice is issued.

34 The freezing notice must be served personally on any person affected: *Skaljac; Ex parte Director of Public Prosecutions for Western Australia* [2002] WASC 7 by analogy with freezing orders.

35 There is a mechanism for obtaining information about possible affected persons. A statutory declaration must be made at a police station by anyone served with a freezing notice giving details of any other interests in the frozen property.

36 Objections to the freezing notice are made by affected persons lodging an objection at court. If no objection is lodged, property the subject of a freezing notice is automatically confiscated 28 days after service of the freezing notice.

37 If objection is lodged, then in due course the court determines the objection. Until the objection is finally determined, the property remains under the control and management of the DPP who is required to take reasonable care of it. The DPP may use the Public Trustee to manage the property or may appoint an owner to manage the property. Owners may be appointed by the court to have the control and management of the property.

38 Although the general scheme is to retain the property pending judicial determination, there is power in the court to order property to be sold or destroyed in certain circumstances. It is these circumstances which are in controversy in the present case.

39 Once property is frozen, any owner who thereafter deals with it in any way, except by order of the court granting them control and management over the property, or the right to sell or destroy the property, commits a very serious offence.

40 The DPP or a police officer must cancel a freezing notice if the grounds for suspecting that the property is crime-used or crime-derived no longer exist.

41 From this concise overview, I now turn to the specific provisions of the CPCA.

…

44 'Crime-derived' property is defined by s 148:

> (1) Property that is wholly or partly derived or realised, directly or indirectly, from the commission of a confiscation offence is crime-derived, whether or not —
> (a) anyone has been charged with or convicted of the offence;
> (b) anyone who directly or indirectly derived or realised the property from the commission of the offence has been identified; or
> (c) anyone who directly or indirectly derived or realised the property from the commission of the offence was involved in the commission of the offence.

45 Other paragraphs of s 148 expand on this basic definition.

46 Section 148(5) provides:

> Property owned by 2 or more people, whether jointly or as tenants in common, is crime-derived if any part of the share of any of the owners is crime-derived, whether or not any of the owners is an innocent party in relation to the share or part-share that is crime-derived.

47 Therefore if, in due course, it is established that Mrs Ritchie's joint interest in the property was derived from criminal activity or, more correctly, if she or Mr Ritchie fail to prove the contrary, then the whole of the Riseley Street property will be regarded as crime-derived property even if Mr Ritchie and Permanent Trustees Co Ltd are innocent parties.

Freezing notices

48 Part 4 Division 2 is entitled 'Freezing notices for crime-used and crime-derived property'. Section 34(2) and s 34(3) provide:

> (2) A Justice of the Peace may issue a freezing notice for any property if there are reasonable grounds for suspecting that the property is crime-used or crime-derived.
> (3) A Justice of the Peace may issue a freezing notice for all or any property that is owned or effectively controlled by a person, or that the person has at any time given away if —
> (a) the person has been charged with an offence, or the applicant for the notice advises the Justice of the Peace that the person is likely to be charged with an offence within 21 days after the day on which the freezing notice is issued; and
> (b) the person could be declared to be a drug trafficker under section 32A(1) of the Misuse of Drugs Act 1981 if he or she is convicted of the offence.

…

Automatic confiscation

50 Confiscation of property is dealt with in Part 2. Section 7 deals with 'automatic confiscation of certain property' and s 8 deals with the confiscation of a drug trafficker's property. By s 7(1) 'frozen property is confiscated if an objection to the confiscation of the property is not filed on or before the 28th day after the service cut-off date for the property'. This is the fundamental difference between the CPCA and other criminal confiscation statutes. The DPP or a police officer has only to satisfy a Justice of the Peace or a Magistrate that there are reasonable grounds for issuing a freezing notice. If a freezing notice is issued and a person fails to object within 28 days after the last day on which a copy of the freezing notice was served on anyone with an interest in the property (see s 36(4), s 37, s 150) then the property is confiscated by operation of law without any further judicial or administrative intervention…

Objections and their determination

53 Objections to confiscation are dealt with in Part 6. 'A person may file an objection to the confiscation of frozen property': s 79(1).

54 The immediate effect of an objection to a freezing notice is to suspend the confiscation process until the court determines the objection.

55 The court may order the release of crime-used property if the objector establishes that it is more likely than not that the property is not crime-used: s 82(1). The court may set aside

a freezing notice for crime-derived property if the objector establishes that it is more likely than not that the property is not crime-derived: s 83(1). While such objections may often not be able to be determined until after a criminal trial, in some cases early determination will occur.

56 Where a freezing notice is issued on the basis that a person could be declared a drug trafficker, there appears to be no way in which any objection can be determined prior to the criminal trial of the alleged offender because, until the result of that trial is known, it cannot be ascertained whether the court will make a declaration that the person is a drug trafficker. There may be a further delay, of up to six months, before application for a declaration is made.

Release of confiscated property

57 Part 6 also deals with the release of confiscated property. Such a situation might occur where no objection has been filed. Section 87 provides for orders to release confiscated property …

58 This would appear to be the only mechanism by which an innocent mortgagee may recover the value of its security if property is confiscated because the property owner was a declared drug dealer or the property was crime-used or crime-derived.

…

The control and management of frozen properties

62 The freezing notice issued against Mrs Ritchie states there are reasonable grounds for suspecting that the Riseley Street, Booragoon property is crime-used, is crime-derived, and that Mrs Ritchie could be declared to be a drug trafficker under s 32A(1) of the Misuse of Drugs Act. In other words, all three possible bases for confiscation are asserted. The evidence put before the Magistrate must have satisfied him that there were reasonable grounds for suspecting the property was in each of the three categories.

63 It is likely that under the CPCA, there will be many freezing notices issued. It is also reasonable to expect that there will be many objections to freezing notices lodged with the court. Real property is often subject to mortgage and a mortgagee will usually be an innocent party. Property is often jointly owned by a person suspected of using property for criminal purposes, or purchasing an interest in property from criminal proceeds, and someone not so suspected. A considerable amount of property, both real and personal, will be in the possession of the State at any time in a legal limbus until objections are resolved. The CPCA requires that when property is frozen, the DPP has control and management of the property unless the court appoints an owner to have control and management. No-one else can deal with frozen property in any way: s 50.

…

69 An owner of frozen property is given a right to apply to the court for orders. An '"owner" in relation to property means a person who has a legal or equitable interest in the property'. It is not in issue that both Permanent Trustee Co Ltd and Mr Ritchie are both owners of the property as defined.

91. Applications by owner for control and management

(1) An owner of frozen property may apply to the court for an order under subsection (2) in relation to the property.

(2) On hearing an application, the court may, if it thinks fit, by order appoint the person —
  (a) to control and manage the property while the freezing notice or freezing order is in force; or
  (b) to sell or destroy the property.

70 The application by Permanent Trustee Co Ltd is made under s 91(2)(b). The application by Mr Ritchie is made under s 91(2)(a).

…

73 The terms of the chamber summons for orders for possession and sale by Permanent Trustee Co Ltd are important and I set them out in full:

1. Pursuant to s 91(2) of the Criminal Property Confiscation Act 2000 and subject to these orders the Applicant be authorised to take possession of the property and be appointed to sell the estate in fee simple in portion of Cockburn Sound Location 356 and being Lot 229 on Plan 12242, Certificate of Title Volume 1487 Folio 502 ('the Property') if entitled to do so pursuant to its rights under mortgage number H 353853 dated 3 February 2000 ('the Mortgage').
2. (a) Prior to the sale of the Property the Applicant is to obtain a valuation report in relation to the Property and provide a copy to the Director of Public Prosecutions ('the DPP') not less than 7 days prior to offering the Property for sale.
   (b) At any sale of the Property by auction or otherwise a reserve price shall be set by agreement between the Applicant and the DPP, and if no agreement is able to be reached, a reserved price is to be set at 80% of the value of the Property as determined by the valuation referred to in paragraph 2(a) hereof.
   (c) Should the property fail to sell at the reserve price referred to in paragraph 2(b) hereof, then the Applicant shall sell the Property at the best price reasonably obtainable.
3. Upon receipt of the proceeds of the sale of the Property the Applicant shall apply the same in the following orders:
   (a) the amount owing to the Applicant by the Mortgagor pursuant to the Mortgage at time of settlement.
   (b) reasonable expenses incurred by the Applicant in enforcing the Mortgage and retaking possession of the Property.
   (c) the costs and expenses in relation to the sale of the Property including:
      (i) agents commission;
      (ii) any fees charged by the Department of Land Administration of Western Australia incurred by the Applicant in the course of dealing with the Property;
      (iii) settlement costs; and
      (iv) outstanding land and water rates relating to the Property.
   (d) the costs of this application be taxed or agreed.
   (e) payment of the balance of the proceeds of sale, if any, after payment of the amounts referred to in paragraphs 4(a) to 4(d) inclusive hereof ('the Surplus') to the DPP.
4. Payment of the Surplus to the DPP be effected by delivery of a bank cheque made payable to the Public Trustee within 3 days of the settlement of the sale of the Property.
5. The DPP pay the Surplus into an interest bearing account with the Public Trustee in the name of the DPP and Margaret Elizabeth Ritchie.

6. The expense of the Public Trustee and all other expenses associated with the investment of the Surplus by the Public Trustee are to be met out of the interest earned thereon, and if that amount is insufficient, out of the Surplus.
7. In any application made pursuant to the Criminal Property Confiscation Act 2000 the Surplus shall be deemed to be and shall be dealt with as if it was the Property.
8. The parties have liberty to apply on 48 hours written notice.

74 It is unsurprising that a mortgagee in the position of Permanent Trustee Co Ltd would wish to take action to limit its exposure as soon as possible after what it perceives to be a default in the mortgage.

75 Permanent Trustee Co Ltd contends that the Ritchies, as registered proprietors of the property, are in default of the mortgage, particularly Part 4.1(h). The land has been taken out of their control. Under CPCA s 50(2) the Permanent Trustee Co Ltd is permitted to act in accordance with an order under s 91(2) or 93(2), so it is contended the only manner in which it can exercise its rights under the mortgage is to obtain an order from this Court to sell the property.

76 I observe that the summons goes well beyond a simple order to sell. It seeks the court's power to enter the property for the purpose of a valuation and seeks the court's sanction to a reserve price being set at 80 per cent of the valuation in the absence of agreement between Permanent Trustee Co Ltd and the DPP. This is notwithstanding possible fiduciary duties owed by the mortgagee to the mortgagor on sale. In advance of any determination of property rights under the CPCA Part 6, the effect of the Permanent Trustee Co Ltd's application, if granted, is to circumvent the effect of the freezing notice so far as it is applicable to Permanent Trustee Co Ltd's interest in the Riseley Street property.

77 In my judgment s 91 does not permit the making of the order sought by the Permanent Trustee Co Ltd. Section 91 must be read in context within the scheme as I have outlined. The CPCA provides for automatic confiscation within a short period unless objection is lodged. When an objection is lodged, the CPCA provides a complete mechanism for the release of crime-used property and crime-derived property prior to a criminal trial. It does not provide any mechanism for the early release of the property of a drug trafficker, notwithstanding the fact that the objector is innocent as most mortgagees are likely to be.

78 When an objection is raised to confiscation, the matter must wait for criminal proceedings or proceedings under the Misuse of Drugs Act and the CPCA to be concluded. The legal limbus to which I have referred descends on the property. The *status quo ante* is maintained until a resolution of the legal questions as to the confiscation and the value of any innocent person's share in confiscated property.

79 If any owner is not an innocent party then crime-used or crime-derived property may not be released. The most that can be ordered is the amount of the value of the innocent objector's share of the property after confiscation. The provisions of s 87 cannot be short-circuited by a mortgagee exercising a right of sale under the contractual arrangements existing between it and the mortgagor.

80 Recognising that some time may pass, the CPCA provides for the management and control of frozen property and it is in that context s 91 must be read. The DPP has the general control and management of frozen property although the DPP may appoint others from the defined class to manage property as set out above.

81 This appointment by the DPP of a manager does not extend to the power to relinquish control. Hence under s 92, as I have said, there exist concurrent duties to take reasonable steps to maintain property in both the DPP and any appointed manager.

82 The appointment by the court of an owner to control and manage property is the only way in which an owner can exert control over property after it has been frozen. Having regard to the whole scheme of the CPCA, and in particular the earlier part dealing with objections, s 91(2) cannot be regarded as empowering a court to grant an unrestricted right of sale when such a sale would defeat the other provisions of the CPCA. The power to order destruction or sale must be an adjunct to and read in conjunction with s 93 and s 94. Section 91(2)(b) must be read in the light of s 94, that is, that the property may be sold if it is more likely than not that the property is, or will be subject to substantial waste or loss of value if it is retained, or the cost of managing or protecting the property will exceed the value of the property if it is retained until it is dealt with under another provision of the Act.

83 The fact that the property has deteriorated to the degree described in s 94(2) may not be immediately apparent at the time an appointment is made to control or manage the property. In that case, s 93 and s 94 gives the person appointed under s 91(2)(a) the right to apply subsequently for the destruction or sale of property. The need for destruction or sale might be immediately apparent so that the owner may not wish to control or manage the property but simply dispose of it by way of sale or destruction.

84 The DPP has no right to sell or destroy property but must apply under s 93 or s 94.

85 What cannot be done is use s 91(2)(b) as an artifice to overcome the specific provisions of the CPCA by allowing a sale on terms in a purported exercise of rights under the mortgage.

…

90 The present case provides an illustration why a construction of the power to sell under s 91(2) should be construed restrictively by having regard to s 94.

91 The default asserted by Permanent Trustee Co Ltd is that the Ritchies have put the Riseley Street property out of their control. Similar clauses are common in other mortgages.

92 If the act of the State in obtaining a freezing notice triggers a default provision in a mortgage, and the property is sold under s 91, there is potential for irremediable injustice. If the State later fails to establish its criminal case in respect of a drug trafficker, or the person proves that the property was probably not crime-related or crime-derived, then an innocent person will have lost their property through no fault or act of their own. A construction of s 91 which achieves this result should be rejected unless it is compelling. In the present case, I consider there is a better alternative construction which fits within the overall purpose of the CPCA. As I have outlined, that construction is to read s 91 in conjunction with s 93 and s 94. To confirm this construction I conclude that there is no power under CPCA s 91 to make ancillary orders of the type contemplated in the Permanent Trustee Co Ltd chamber summons.

…

Conclusion on the Permanent Trustee Co Ltd application

95 The evidence does not permit a finding that the property is, or will be, subject to substantial waste or loss of value if it is retained until it is dealt with under the CPCA, nor is there any

evidence that the cost of managing or protecting the property will exceed the value of the property if it is so retained.

96 In the present case there is evidence that the property was in a dilapidated state, but there is also evidence that it has now been remedied. The DPP has a continuing duty to maintain the property. There is evidence that mortgage payments are being made in excess of the required rate. The plaintiff does not seek to control and manage the property, only to sell it. Therefore there is no evidence sufficient to justify an order for the sale of the Riseley Street property. I dismiss the application.

The application by Mr Ritchie

97 Mr Ritchie seeks an order for the control and management of the property. His reason for seeking the order is expressed by him as follows:

> My request for the control and management of the property is due to the fact that I wish to enter into a tenancy agreement and, if possible, at all times keep the property rented out so that it may earn income to assist me in payment of the Mortgage instalments. Unless I have control and management of the property, I will suffer financial hardship in that it will be more difficult for me to meet the mortgage instalments.

98 Section 91 does not expressly empower the court to make provision for the expenses of managing property. If property is ultimately sold by the State and a freezing notice or order was in force over the property, the expenses incurred by a person appointed to manage the property while the notice or order was in force appear to be able to be taken into account and presumably reimbursed under s 152. The Public Trustee's position under Part 7 Division 3 may be contrasted. There is express provision for the Public Trustee to receive fees: s 99.

99 There is no power for the court to allow a person in the position of Mr Ritchie to receive rental payments. The CPCA s 151 defines 'Dealing with property' as including taking any profit, benefit or proceeds from the property.

100 Under s 50 a person must not deal with seized or frozen property in any way.

101 That section is of general application, save for a person acting under s 91(2) and s 93(2).

102 The concept of 'control and management' of the property under s 91 does not extend to taking the profits of the property and applying them to paying a mortgage. Although receipt of rent would ordinarily come under the concept of control and management, the overall purpose of the CPCA would be diminished if control was extended to allow rent receipts to be disbursed to pay the mortgage. This is made explicit by CPCA s 34(7) 'Any income or other property derived from the property while the freezing notice is in force is taken to be part of the property'.

103 CPCA s 52 'Permitted dealings in mortgaged property' requires mortgage payments to be made with money that has not been seized or frozen. It follows that the fruits of frozen property in the form of rent cannot be used.

104 If the property is ultimately confiscated, it would promote the scheme of the CPCA that any profits derived from the frozen property go to the Crown. If ultimately the property is not forfeited, for whatever reason, then s 82, s 83 and s 87 would seem to allow for appropriate adjustment to be made in respect of rent earned during the period of the freezing order.

105 An owner appointed under s 91(2) to control and manage the property while the freezing notice is in force is doing so on behalf of the State as well as their own behalf.

106 Although there may be grounds for Mr Ritchie to be appointed to control and manage the Riseley Street property, I am not prepared to make an order on the present evidence and for the express reason he advances in his application.

Conclusion

107 The CPCA effects substantial alteration of property rights. It is the operation of the CPCA upon the rights of Permanent Trustee Co Ltd which impact adversely upon its security, not its rights and responsibilities under the mortgage. The CPCA prevents the exercise of any such rights under the mortgage which involve dealing with the land in any way.

108 So also with Mr Ritchie. It is the impact of the CPCA upon his previous private enjoyment of the Riseley Street property which presently deprives him of income in respect of that land.

109 In the event, on the evidence put before me, each application must be dismissed. However, it is open to the parties to bring fresh applications under s 91 in light of this judgment.

32.11C *White v Director of Public Prosecutions (WA)*

[2011] HCA 20; 277 ALR 405
High Court of Australia

French CJ, Crennan and Bell JJ:

Introduction

1 The *Criminal Property Confiscation Act* 2000 (WA) ('the Act') provides for the confiscation of property used in criminal offences. Where property so used neither belongs to nor is effectively controlled by the offender, s 22 of the Act enables a declaration to be made, on the application of the Director of Public Prosecutions ('the DPP'), that property owned by the offender is available for confiscation instead of the crime-used property. Such an order is called a crime-used property substitution declaration.[1] A judge of the Supreme Court of Western Australia dismissed an application for such a declaration against the appellant, who had been convicted in 2003 of a wilful murder committed in 2001.[2] An appeal to the Court of Appeal of the Supreme Court of Western Australia by the DPP was allowed.[3] On 25 March 2010, the Court of Appeal made the declaration sought by the DPP.

2 The wilful murder, of which the appellant was convicted, was committed immediately outside the boundary fence of fenced and gated premises at 10 Jade Street, Maddington, Western Australia. At the time of the offence the appellant was leasing those premises. The appellant had shot at the deceased five times inside the premises, the gates to which had been locked at the appellant's direction. At least two of the shots wounded the deceased. The deceased climbed over one of the locked gates to escape the appellant, but was fatally shot while on the ground outside the gate. The sentencing judge described the killing as 'a cold-blooded execution'. The appellant was sentenced to strict-security life imprisonment with a non-parole period of 22 years.

3 A 'crime-used property substitution declaration' can be made if 'the crime-used property is not available for confiscation'[4] and if 'it is more likely than not that the [appellant] made criminal use of the crime-used property'.[5] It was accepted in the litigation that the rented premises were not available for confiscation. Thus, the questions raised by this appeal are whether the premises, leased by the appellant, were 'crime-used property' within the meaning of s 146 of the Act and whether he made 'criminal use' of those premises within the meaning of s 147 of the Act. Those are necessary conditions for the making of a declaration under s 22. On their proper construction and application to the facts of this case, both conditions were fulfilled. The appeal against the decision of the Court of Appeal should be dismissed.

Factual background

4 On the appeal to this Court, the parties were on common ground as to relevant facts before the jury. Those facts, which were set out in the written submissions filed on behalf of the appellant, may be summarised as follows:

- The premises at Jade Street, Maddington, were in an industrial area. The appellant rented them and operated a trucking business from them.
- The premises were surrounded by a cyclone fence. Entry was gained through two gates, each six-feet high, surmounted by three strands of barbed wire and with a chain and two padlocks.
- On 19 August 2001, the deceased attended the property with a Mrs Miller for the purpose of obtaining amphetamines. Both had consumed alcohol and amphetamines earlier. When they arrived, there were three young women already at the premises, two unidentified men, and a man known as Rainbow.
- On that day, the appellant instructed Sidney Reid to go to the premises, lock the gates and not let anyone come in or out. He did not give Reid a reason for this instruction.
- Reid complied with the appellant's instructions. He drove to the property, parked his car there, and asked Rainbow, who had a key, to lock the gates. Rainbow did so. He and Rainbow then went up to the house.
- The appellant denied that he had telephoned Reid asking him to close the gates. He accepted that the deceased and Mrs Miller may have turned up at the property unannounced.
- The appellant and one Richard Samuels drove to the property and arrived there shortly after the gates had been locked. They unlocked the gates, drove the car onto the property, locked the gates behind them and walked to the house.
- The appellant told Mrs Miller and the other women to leave the premises. They left in a car. Rainbow unlocked the gates to let the women out. He then relocked them.
- The appellant confronted the deceased about the repayment of money. The deceased did not reply. The appellant said he would make an example of him. As the deceased walked from the house towards the back of the property, he was followed by the appellant, who produced a gun and shot him in the left shoulder.
- The deceased ran from the appellant who fired a further three shots at the deceased, before the deceased reached the locked gates.
- The deceased climbed the locked gates to leave the premises. As he reached the top of the gates, the appellant shot him in the buttocks.
- The deceased came down on the other side of the gates and collapsed on the ground. The appellant then unlocked the gates, walked out of the premises and shot the deceased in the head, killing him. He then moved the deceased's body onto the premises before transporting and disposing of it.

Statutory framework

5 The Act provides 'for the confiscation in certain circumstances of property acquired as a result of criminal activity and property used for criminal activity'.[6] A key term in the Act is 'property', defined in the Glossary to the Act as:

> (a) real or personal property of any description, wherever situated, whether tangible or intangible; or
> (b) a legal or equitable interest in any property referred to in paragraph (a).

The definition is more limited than the usage of the term 'property' in parts of the Act where it plainly refers to the land or things which are the subject of property interests. Its usage is considered later in these reasons.

6 The Act provides in s 21 that the DPP may apply to a court for a 'crime-used property substitution declaration against a person'.[7] The form of such a declaration and the conditions under which it must be made are set out in s 22. If the conditions are satisfied, a declaration must be made by the court 'that property owned by the respondent is available for confiscation instead of crime-used property'.[8] The conditions are that:[9]

> (a) the crime-used property is not available for confiscation as mentioned in subsection (2); and
> (b) it is more likely than not that the respondent made criminal use of the crime-used property.

7 The crime-used property is not available for confiscation if the respondent does not own and have effective control of it.[10] There is a presumption that property is crime-used where the respondent has been convicted of a relevant confiscation offence.[11] The presumption appears to be activated by the fact of the allegation, in proceedings under s 21, that the property was 'crime-used' in relation to the confiscation offence. Otherwise, the applicant for the declaration bears the onus of establishing that the respondent made criminal use of the property.[12] The term 'relevant confiscation offence' is defined in the Glossary to the Act to mean:

> the confiscation offence or suspected confiscation offence that is relevant to bringing the property within the scope of this Act.

8 The court is required, when making a declaration under s 22, to assess the value of the crime-used property in accordance with s 23 and to specify that value in the declaration.[13]

9 The terms 'crime-used' and 'criminal use' are defined in ss 146 and 147 of the Act. Section 146 relevantly provides:

> (1) For the purposes of this Act, property is crime-used if —
> (a) the property is or was used, or intended for use, directly or indirectly, in or in connection with the commission of a confiscation offence, or in or in connection with facilitating the commission of a confiscation offence;
> (b) the property is or was used for storing property that was acquired unlawfully in the course of the commission of a confiscation offence; or
> (c) any act or omission was done, omitted to be done or facilitated in or on the property in connection with the commission of a confiscation offence.
> …

(3) Without limiting subsection (1) or (2), any property in or on which an offence under Chapter XXII or XXXI of *The Criminal Code* is committed is crime-used property.[14]

As will be apparent, crime-used property is not limited to any land or thing in which the offender has or has ever had any interest, or which is or has ever been controlled by the offender. Section 147 provides:

> For the purposes of this Act, a person makes criminal use of property if the person, alone or with anyone else (who need not be identified) uses or intends to use the property in a way that brings the property within the definition of crime-used property.

10 Before turning to the constructional issues raised on the appeal, it is necessary to consider the way in which the word 'property' is used in ss 22, 146 and 147. The ordinary meaning of the word 'property' is '[t]hat which one owns; a thing or things belonging to a person or persons …' and '[a] house or piece of land owned'.[15] In law, 'property' generally refers not to a thing but to 'a legal relationship with a thing'.[16] In *Telstra Corporation Limited v The Commonwealth*,[17] this Court observed that in many cases it may be helpful to speak of property as 'a bundle of rights'.[18] At other times it may be more helpful to speak of property as 'a legally endorsed concentration of power over things and resources'.[19] The Court said that:[20]

> Seldom will it be useful to use the word 'property' as referring only to the subject matter of that legally endorsed concentration of power.

Nevertheless, as **Latham CJ** pointed out, in *Minister of State for the Army v Dalziel*[21] the term 'property' is ambiguous:[22]

> As applied to land it may mean the land itself in relation to which rights of ownership exist, or it may refer to the rights of ownership which exist in relation to the land.

11 An example of an interpretation of a contract according to the ordinary meaning of 'property' may be seen in the judgment of Barwick CJ in *Travinto Nominees Pty Ltd v Vlattas*.[23] There the words 'error or misdescription of the property', appearing in standard terms of a contract for the sale of land, were construed as referring to misdescription of the land the subject matter of the sale.

12 The term 'property' used in a statute may take its ordinary meaning, its legal meaning, or both meanings. The interpretation of the term depends upon the context and purpose of the provision in which it is found. Section 146(1)(b) of the Act refers to 'property … used for storing property'. That usage may be taken to include the exercise of rights over the land or a thing (eg, a container) to store property. It may also extend to the use of things which are the subject of property rights. That extension is intended as appears from s 146(1)(c) which speaks of things done 'in or on the property'. It follows that the term 'property' used in s 146, and therefore having a similar usage in ss 22 and 147, covers the use of property rights of the kind defined in the Glossary and the use of things which are the subject of property rights.

The primary judge's decision

13 The primary judge held that the premises were crime-used property.[24] In so holding, her Honour relied upon s 146(1)(c) and not upon s 146(1)(a).

14 Her Honour doubted that it could be said that the premises were used in, or in connection with, the commission of the offence of wilful murder in the sense contemplated by s 146(1)

(a). It was straining ordinary speech to say that, because the fence and gates were used in connection with the offence, the premises were also used in that connection.[25]

15 The premises, however, were held to be crime-used property within the meaning of s 146(1)(c). This was because the deceased was shot by the appellant while he was on the premises and the acts of the appellant were 'in connection with' the ultimate fatal shot which was discharged with an intent to kill. Even putting the earlier shots to one side, the appellant's penultimate shot, fired while he was standing on the premises, had a clear connection to the fatal shot which he fired with an intention to kill.[26]

16 Her Honour went on to hold, however, that this conclusion would not support a finding that the appellant had made criminal use of the premises within the meaning of s 147. Her Honour held, in effect, that while conduct by the appellant rendering property 'crime-used' within the meaning of ss 146(1)(a) and (b) would constitute criminal use of the property for the purposes of s 147, the same was not true of conduct by the appellant only caught by s 146(1)(c).[27]

The decision of the Court of Appeal

17 The Court of Appeal held, contrary to the finding of the primary judge, that the property was crime-used within the meaning of s 146(1)(a). In so doing, the Court held that it was not necessary, for the application of s 146(1)(a), that the act or acts constituting the relevant use had to be done with the intention or purpose of committing the specific unlawful act constituting the confiscation offence. The use of the premises for the purposes of s 146(1)(a) could be 'indirectly in connection with the facilitation of a confiscation offence'.[28]

18 The Court of Appeal also held, contrary to the primary judge's conclusion, that the primary defined term in ss 22, 146 and 147 is 'crime-used' and that it incorporates the word 'used' to encompass all the activities listed in ss 146(1) and (3). This indicates that all those activities are intended to be uses for the purposes of s 147.[29] The Court of Appeal allowed the appeal and set aside the orders made by the primary judge ....

The construction of 'criminal use' under s 147

21 As was submitted by the appellant, s 146(1)(c) has a broad application. It covers cases in which acts or omissions were done or facilitated in or on the property in connection with the commission of a confiscation offence. On the face of it, the mere doing of an act in or on a property in connection with the commission of a confiscation offence, does not necessarily fit comfortably within the concept of use applied to property. The relevant ordinary meaning of the verb 'use' is to '[m]ake use of (a thing), esp. for a particular end or purpose; utilize, turn to account'.[30] According to that ordinary meaning, 'use' would be a subset of the class of conduct described in s 146(1)(c). However, the relationship which the words 'in connection with' forge between 'act or omission done on the property' and 'the commission of a confiscation offence' suggests that even though it may involve an extension of the verb 'use', the conduct described in s 146(1)(c) can be brought within the meaning 'makes criminal use of property' in s 147, without doing violence to the language of the latter section. In this case, purpose and context favour that interpretation.

22 The appellant submitted that the word 'use' in s 147 refers only to the categories of conduct in s 146(1)(a) and (b) as conduct bringing the property within the alternative definitions of crime-used property in those two paragraphs. That interpretation, however, gives rise to a disconformity between ss 146 and 147. As appears from the conditions in s 22(1)

to which they relate, the two provisions complement each other. The disconformity is removed and complementarity is effected if the term 'definition of crime-used property' in s 147 is construed as picking up each of the alternative definitions in s 146(1) and (3).

23 The latter construction is supported by reference to s 82 of the Act, which provides for the setting aside of freezing notices and freezing orders made under the Act. A court may set aside a freezing notice, or order affecting property, if an objector establishes, inter alia, that it is more likely than not that the objector is an owner[31]and an innocent party,[32] and that the property is not effectively controlled by a person who made criminal use of the property.[33] The construction of s 147 for which the appellant contended, would, as the DPP submitted, be inconsistent with the apparent intentions of ss 82(4) and 87. On the construction of s 147 advanced by the appellant, a person who did not own the property, but effectively controlled it, and whose acts rendered the property crime-used within the meaning of s 146(1)(c), would be entitled to have a freezing order set aside, or to have the crime-used property returned after confiscation. A person in the same position, whose act rendered the property crime-used under s 146(1)(a) or (b), would not be so entitled.

24 The appellant's construction of s 147 not being accepted, this appeal cannot succeed. It is unnecessary to consider the other contentions advanced by the appellant in relation to the construction of s 146(1)(a) and its application to the facts of the case.

[**Gummow J** and **Heydon J** in separate judgments agreed that the appeal should be dismissed.]

Footnotes

1. Act, s 3 and Glossary.
2. *Director of Public Prosecutions (WA) v White* [2009] WASC 62; (2009) 194 A Crim R 192.
3. *Director of Public Prosecutions (WA) v White* (2010) 199 A Crim R 448.
4. Act, s 22(1)(a).
5. Act, s 22(1)(b).
6. Act, long title.
7. Act, s 21(1).
8. Act, s 22(1).
9. Act, s 22(1)(a) and (b).
10. Act, s 22(2)(a).
11. Act, s 22(3).
12. Act, s 22(5).
13. Act, s 22(6).
14. Chapter XXII deals with offences against morality. Chapter XXXI deals with sexual offences.
15. *Shorter Oxford English Dictionary*, 6th ed (2007) at 2370.
16. *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351 at 365–6 [17] per Gleeson CJ, Gaudron, Kirby and Hayne JJ; [1999] HCA 53.
17. (2008) 234 CLR 210; [2008] HCA 7.
18. [2008] HCA 7; (2008) 234 CLR 210 at 230–1 [44].
19. [2008] HCA 7; (2008) 234 CLR 210 at 230–1 [44].
20. [2008] HCA 7; (2008) 234 CLR 210 at 230–1 [44].
21. [1944] HCA 4; (1944) 68 CLR 261 at 276; [1944] HCA 4.
22. See also, *McCaughey v Commissioner of Stamp Duties* (1946) 46 SR (NSW) 192 at 201 per Jordan CJ.
23. [1973] HCA 14; (1973) 129 CLR 1 at 15, 26 per McTiernan J, 29 per Menzies J and 37 per Stephen J agreeing with McTiernan J; [1973] HCA 14.

24. [2009] WASC 62; (2009) 194 A Crim R 192 at 212 [101].
25. [2009] WASC 62; (2009) 194 A Crim R 192 at 211 [97].
26. [2009] WASC 62; (2009) 194 A Crim R 192 at 212 [99], [100].
27. [2009] WASC 62; (2009) 194 A Crim R 192 at 212–13 [103]–[109].
28. (2010) 199 A Crim R 448 at 457 [39].
29. (2010) 199 A Crim R 448 at 459 [48].
30. *Shorter Oxford English Dictionary*, 6th ed (2007) at 3484.
31. Act, s 82(4)(a).
32. Act, s 82(4)(c).
33. Act, s 82(4)(b).