ACTUS REUS

POLICY ISSUES

R v S

COURT AND DATE

High Court Auckland
26 May 2016

Brewer J

FACTS

- Ms. H admitted to Mr. S that she had sexually abused his six year old daughter.
- Mr. S said that if Ms. H wanted to stay, he would have to break her finger. (Specifically, her right index finger).
- Ms. H agreed to having her finger broken and admitted to the police that she consented to it.
- He put on her favourite song and told her he would break her finger at some point during the song.
- During the playing of the song Mr. S swung the hammer and struck Ms. H's finger on the brick and broke it.

RELIEF SOUGHT

- Criminal indictment so looking for a charge.

PRIOR PROCEEDINGS

- No prior proceedings.

RESULT

- The judge held the withdrawal of the defence of consent in this case as s/he found that there was no good reason or social utility in the deliberate infliction of serious harm in a domestic relationship as a condition for its maintenance.
- This was also based on a number of reasons that were deemed enough to override personal autonomy here.
    - Domestic violence is a major problem in NZ
    - There was already a significant power imbalance in the relationship.
    - Mr. S knew that Ms. H was particularly vulnerable due to her troubled history.
    - This is an issue of gender.

PLAINTIFF'S THEORY

- The public policy reasons against consent being available as a defence outweigh the importance of personal autonomy here.
- The defendant was clearly coming from a position of power, and this was done in an exploitative context.
- *R v Barker, Ah-Chong v R and R v Lee,* the public policy reasons outweigh the social utility and the value of personal autonomy for this set of facts.
- The level of harm is enough to withdraw the defence anyway - it was quite serious.
- (As above)

DEFENDANT'S THEORY

- *R v Lee:* full CA decided that consent is always available as a defence (with exceptions) unless the level of harm is at the grievous bodily harm level.
    - Breaking a finger is not at this level.
    - *Lee* and *Barker* are ambiguous on what happens in cases between bodily injury and grievous bodily harm.

- There are no policy reasons that outweigh the social utility of continuing to prioritise autonomy within the criminal law system - both *Lee* and *Barker* recognised this in their deliberation:
    - We risk becoming to paternalistic and not allowing people choice over themselves.
- Ms. H bore the risk, she must bear the consequence.
- There was no serious injury intended.

ISSUE(S)

1. Can a judge withdraw consent as a defence to a charge of wounding with intent to injure?
2. Are there public policy reasons (in this case) that should compel me to withdraw consent as a defence?

RATIO DECIDENDI

1. 'The law is that where a person is charged with wounding with intent to injure, then consent can be a good defence at common law. However, and depending... on the level of harm intentionally inflicted, a Judge may withdraw the defence of consent if there are good public policy reasons to do so and those policy reasons outweigh the social utility of the act in question and the value that society places on personal autonomy.'
2. Yes - the lack of social utility involved in allowing violence in a domestic relationship far outweighs the importance of maintaining personal autonomy in this case.

POLICIES

- The courts have the ability to protect people from harm, even if they may consent to the harm themselves.
- Social utility and good reason must be weighed against personal autonomy.
- The context of the case socially i.e the domestic violence problem in NZ must also be analysed when looking at social utility.

R v BM

COURT AND DATE

- English Court of Appeal
    - On appeal from Crown Court at Wolverhampton
- 22/08/18

Judges:

- Lord Burnett of Maldon (delivers judgement).
- The Hon Mr Justice Nicol
- The Hon Mr Justice William Davis

FACTS

- The appellant is a tattoo and body piercer who also performs 'body modification'.
- Indicted with three counts of wounding with intent to do grievous bodily harm contrary to section 18 of the Offences Against the Person Act 1861 and three alternative counts of inflicting grievous bodily harm contrary to s20 of the same Act.
- The three separate occasions were:
    - On 25th July 2015, a customer named Ezechiel Lott had his left ear removed without anesthetic, with his consent.
    - On the 23rd of July 2012, a tongue splitting of an unknown female was conducted, with her consent.
    - A nipple was removed from an unknown male on 16 August 2012 - with consent assumingly.

RELIEF SOUGHT

- Criminal case so there was intended to be formal charges brought against the appellant.

PRIOR PROCEEDINGS

- Apparently he lost?
- There was no clear ruling - only a preparatory hearing.

RESULT
- The appeal was dismissed.
- It was held that body modification was not a good enough reason to allow consent to be used as an defence against charges brought in relation to the provisions relevant in this case.
- The personal autonomy of one individual does not exclude another from what would be considered a crime.

PLAINTIFF'S THEORY
- The precedent must be taken from *R v Brown.* In this, it was decided that consent did not provide defence to causing actual or grievous bodily harm.
- This is because there is no good reason for someone to harm someone else, regardless of consent.
- However, *Brown* also came to the conclusion that where there is good reason e.g exercising of religious freedom, and the harm caused was not extremely serious, an exemption to the rule could be made.
- It would not be unreasonable for the common law to legislate against body modification.
- There is no good policy reason to allow exemption from the rule in *R v Brown* in this case.

DEFENDANT'S THEORY
- Personal autonomy over one's own body is enough of a reason to make an exemption to the rule.
- As well as this, it was argued that body modification is closer to tattooing than other forms of self-inflicted harm (e.g sado-masochistic sex) and for that reason should be legal anyway.
    - Akin to body adornment, which is widely accepted in the UK and in other areas around the world.

ISSUE(S)
- Can consent be used as a defence where body modification procedures were performed on someone that caused the appropriate level of harm that would otherwise be considered under the ambit of the law of assault?

RATIO DECIDENDI
- Consent cannot be used as a defence where bodily harm is caused as a result of body modification procedures, as there is no good reason to allow exemption from the rule in *R v Brown.*

POLICIES
- Paternalism - the state intervention in your personal autonomy!!!
- There is no good reason to cause harm to another person.
- There can be exceptions to the rule if it is for wider social benefit.

DUTY

Fagan v Metropolitan Police Commissioner

COURT AND DATE
Fagan v MPC [1963] 3 WLR 1120 (DC)

FACTS
- PC Morris asked D to drive his car closer to the kerb.
- The appellant drove forward and stopped with his wheel on the PC's foot.
- The PC asked D to get off and he said 'fuck off, you can wait'.
- The engine stopped running (D turned off the ignition at some point).
- PC kept asking and then D turned on the ignition and reversed the car off the constable's foot.

RELIEF SOUGHT
- Charged with assault.

RESULT
- It was held in the minority judgement that an assault did occur.
- This is because the acts of D constituted an ongoing act.
- Intention was formed at some point during the act, this is clear when the ignition was switched off and in the words said.
- This means that the AR and MR were able to occur at the same time.
- He was committing the assault himself bc his body was in contact w the car which was in contact w the foot (lol)
    - In battery it doesn't matter if there was some other medium involved anyway.
- There was a duty to the policeman to take the car off of the PC's foot.

- Dissenting judgement held that it was an omission to not move the vehicle - assault cannot be committed by omission.
- The AR and MR did not occur concurrently.

PLAINTIFF'S THEORY
- There was no MR when the act of the car being placed on the foot ended.
- There was not AR only an omission.

DEFENDANT'S THEORY
- There was a continuing act.
- During the act, MR was formed.
- There was a duty to act and take the car off.

ISSUE(S)
- Will D be liable for assault when he failed to remove his car from the foot of the appellant and did not intend on harming the appellant?

RATIO DECIDENDI
- D will be liable for assault as his actions constitute a continuing act, meaning AR and MR were formed and did occur at the same time.

POLICIES
- Assault cannot be committed by an omission.
- There can be duties to act.
- AR and MR must occur at the same time.

R v Miller
COURT AND DATE
- House of Lords

FACTS
- D was sleeping at his mates after a night on the grog.
- Fell asleep w a ciggie in his hand.
- Ciggie lit the bed on fire.
- Breather woke up, saw the smoke and just got up and went into another room.
- The house caught on fire.

RELIEF SOUGHT
- Charge of arson

PRIOR PROCEEDINGS

- Assumed he's been charged lmao.

RESULT
- Appeal dismissed.

PLAINTIFF'S THEORY
- There was a duty to act on the part of D to take the reasonable steps to remedy the dangerous situation that he had created.
- He was aware of the risk when he fell asleep so there is no reason why he cannot be held liable for not acting later on.
- The dropping of the cigarette to the house lighting on fire was a continuous act.

DEFENDANT'S THEORY
- Had no duty to act.
- Did not actually have any kind of act, rather an omission of act, which cannot be charged with arson.

ISSUE(S)
- Can arson be committed by an act of omission where the behaviour of D created the dangerous situation?

RATIO DECIDENDI
- Yes.

POLICIES
- H.L decided that although the statute of arson did not comment on omissions liability, it did not prevent liability for omissions.
- If you create the danger, you must take reasonable steps to mitigate it.

CONTROL AND FAULT

Kilbride v Lake

COURT AND DATE
Supreme Court - Now HC
1962

FACTS
- Appellant drove his wifes car onto Queen Street where he left it parked.
- He returned to find letter saying that he was not displaying his current WOR.
- It was agreed that the warrant had been in its correct position when he left the vehicle, but it was not there upon his return.
- The warrant was current at the time that it disappeared.

RELIEF SOUGHT
- Wanted the conviction to be overturned.

PRIOR PROCEEDINGS
- Had been charged at the district court level.

RESULT
- The appeal was allowed and the conviction overturned.

APPELLANT'S THEORY
- Argued that the offence could not be completed bc there was no MR.
    - The judge saw that the offence did not need an MR anyway, it was a strict liability offence.

RESPONDENT'S THEORY
- Not much detail but assumedly would have argued on the fact that it was a strict liability offence.

ISSUE(S)
- 'Whether something done perfectly lawfully by the appellant could become an offence on his part by reason of an intervening cause beyond his influence or control, and which produced an effect entirely out of his means of knowledge'.
- 'Was the physical element produced by the appellant?'

RATIO DECIDENDI

JUDGE'S REASONING
- The offence is a prohibition followed by an exemption.
- The act of being in the road and the omission of carrying the warrant must occur at the same time.
- The appellant was responsible for the car being on the road.
- However, when it comes to the warrant, the appellant was 'inactive'.
- A person cannot be made responsible for acts or omissions where there was no other course of action available to him. Where this is the case, any act or omission can be seen to be involuntary, unconscious or unrelated to the forbidden event.

POLICIES
- A person cannot be convicted of any crime unless he committed the act prohibited by the law.
- AR can be an act or an omission.
    - This type of offence is constituted by the events.
- There must be freedom to take one course over another for the criminal law to impose liability.

Tifaga v Department of Labour

COURT AND DATE
- CA - 1980

FACTS
- D had a permit to be in NZ until the 10th of August.
- In the meantime in March, he was convicted od an offence and imprisoned for 6 months.
- Upon leaving prison in July, he was served with a notice stating that he had 21 days to leave the country. He subsequently failed to do so.

RELIEF SOUGHT
- Overturning further conviction.

PRIOR PROCEEDINGS
- Charged at lower courts.

RESULT
- Appeal failed, charge upheld.

APPELLANT'S THEORY
- He didn't have any money to leave the country when he left, he could not do anything about this.
- Therefore, his acts were involuntary as he had no other option (argued on the authority of *Kilbride*).

RESPONDENT'S THEORY
- Tried to argue that this offence was in the special type of offences outlined in *Kilbride,* where although strict, exceptions can occur.

ISSUE(S)

- "Whether the defendant had been shown in terms of causation or otherwise to be responsible for the occurrence of the forbidden event complained of by the prosecution".

JUDGE'S REASONING

- *Kilbride* was fore-mostly used to draw a distinction between the AR and the relevant MR.
- However, it also outlined that there must be a link between the AR and the actions of the defendant, even in strict liability offences.
- This is an omission.
- The conscious volition or opportunity of choice is an essential basis for testing responsibility for acts and omissions.
- There is no difficulty linking Tifaga with this omission (unlike in Kilbride).
- He had a practical and continuing responsibility to be able to be in a position where he could leave the country. Him being imprisoned was out of actions of his own and it cannot be regarded as an intervening cause that can have changed the situation.

RATIO DECIDENDI

- Where a defendant is responsible for the situations leading to his lack of choice, he will be liable for any offence incurred as a consequence of the resulting omissions.

POLICIES

- The conscious volition or opportunity of choice is an essential basis for testing responsibility for acts and omissions.
- If you could have not been in that position, then liability can be imposed.

Hill v Baxter

COURT AND DATE

- Queen's Bench (UK).
- 1958

FACTS

- Respondent was charged with dangerous driving of a motor vehicle for failing to stop at a 'Halt' sign.
- Respondent just kept on going and then overturned.
- When he was found, he was in a dazed condition and did not remember driving the part of the drive after the top sign.
- The roads after the stop sign were not an easy drive but he managed to navigate it without any issues.
- However it was agreed by the previous justices that the respondent was not conscious of what he was doing once he started driving and was not capable of forming any intention to do with his manner of driving.
- Impossible to state whether he medically had a blackout or not.

RELIEF SOUGHT

- Overturning of charge.

PRIOR PROCEEDINGS

- Was found to be in a state of automatism even if there was no proof lmao.

RESULT

- Appeal allowed and D was charged.

APPELLANT'S THEORY

- D had no idea what was happening, he was operating in a state of automatism.

RESPONDENT'S THEORY
- No evidence of the above.

ISSUE(S)
- Can D be convicted of dangerous driving given that he was unaware of his actions at the time of the offence, and still cannot recall the events occurring?

JUDGE'S REASONING
Lord Goddard C.J:
- There was no evidence of automatism.
- Not enough to constitute a *novus actus interveniens* if he fell asleep - he had the ability to not fall asleep.
- Cites Humphreys J. in *Kay v Butterworth* where his dictum outlines a 'sudden illness' or a 'swarm of bees' as being enough to meet that threshold.

Pearson J:
- He had a duty to keep himself awake.

RATIO DECIDENDI
- D will be liable for dangerous driving given that no medical evidence can be given to support his lack of awareness in regards to his action.

POLICIES
- You have a duty to stay awake.
- If you cannot provide evidence then it cannot count as a lack of awareness.
- The threshold of a *novus actus interveniens* is quite high - it cannot be something that is at all within your reasonable control.
    - Must be an 'extraordinary mischance'.

Empress Car Co.
COURT AND DATE
Empress Car Co (Abertillery) Ltd v Natural Rivers Authority [1998] 1 All ER 481 (HL).

House of Lords - Lord Hoffman

FACTS
- The defendants left an unguarded tap on a large diesel tank next to a river
- An unknown vandal trespassed on the property of the defendants and opened the tap, allowing the diesel to discharge into the river
- It is a strict liability offence to cause the discharge of diesel into a river, under the Water Resources Act 1991, section 85

RELIEF SOUGHT
- Drop da charge uce.

PRIOR PROCEEDINGS
- They had lost at previous levels.

RESULT
- The appeal was dismissed and the conviction upheld.

APELLANT'S THEORY
- They cannot be held responsible bc an unforeseeable act of a third party was what caused the diesel to escape and thus was the direct cause for the river pollution.

RESPONDENT'S THEORY

- They were responsible bc they allowed the situation to occur in the first place by keeping a diesel tank on their property.

ISSUE(S)

- Was there any 'positive act' done by the company that was required by the act?
- Did the company's actions cause the leak into the river?

JUDGE'S REASONING

Question 1:

- Yes, there had to be a positive act under the structuring and wording of the relevant provision.
- It was held that keeping the tank on the property could be considered to be a positive act.
  - This is a continuing act.
- The D does not need to be the immediate cause of the pollution.

Question 2:

- Although the actions of the third party were deliberate, they are not enough to excuse liability.
- The actions of the third party must be unforeseeable.
  - Common sense is used as a limiting factor here.
- There must be some kind of extraordinary intervention (which this was not) - this is similar to the reasoning used in *Hallet* where tides were discussed.
- Only then can the causal chain be broken.

RATIO DECIDENDI

1. A positive act is required by the relevant provision and can be fulfilled by the maintenance of something or the maintenance of a state of affairs by D.
2. The third party intervention will not be enough to show that the company's actions did not cause the leak into the river, as the intervention was not unforeseeable or extraordinary.

POLICIES

In order for the action of a 3rd party to relieve criminal liability:

- 3rd party intervention must be free, deliberate and informed'.
- The intervention must be unforeseeable.
- It must be an extraordinary occurrence (extraordinary mischance).

MENS REA

INTENTION

R v Chandler

COURT AND DATE

House of Lords

1962

Lord Radcliffe

FACTS

- D's intended on entering the Royal Air Force station in order to immobilise it at least temporarily.
- This was bc they wanted to raise awareness against nuclear weaponry, which was though to be stored, developed and tried at the air base.

RELIEF SOUGHT

- Overturning of the charge.

PRIOR PROCEEDINGS
- They were charged uce.

RESULT
- Appeal dismissed, charge upheld.

PLAINTIFF'S THEORY
- Their purpose of raising awareness for anti-nuclear policies did not constitute a 'purpose' for the meanings of s. 1 of the Official Secrets Act 1911.

DEFENDANT'S THEORY

ISSUE(S)
- Will the D's be liable considering that their direct intention of raising awareness was not criminal in nature?

JUDGE'S REASONING
- Accepts the trial judge's reasoning that they entered for two separate purpose:
    - An immediate purpose of obstructing the airfield
    - Further long term purpose of inducing or compelling the government to abandom nuclear weapons in the interests of the state.
- The immediate purpose was deemed an obstruction under the offence of s1 and they were found to be liable.
- Asserts that there is a difference between a motive and a purpose:
    - The motive was to raise awareness, the purpose was to obstruct the airfield.
- BUT he sees that separating it into a question of direct and indirect purpose is a better distinction.
    - If the direct purpose was obstruction, then the offence has been committed, regardless of indirect intention - they do not alter the nature or the content of the offence.
- It wasn't up to the court to consider nuclear debate anyway.

RATIO DECIDENDI
- If the direct intention of D is one which constitutes an offence, then the presence of any other, albeit lawful, indirect intention will not excuse the offence committed.

POLICIES
- If the direct intention of D is one which constitutes an offence, then the presence of any other, albeit lawful, indirect intention will not excuse the offence committed.
- Indirect v direct intention is how purpose should be discerned for an act.
- The court cannot consider substantive policy issues.

R v Woollin
COURT AND DATE
House of Lords
22 July 1998

Lord Steyn delivered main judgement, backed up by Lord Hope of Craighead.

FACTS
- Appellant lost his temper and threw his 2 month old child on to a hard surface.
- The son sustained a fractured skull and died.
- The Crown did not content that the appellant desired to kill his son or cause him serious injury.

RELIEF SOUGHT

PRIOR PROCEEDINGS

- Trial hearing: Applied *Nedrick,* intent can only be inferred if they feel death or serious bodily harm was a virtual certainty from the actions of D and that D was aware of this. He was subsequently charged and the jury found the necessary intent.
- Appealed to CA on the basis that the trial judge had widened the mental element of murder too far. CA dismissed the appeal on this ground.
    - Asked the questions about the *Nedrick* test which were appealed up to the HL for decision
        1. In murder where there is no direct evidence of intent can the jury be directed to infer intent only if a) they are satisfied that serious bodily harm was a virtual certainty and that b) D appreciated that fact?
        2. If yes, is such a direction necessary in all cases or only where the sole evidence of intent is to be found in actions and consequence to the victim?

Legal Context to *Nedrick*:

- *Director of Public Prosecutions v Smith* [1961]: The House ruled that D could be charged with murder bc the death or GBH was foreseen by D as a 'likely' result of his act and (2) that he was deemed to have foreseen the risk that a reasonable person in his position would have foreseen.
- S 8 of the Criminal Justice Act 1976 reversed the above.
    - Mental element of murder is concerned with the subjective question of what was in the mind of the man accused of murder.
- *Reg. v Hyam* [1975]: HL - 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.
    - Judges came to this conclusion for different reasons.
- *Reg. v Moloney* [1985]: Narrowed down the broad approach to MR suggested in *Hyam.*
    - Lord Bridge of Harwish: '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.
    - Where the jury must be directed they should consider:
        - Was death or really serious injury in a murder case a natural consequence of D's voluntary act?
        - Was D aware that it was a natural consequence of his act?
    - Natural consequence conveys the idea of high probability.
- *R v Hancock* [1986]: *Moloney* was applied at the trial level but overturned in the CA and then the overturning was affirmed in the HL. The HL said that *Moloney* was flawed bc it did not discuss probability:
    - Lord Scarman: "the greater the probability of the consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the more likely it is that it was intended".
- *Nedrick* had to work out how to direct juries when no clear intention can be seen.
- *Nedrick* itself: dude poured parrafin wax through a letterhole thing and caught on fire and a child died. Lord Lane CJ observed that in determining intent:
    - The jury can ask:
        - How probable was the consequence which resulted from D's voluntary act?
        - Did he foresee the consequence?
    - The jury can infer intention where they feel that death or SBH was a virtual certainty (barring some foreseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.

RESULT

- Appeal allowed, charged dismissed.
- Charge for manslaughter substituted.

APELLANT'S THEORY

- Trial judge unfairly widened the mental element of murder.

    - Judge substituted the idea of a 'virtual certainty' in *Nedrick* for a much wider 'substantial risk' being able to infer intent.
- Can only be charged if he had and intent to kill or cause serious bodily harm.

RESPONDENT'S THEORY

- Argued that *Nedrick* prevents the jury from taking all evidence into account.
- *Nedrick* conflicts with *Hancock.*

ISSUE(S)

- Can D be liable for forming the necessary intent and subsequently charged for murder, when his actions caused a consequence that he did not mean to occur?

JUDGE'S REASONING

Lord Steyn:

- The Crown's argument that *Nedrick* prevents the consideration of all available evidence is wrong, it only provides guidance on the state of mind required to fulfill the offence.
- Rejected the *Hancock* argument: *Hancock* mostly agreed with *Moloney,* where a similar though process to *Nedrick* was used. It also did not rule out the directions by the CA in *Moloney.* Therefore *Hancock* did not disagree with *Moloney.*
- *Nedrick* was welcomed by academics.
- Did not agree with the CA that the phrase of 'virtual certainty' should be confined to cases where the evidence of intent is limited to admitted actions of the consequences and the consequences of those actions.
    - This produces practical difficulties - the judge would have to direct different juries differently based on admissible evidence.
    - Sees that it may be appropriate to give *Nedrick* direction to any case where the defendant may not have desired the result of his act.
- Therefore, in departing from *Nedrick,* the use of 'substantial risk' in the CA was wrong and blurred the line between intention and recklessness and hence between murder and manslaughter. This enlarged the scope for murder.
- Conviction of murder is unsafe.

On the status of *Nedrick:*

- Approved it.
- Only substituted the words 'to find' instead of 'infer' the necessary direction.
- The two questions are irrelevant, the main part that is affirmed and adopted by Steyn is the highlighted part above.

Lord Hope of Craighead:

- Just wanted to get rid of the two questions for clarity purposes.

RATIO DECIDENDI

- A jury can (but also can choose not to) find intention where the relevant indictable result was a virtual certainty of the defendant's actions and that the defendant appreciated that such was the case.

POLICIES

- Must be AWARE of the risks of the result to be known to have intention.
- Jury can but also can choose not to infer this intention.
- The test can be used for any such case where any defendant did not desire the result of his actions.

RECKLESSNESS

Reg v Stephenson

COURT AND DATE
Court of Appeal (England)
1979

Geoffrey Lane LJ, Ackner and Watkins JJ.

FACTS
- Charged with arson under s 1 and s 3 of the Criminal Damage Act.
- D cut a hole in the side of a hay stack. He crawled in and tried to go to sleep.
- He felt cold so he lit some twigs on fire inside the hollow.
- The stack caught fire and damage resulted.
- D had a long history of schizophrenia.
    - There was evidence that the appellant would not have had the mental capacity to recognise the risk anyway.

RELIEF SOUGHT
- Wanted the conviction quashed.
- Wanted courts to recognise that recklessness had to involve thought AND was a subjective test as to whether it would be reasonable for someone *in D's circumstances* to take that risk.

PRIOR PROCEEDINGS
- Trial judge gave the direction that a man is reckless if he realises that there is a risk but carries on regardless.
- He can also be reckless if you 'close [your] mind to the obvious fact that there is some risk of damage resulting from the act, but nevertheless continuing in the performance of the act.'
    - He said that a reason for closing your mind could be something like schizophrenia.

RESULT
- Conviction overturned.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)
- Does the word 'reckless' require that the defendant must be proved actually to have foreseen the risk of some damage resulting from his actions and nevertheless to have run the risk (the subjective test) or is it sufficient to prove that the risk of damage resulting would have been obvious to any reasonable person in the defendant's position (the objective test)?

JUDGE'S REASONING
- Direction not contrary to *Briggs* bc it was extended by *Daryl Parker.*
- Notes the Law Commission Working Paper again and outlines that the use of the word reckless was intended to reflect the ordinary meanings of the courts.
    - Acknowledges that many of the ordinary meanings seem to state that a man can be reckless if he does not stop to consider whether anyone or anything is subject to any risk.
    - Lord Atkin in *Andrews v DPP* seemed to say that the primary meaning of the word involved the objective test.
    - In *Shawinigan Ltd. V Vokins & Co. Ltd* the judge saw that the test was probably objective.
    - If only the above existed, it would be easy to determine that this was an objective test.
    - But because of *Herrington v British Railways Boaard* [1971] the meaning of reckless in the law of tort was the subjective meaning here. The house of lords agreed that recklessness was a subjective test.
        - Weird if it meant different things in crimes and torts.
- Acknowledges Kenny's definition.

- Not the taking of every risk is reckless. The risk must be one that which in all its circumstances is unreasonable to take.
- The test is still subjective, the knowledge or appreciation of the risk must enter D's mind even though he suppresses it (e.g this is what *Daryl Parker* meant in close his mind to something.
- The mental condition was one that meant he could not form the MR.
    - But this is not always the case.
- Unsafe for a conviction to be handed down.

RATIO DECIDENDI

- Recklessness is a subjective test where a person's risk taking is unreasonable taking in all the circumstances surrounding the offence.
- "A man is reckless when he carries out the deliberate act appreciating that there is a risk that damage to property may result from his act. It is however not the taking of every risk which could properly be classed as reckless. The risk must be one which it is in all the circumstances unreasonable for him to take."

POLICIES

- Recklessness is subjective and the test is whether it is unreasonable to do what the defendant did if you are in his circumstances.

Caldwell

COURT AND DATE

House of Lords
Judgement delivered 1981.

Commissioner of Police of the Metropolis v Caldwell

Lord Wilberforce, Lord Diplock, Lord Edmund-Davies, Lord Keith of Kinkel and Lord Roskill.

FACTS

- Charged under s 1 of the Criminal Damage Act 1971.
- Defendant set fire to a residential hotel where he had been employed. He bore a grudge on the person who owned the hotel.
- According to his evidence he was so drunk that it did not occur to him that there were people inside that could have been hurt.
- Pleaded guilty to a charge under s 1 (1) but not of one under s 1 (2) of intending to damage property intending to endanger life or being reckless as to whether life was endangered.

RELIEF SOUGHT

- The state was appealing the overturning of his eviction from the Court of Appeal.

PRIOR PROCEEDINGS

- He was charged in the trial court as it was held that drunkenness was not a defence for the charge.
- The CA quashed the conviction.

RESULT

- CA decision was upheld and the appeal dismissed. BUT for practicality purposes and not principle.

Held:

- Self-induced drunkenness can be a defence for intent but not for recklessness.
- The word reckless takes on its ordinary English meaning.

RESPONDENT'S THEORY

- Too drunk to form MR of recklessness, didn't even think about it.

APPELLANT'S THEORY

- Still should have been charged rawr!

ISSUE(S)

- "Whether evidence of self-induced intoxication can be relevant to the following questions - (a) Whether the defendant intended to endanger the life of another; and b) whether the defendant was reckless as to whether the life of another would be endangered, within the meaning of section 1 (2) (b) of the Criminal Damage Act 1971."

JUDGE'S REASONING

- There is no criminal code in England, this influences the way that the judges decided *Caldwell:*
  - Changing definitions could probably be more confined e.g could argue that the definition only changed re the criminal damage act.
- In NZ judges routinely try to work out what the intention of parliament is, UK judge's don't do that:
  - This allows them to impose their own morality and be more objective.

Lord Diplock:

- Two alternative states of mind needed to establish the MR - either intention or recklessness, only need one not both.
- Criminal Damage Act replaced the Malicious Damage Act 1861, the word malicious was substituted for one of the three forms of MR.
  - Diplock doesn't understand why parliament would want to put such large distinctions between two elements of MR (intention and recklessness).
- This resulted in *R v Cunningham* [1957] which was approved as an accurate statement of the law. Recklessness was defined by Professor Kenny as "recklessness as to whether such harm should occur (i.e the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it).
  - Definition presupposes that if thought were given to the matter by the doer before the act was done, it would have been apparent that there was substantial risk involved.
  - Lord Diplock agreed but said that it also included "failing to give any thought at all to whether or not there is any risk of those harmful consequences" as well as when you recognise the risk and act anyway.
  - Argues that this definition was only relevant to the description of an offence under the Malicious Damage Act and not directed to the meaning of the actual word "reckless" in general.
- Does not think that there is a moral difference between thinking and not thinking.
- Hard for a jury to not take the word of a defendant when they say that they didn't think of something, therefore they will more often than not escape liability.
- Doesn't think parliament wanted to perpetuate differences such as that.
- Acknowledges that the law in the time preceding has been unclear on recklessness.
  - Lots of debate between subjective and objective tests (which he thinks is bullshit anyway).
  - *Reg. v Briggs:* kind of a subjective standard.
  - *Reg. v Daryl Parker:* more objective, said you can be reckless if you close your mind to the obvious fact.
  - *Reg. v Stephenson:* the argument for the appellant was that the test should be subjective.
  - The courts overall made the assumption that in replacing the word maliciously with more specific phrases, parliament intended them to be read in the exact same way as maliciously was previously. Diplock says this is bullshit but indeed that is exactly what parliament wanted.
- Says "reckless" is an ordinary English word.
- Includes not only "deciding to ignore a risk of harmful consequences resulting from one's actions that one has recognised as existing, but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there is."

    - You can be reckless if you don't think. This was way out of line with previous thought, which held that if you did not think, this was just negligence.
- MR is the state of mind at the moment the accused did the act in question.
- To decide whether someone has been reckless there is some call for consideration into how the mind of an ordinary individual would have reacted in the situation.
    - Gravity of the possible harmful consequences can also be taken into account.
    - This is an objective part of the test.
- When a person is charged under the criminal damage act they are also reckless if they did not geive any thought to the possibility of their being any risk.
- The jury mist be satisfied of an offence under s 1 (1) to be charged under s 1 (2).
- Following *Reg. v Majewski* drunkenness is a reckless course of action anyway, therefore self-induced intoxication is no defence if that risk would have been obvious to the person if they were sober.
- Classifications of intent are useless where you can also be charged under recklessness.
- All in all drunkenness was irrelevant and you can be reckless for not thinking.
- But the appeal was dismissed bc it made no difference for the charge.
- It is very likely that if D hadn't given any thought to the harm but that he wasn't drunk and he didn't have a prejudicial motive, he probably would have been acquitted.

Lord Edmund-Davies:

- Agrees with the definition from Professor Kenny.
- This is what the Law Commission said in their Working Paper.
- Recklessness involves foresight of consequences therefore you cannot charge someone when he has not thought about a risk.
    - It has to be known risk taking.
- There is an ulterior motive of harming people which is an addition to the basic intent of starting the fire.
- The crime under s 1 (2) is simple intent so intoxication is relevant.
    - Also saw that *Reg. v Majewski* related solely to charges of arson (which is a basic intent offence) and the judge made it clear that this was the case.
- Thinks that drunkenness as no defence is a very harsh law.
- Also roasts the majority for ignoring the recommendations by Select Committees.

RATIO DECIDENDI

- A person charged with an offence under s 1 (1) is reckless f he doesn't an act which creates an obvious risk that property will be destroyed or damaged AND when he does the act either has not given an y thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.
- Pg. 354 at F.
- Drunkenness not a defence for basic intent crimes.

POLICIES

- You can be reckless for not thinking.
- Law v harsh around drunkenness.

John Smith - Criminal Damage Case Note: *R v Caldwell.*

- The question of law certified for the opinion of the House was: "Whether evidence of self-induced intoxication can be relevant to the following questions: a) Whether the defendant intended to endanger the life of another and b) whether the defendant was reckless as to whether the life of another would be endangered within the meaning for s 1 (2) (b) of the Criminal Damage Act 1971.

Held:

- The meaning of recklessness in s 1 of the Act was that that was held in ordinary speech, including not only deciding to ignore a risk of harmful consequences resulting from one's acts that one has

recognised as existing but also failing to give any thought to whether or not there was any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was. The fact that the defendant was unaware of the risk of endangering lived owing to his self-induced intoxication would not be a defence if the risk would have been obvious to him had he been sober.

- Evidence of self-induced intoxication should be relevant as a defence but not when the charge included reference to being reckless as to whether life would be endangered or not.
    - *I.e specific but not basic intent crimes.*

Commentary:

- The decision plainly defeats the intention of the Law Commission which was responsible for the drafting of the legislation and whose recommendations were accepted by parliament and it conflicts with the proposals of the Criminal Law Revision Committee in their report on the law of offences against the person.
    - Set the law on the mental element back like 150 years.

The Intention of Parliament:

- Parliament has always known the meaning of recklessness and has never attempted to change it.
- The Criminal Law Revision Committee rejected Diplock's meaning in a previous paper, rejecting a meaning of recklessness that included "mere carelessness."
- The Law Commission Working Paper No. 23 on Malicious Damage made the provisional proposals of the Law Commission clear. Having reviewed the law in *Cunningham* (which required foresight) they outlined a desire to "adhere to this pattern."
- The Law Commission on Criminal Damage (Law Com. No. 29) expressly stated that they wanted to adopt *Cunningham.*
- This was adopted in various other writings from the Law Commission and the Criminal Law Revision Committee.
- Lord Diplock points out that the purpose of the Criminal Damage Act was to 'revise the law,' and that it would make no sense for parliament to differentiate between different mental elements if they didn't want anything to change.
- The Criminal Damage Act made a massive revision of the law everywhere but MR, which is the only thing it thought was ok.
- Parliamentary debates: Mr Mark Carlisle - recklessness "did not necessarily intend to cause the damage but could not care less whether he caused it or caused it not."
- Parliament seems content to keep this meaning and this was what was correctly interpreted in *Stephenson.*

New Meaning of Recklessness:

- Diplock's formulation leaves no room in the majority of cases for inquiry into the defendant's state of mind.
- He is reckless when "1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and 2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it."
- There just has to be an "obvious risk of damage", the jury does not have to inquire into D's actual state of mind.
- Whether there was an "obvious" risk can be answered only by considering whether any ordinary, prudent person would have realised there was a risk and if he would, it makes no different what the defendant thought, because he is guilty whether he realised that there was a risk or not.
- Smith thinks Diplock has essentially made the offence into one of strict liability by not requiring thought.

Offences requiring 'malice':

- So far as offences which may be committed maliciously are concerned, the law remains unchanged.

- Diplock thinks that maliciously as outlined by Professor Kenny requires 'fine and impracticable distinctions."
    - Smith does not really think that there is no evidence that it has not worked.
- The decision to change the meaning of recklessness has implications for other offences anyway, e.g rape.
    - This makes the law stricter than what is stated in *Morgan,* which requires 'indifference', which in turn requires knowledge.

Intoxication:

- The intoxicated offender who unreasonably fails to foresee a risk of causing criminal harm is now reckless under the new definition and may be held guilty of an offence which may be committed recklessly without doing further violence to the words of the statute.
- But offences of 'malice' would continue to need to be distinguished, because it now requires a higher degree of MR and is different from the meaning of reckless.
- Might be hard to know what meaning to give to assault, it can be argued that the narrower meaning of professor Kenny should be given to it.

'Objective' and 'subjective':

- They are terms that are relatively simple compared to some shit Diplock has come up with. They are relatively well-understood terms which are used to distinguish between conclusive presumptions as to a mental state and an actual mental state, and between standards of conduct and states of mind. Such distinctions have constantly to be made in expounding the criminal law and the present case does nothing to lessen their significance.

R v Howe

COURT AND DATE

Court of Appeal (Wellington)
November 1982.
Cooke, McMullin and Ongley JJ.

FACTS

- During the Springbok riots an unmarked police car was overturned by demonstrators and badly damaged.
- 13 people were tried jointly under s 90 of the Crimes Act 1961 of riotous damage of a Crown vehicle.
- The appeal was made on the grounds that the Judge had misdirected the jury as to the mens rea that the Crown was required to prove to establish riotous damage.

RELIEF SOUGHT

PRIOR PROCEEDINGS

- Judge told the jury that it does not matter if the accused didn't know that it was a Crown vehicle.
- "Knowledge on their part as to whether they knew it was a police car is completely immaterial."

RESULT

Held:

- No misdirection from the judge.
- D should be found guilty of the offence if he either knew the car was a police one or was reckless as to whether or not it might turn out to be a Crown vehicle. In this context, recklessness included giving no thought to the manner.
- Conviction upheld.

APPELLANT'S THEORY

- It must be shown that the accused knew that the vehicle in question was a police car and proceeded anyway.

- Insufficient evidence to establish knowledge.
- Argument on general principle *R v Reynhoudt:* Australia
    - It was not necessary to show intention in relation to the other elements of the offence, namely that the person assaulted was a policeman and acting in the execution of his duty. (The minority held that the intent must go to all the ingredients of the offence.)
- *R v Galvin:* Victoria.
    - At least the chance of the person being a policeman must be foreseen.

RESPONDENT'S THEORY

ISSUE(S)

JUDGE'S REASONING

- Court found the theory in *Reynhoudt* attractive.
- Indifference is a sufficient MR in this context.
- Courts generally lean towards interpreting ambiguous offences as requiring MR that extends to all the ingredients.
    - NZ subscribes quite heavily to the principle of MR.
    - This principle of importing MR for serious offences was seen in *Sweet v Parsley.*
- Recklessness has no separate legal meaning and is not limited to deliberate risk-taking but includes failing to give thought to an obvious and serious.
    - Applies *Caldwell* to the case but NOT AS A WHOLE.
- It is not plausible that parliament intended for liability under the provision to hinge on whether someone gave thought to the status of the car.
- The purposes of the legislation are achieved if there is a more robust MR application.
- Someone should be found guilty either if they knew that the car was a crown car or was reckless as to whether the vehicle might turn out to be one.
- But says that there can be a defence of reasonable believe that the vehicle was not used for crown purposes.

RATIO DECIDENDI

- A person will be charged under the section if they knew that the vehicle was one of the Crown or was indifferent to it being on anyway.
- Indifference enough in this context.

POLICIES

- Toyed with the possibility of adopting *Caldwell.*
- In some contexts indifference can amount to recklessness.

Elliot v C

COURT AND DATE

Queen's Bench
1983
Robert Goff LJ and Glidewell J.

FACTS

- D is 14 years old and of low intelligence.
- Spent the night out.
- At 5 am she entered into a wooden garden shed where there was a bottle of spirit.
- She poured it onto the floor and set it alight.
- D left the shed and its contents subsequently went alight.
- Charged with arson.
- She was not convicted upon the initial trial.

RELIEF SOUGHT

- Conviction to be overturned.

PRIOR PROCEEDINGS

- At trial it was found that the defendant must not have given thought to the possibility of risk and even if she had given it thought the risk would not be obvious to her.
- Held that since the risk would not have been obvious to her, she cannot have acted recklessly within the meaning of the section.

RESULT

- Appeal allowed.
- The offence of reckless damage to property under s 1 (1) of the Criminal Damage Act consisted of an act which created an obvious risk to a reasonably prudent person that property would be destroyed or damaged.
- She acted recklessly albeit she would not have appreciated the risk had she thought of it.

Minority:

- Where there is no thought for the consequences of the act, any further inquiry necessary for establishing guilt should be directed to the question why such thought was not given rather than what the particular person would have appreciated that he had directed his mind to the matter.

APPELLANT'S THEORY

- By saying "creates an obvious risk" Diplock meant to include an objective test in *Caldwell.*
- Once shown that a reasonably prudent person would have appreciated the risk it is not a defence that because of lack of intelligence or exhaustion she would not have appreciated the risk had she thought about it.

RESPONDENT'S THEORY

ISSUE(S)

- A defendant should only be held to have acted recklessly by virtue of his failure to give any thought to an obvious risk that property would be damaged, where such risk would have been obvious to him had he given it thought?
- Was the trial decision proper?

JUDGE'S REASONING

Glidewell J:

- Cites *Caldwell:*
    - Talks about how a person can be reckless when they do not give thought.
    - The case right before *Caldwell* was *R v Stephenson,* where the minority opinion of *Caldwell* was found.
- Previous justices bound to accept the model direction of *Caldwell,* but they were swayed by arguments for counsel that Diplock meant that the risk must be obvious to the particular defendant.
    - Limited *Caldwell* in saying that recklessness should only be found by virtue of someone's failure to give thought to an obvious risk where such a risk would be obvious to THAT person had they thought about it.
- Talks about stuff that Diplock said in *Caldwell:*
    - Made a point about risk being obvious to D had they given thought to it from *R v Briggs.*
    - Also said that there would be no defence if that risk would have been obvious when the person was sober.
        - Taken from *R v Majewski.*
    - Therefore if drunkenness could not take you out of a state of recklessness, neither could low intelligence.
- Also notes *Reg. v Lawrence (Stephen)*

    - (Lord Diplock) Something about describing something as a reckless situation makes us believe that it would have drawn the attention of harm occurring to an ordinary reasonable person.
- Notes *Reg v Miller:*
    - Lord Diplock said that being reckless in regards to arson there is where the risk of property being damaged must be one that would be obvious to anyone who had given his mind to it at whatever is the relevant time for determining MR.
- Bases his judgement off *Miller* and *Lawrence.*
- Answers 'no' to the two issue questions.

Robert Goff LJ:
- Agrees to allow the appeal but for completely different reasons i.e have to because of binding authority.
- Notes that if we apply *Caldwell* the conclusion is obvious.
- But wants to ask us if we would really consider her to be reckless, to which he says no.
    - This is not a case of deliberate disregard of risk.
    - The only way she can be charged is if we hold an objective standard.
    - Does not think that such a test is appropriate here, esp. in the sense that recklessness has to be related to a particular consequence.
- Tries to construe *Caldwell* to get D acquitted but straight does not work.
- Cites Glanville Williams in that a person should only be charged if risk would have been obvious to him if he had given thought to the matter.
- Doesn't think Diplock qualification is justified.
- Have to ask why the person didn't give thought to the consequences of their actions not just to what a reasonable person would have done.
- Same Diplock argument kind of brought forward in the rape case of *Reg. v Pigg.* Where indifference was recklessness within the meaning of rape.
- However he thinks that in answering the second issue, he would say yes. i.e it is not proper for the court to find that she had acted recklessly.
- BUT bound by precedent and says the court cannot overturn it.

RATIO DECIDENDI
- Affirmation of *Caldwell:* criminal damage from arson can occur when a person did not think of the consequences of their actions, even if the risks would not have been obvious to the defendant even if they had appreciated them.

POLICIES
- Affirms *Caldwell.*
- MR is an objective standard.

R v Harney
THIS IS THE GENERAL RECKLESSNESS UNDERSTANDING IN NZ

COURT AND DATE
- Court of Appeal (Wellington)
- September 1987.
- Cooke P, Casey and Chilwell JJ.

FACTS
- Harney stabbed someone during a street brawl.
- The person who was stabbed knocked the appellant's GF to the ground.
- The appellant became enraged and so he drew a knife.
- The deceased made a lunge for the appellant.
- The appellant was aiming for the deceased's leg but he claims that the lunge led him to accidentally stab him in the stomach.

- Appellant did not give evidence. He admitted to intending to stab the man but said "I was not going to kill him."
- Charged under s 167 (b) of the Crimes Act.

RELIEF SOUGHT

- Conviction to be overturned.

PRIOR PROCEEDINGS

- Trial judge outlined that "recklessness is present when someone does an act which creates an obvious risk for the safety of another and when he does that he *either has not given any thought to the possibility of there being any risk*, or has recognised some risk involved and has nonetheless gone ahead with it."

RESULT

- Reckless in s 167 (b) of the Crimes Act means that there must be a conscious taking of the risk. Failing to give though does not suffice.
- BUT the judge cured his error as a whole and so the mistake became immaterial.
- Appeal dismissed.

RESPONDENT'S THEORY

APPELLANT'S THEORY

- Lack of intent.
- Provocation.
- Argued that the italicised words introduced an objective element to what should be a subjective test.

ISSUE(S)

JUDGE'S REASONING

Cooke P:

- Satisfied that there was no misunderstanding in the trial that the jury had to be satisfied that the appellant had knowledge by the accused of the likelihood to cause death.
- However states that there was a misdirection of the jury that recklessness did not have to include a conscious taking of risk.
- *Howe* is no longer relevant because s 90 of the Crimes Act has been replaced with a wide and simpler section.
- Understanding that recklessness in NZ is that of pre-Caldwell times.
    - Even if we were to adopt the *Caldwell* meaning of recklessness, it should not apply to murder.
- That would require foresight and intention to continue anyway.
- Looked at *R v Stephens:* Chilwell J accepted that the less harsh approach e.g that in *Elliot v C* had usually been applied in NZ.
    - The court did not doubt that ruling.
- The first limb of s 167 (b) (means to cause the person injury...) requires proof of the accused's actual appreciation of risk so doesn't make sense that the second limb wouldn't. (reckless as to whether it ensues...)
- When the act was brought in, the words "or ought to have known" was taken out of para (d) in the preceeding act. This means disregard was taken OUT of the provision.
    - For the reason that "a man cannot be convicted for being stupid".
- *R v Dixon:*
    - The requirement of recklessness adds nothing significant to the requirement of knowledge.
    - "A particular kind of deliberate risk-taking".
    - The person must be willing to run the risk of death.

    - Conscious appreciation of the likelihood of causing death".
- This was discussed further by *R v Piri.*
- Difference between para (a) and (b) is deliberate killing and taking the deliberate risk of killing.

RATIO DECIDENDI

- Reckless under s 176 (b) means that there must be a conscious taking of the risk of causing death.

POLICIES

- Makes clear that *Howe* and the *Caldwell* decision no longer stand.
- In regards to murder, intention to continue on with an action in face of the knowledge of the risk.
- General tenor of a more subjective test.

R v G

COURT AND DATE

House of Lords
2003

Lord Bingham of Cornhill, Lord Browne-Wilkinson, Lord Steyn, Lord Hutton and Lord Roger of Earlsferry

FACTS

- The defendants were 11 and 12 years old.
- They went camping and then early one morning they went into the back yard of a shop where they found some bundles of newspapers.
- They set fire to some of the newspapers and threw them under a large plastic dustbin.
- The newspapers just kept blazing and caused damage to the shop.
- Defendants were charged with arson pursuant to s 1 (1) of the Criminal Damage Act.
- Accepted that neither of the defendant's accepted that there was a risk of the fire spreading.

RELIEF SOUGHT

PRIOR PROCEEDINGS

- Trial judge found that they were bound by a previous HL decision.
- The test to be applied was whether they had done an act which in fact created an obvious risk that property would be damaged and whether when they did that act they had either not given any thought to the possibility of there being such risk or had recognised that there was some risk involved but still gone on to do it.
    - The question whether there was an obvious risk of property being destroyed or damaged was to be assessed by reference to the reasonable man and not by reference to a person with the defendant's characteristics.
- Told the jury to disregard age and immaturity.
- The jury thus convicted them.
- Directed the jury that the prosecution have to prove
    - That the boys committed the AR
    - That there was a risk which the reasonable person could obviously see.
    - D carried on having not given thought to the risk or acknowledged it and carried on regardless.

RESULT

- Appeal allowed.
- Parliament had not intended to change the law in regards to MR required for recklessness.
    - Foresight of consequences remained essential.
- There needed to be a test where age and mental capacity could be taken into account.
- The threshold from departing from a previous HL decision (i.e *Caldwell* had been met).
- D can be reckless if he:
    - He was aware of a risk but acted anyway and it was unreasonable for him to take that risk.

- D cannot be regarded as reckless if due to some personal characteristics he genuinely did/could not appreciate the risks.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)

- Could someone be seen to be acting recklessly when due to their age they could not appreciate the risks of their actions?
- "Can the defendant properly be convicted under s 1 of the Criminal Damage Act 1971 on the basis that he was reckless as to whether property was destroyed or damaged when he gave n o thought to the risk but, by reason of his age and/or personal characteristics the risk would not have been obvious to him even if he had thought about it.

JUDGE'S REASONING

Lord Bingham of Cornhill:

Reasons for rejecting Caldwell

1. It is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-intoxication) one genuinely does not perceive the risk. Conviction of a serious crime must also have a guilty mind - non facit reum nisi mens sit rea.
2. The model direction in *Caldwell* could cause obvious in justice. Not moral to convict a defendant on the strength of what someone else would have apprehended if D themselves did not have that apprehension.
3. There was lots of criticism for the decision.
4. The majority's understanding of recklessness was a misinterpretation. It is offensive to principle.
5. A different outcome would likely have occurred had it not been about intoxication. The context did not require the House to give consideration to elements such as youth or mentally handicapped/anyone who is not a reasonable adult (but they did overrule *Stephenson* which meant they likely didn't care).

- Some people might argue that you can do *Caldwell* test for kids but subject the reasonable person test with reasonable child. BUT:
    - Offends the principle that conviction should be based on the actual mind of the defendant.
    - It must then also be modified for mentally handicapped etc.
    - This opens doors for practical difficulties in regards to what characteristics should be taken into account.
    - This would substitute one misinterpretation for another.
- Agrees mostly with Robert Goff LJ's statement in *Elliot* that a person acted recklessly by virtue of failure to give any thought to an obvious risk where such risk would have been obvious to him had he given thought to the matter.
    - But still says it can be hard to say what a person would think and is still mostly about whether they did/didn't.
- Pre-*Caldwell* times will probably not lead to the acquittal of people who should have been convicted.
    - This was not seen as a problem.
    - Jury will prob not accept recklessness if it is absolutely a ridiculous claim that they did not think of the risks/if there is evidence to show that D clearly did appreciate the risks.

Lord Steyn:

- *Caldwell* has not performed in the real world.
- Offended people's sense of justice.
- There was no problem of people escaping liability if they ought to have been charged.
- Depart from *Caldwell.*

RATIO DECIDENDI

- A person is reckless when they can foresee the risk of a consequence occurring from their action, but continue to act in spite of this risk.

POLICIES

- Back to pre-*Caldwell* times where it was purely subjective.
- Arguably even easier bc Bingham shows apprehension towards even asking if the risk was reasonable and just analysing whether there was foresight of risk or not.

R v Tipple

COURT AND DATE

Court of Appeal
December 2005

Glazebrook, Panckhurst and Wild JJ.

FACTS

- Charge for the dealing with a firearm with reckless disregard for the safety of others contrary to s 53(3) of the Arms Act 1983.
- D was supervising a shooting party.
- He set up a target which meant that the party would be shooting in the direction of a busy road (although he set up the target to be close to the ground).
- The road was 600m away.
- A rifle with a range of 3000 m was fired at one point.
- The gun was shot and it hit the complainants car, narrowly missing the dogs.
- There was steady traffic on the road.
- D knew that it had this range and was aware of the risk of bullet rise and of lift in the rifle.
- Experts agreed that it was an extremely risky setup.

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT

- Appeal dismissed.

RESPONDENT'S THEORY

- Regardless of if it was a ricochet or a straight shot it was reckless.

First Ground:

- Literally told people to shoot at a road - parliament probably doesn't want to allow this kind of behaviour.

APPELLANT'S THEORY

First Ground:

- Mr Tipple did not deal with the rifle.
    - Running the shooting party did not constitute dealing with the rifle.
    - Differences between s 47 and s 53, s 47 used different terminology and did not involve having to touch the firearm so s 53 required something more.

Second Ground: Misdirection as to a reasonable cause and reckless disregard

- Trial judge directed the jury that you are "reckless if you realise that certain consequences could well follow from what you were doing, but you go ahead and do it anyway. You realise that the consequence could well happen, not just a remote risk, and you decide to run the risk."
    - Must have also had no reasonable cause to do so.

    - Directed the jury that assessing whether there was a real risk that you could endanger the lives of others was an objective test.
- Wanted the jury to be directed that the risk to safety has to be dangerous and not only that it is enough that it is a risk to safety.
    - Wanted the test for recklessness to be recognised as wholly subjective.

- Also said that the breather took precautions so he thought the risk was minimised.

ISSUE(S)

- What is the meaning of reckless disregard?

JUDGE'S REASONING

First Ground:

- The contrast means nothing.
- The purpose of the statute would probably want to criminalise dangerous behaviour regardless of if the firearm was actually touched.
    - There was evidence from the Minister of Police that said that there was intended to be a wide purpose and meaning for the statute anyway.
    - Parliament likely meant "to act in regard to" when using the word deal.

Second Ground:

- Judge asserts that in NZ 'recklessness' requires a conscious taking of the accused of the relevant risk. Asserts that this is a subjective test.
- Wasn't always this way in NZ. There were some that were for a *Caldwell* type test.
    - Example of cases that wanted subjective MR testing for recklessness:
        - *R v Storey:* Concerned the degree of negligence required for motor manslaughter. There was obiter on recklessness: negligence is the remittal of a duty where as reckless is knowingly disregardful.
        - *McBreen v MOT:* Hardie Boys J - recklessness involves a mental element.
        - *R v Stephens:* Recklessness is a state of mind which involves conscious and deliberate taking of an unjustified risk (this was in regards to discharging a shotgun with reckless disregard to safety).
        - *Mutual Rental Cars Ltd v Forster:* There must be a known risk, affirmed *Storey, McBreen* and *R v Lawrence* (UK).
        - *D'almeida v Auckland City Council:* affirmed *Storey* in that recklessness required an "appreciation of the risk as an additional mental element beyond the purely objective standard involved in dangerous driving."
        - *Harney:* Murder requires an actual appreciation of risk. In NZ everything was pre-*Caldwell.*
        - *R v H:* NZ requires a pre-*Caldwell* approach unless outlined by statute - stricter construing of negligence requires a policy decision from parliament.
        - *R v Foley:* Dealt with the exact same charge and outlined that there has to be an appreciation of risk.
- The exceptions are *Howe* and four High Court cases.
    - The cases decided before *Harney.*
    - One of them (*Jefferson v Ministry of Agriculture and Fisheries)* acknowledged *Storey* but did not see it as a Court of Appeal decision that could be applied.
- *Caldwell f u c k e d shit up.*
    - Literally all the decisions beforehand showed that the English CA had established a subjective approach.
    - Says that it had a wholly objective test but ATH says this is not true it was a mixture.
    - Acknowledges that *R v G* restores the law to pre-*Caldwell* times.
- The requirement from *Stephenson* and *R v G* is that the known risk must be one which is unreasonable for the accused to take. Chilwell J refers to this as "an unjustified risk", this is the objective element of recklessness.

    - This requires the jury to take into account all the circumstances, in particular the degree and nature of the risk and the 'social value' of the shooting activity.
- Therefore the test is not WHOLLY SUBJECTIVE
- Also, the consequence does not have to be dangerous.
    - *Harney* argument relied on must be taken in context. It was about murder so the wording is specific to that in this respect. Also, the Court approved *Stephens* in which it was held that someone who is reckless about safety is aware of the likelihood or possibility that safety may be imperiled.
        - Does not have to be a huge risk.
        - Dangerous consequence just means it had to be an unreasonable risk - Simon France.
    - Therefore no misdirection on the judge.
- The jury decided that the risk was not minimal enough despite efforts from D so he could still be charged.

RATIO DECIDENDI

- Reckless disregard includes the pre-*Caldwell* definition of recklessness, of which there is deliberate risk taking or a risk which is in all circumstances unreasonable to take.
- The risk does not need to be huge, it must just be any risk to safety.

POLICIES

- The 'unjustified risk' is the objective element to recklessness: take into account the degree and nature of the risk and the social value of its activity.
    - Almost like Feinburgs principles, the greater the utility of the risk the more ready we are to bear the conseequences.
- Subjective and objective elements are outlined here, further affirmed in *Cameron v R.*

Cameron v R

- The NZ criminal code does not have set out definitions of the different elements of MR. We look to the common law for guidance on these meanings.
- NZ judges use English Royal Commission to help them ascertain the meaning of different statutes.

FACTS

- Four appellants were found guilty in the HC on charges of importing, selling and possessing, for the purpose of sale, the Class C controlled drug 4-MEC.
- They were part of a business which sold products on the 'after-market'.
- The pills were intended to mimic the effects of MDMA.
- Mr Cameron was a business liaison with the gangs involved in the after-market activities, he was a customer of the company London Underground as an on-seller of pulls.

FINDINGS (IN REGARDS TO RECKLESSNESS)

- The issue was mainly in regards to the MR of the offence and whether there had to be complete knowledge of the circumstances to amount to the required MR (if there is not complete knowledge, this is known as innocent belief).

Court of Appeal (first appeal):

- If MR included subjective recklessness and willful blindness it might flout the purposes of the legislation.
- Relied on the exception to proof of MR outlined in *Millar v MOT.*
    - But recognised that this might have more to do with simple regulatory offences.
- Didn't see absolute liability as being appropriate if there is no express statutory authority.
- Decided to require the Crown to prove either identity or illegality knowledge, but with a defence of total absence of fault.
- The MR to be substituted was being able to be reckless to the facts of the case.

Supreme Court:

- Described that equating lack of knowledge with innocent believe was inconsistent with the principles of recklessness. Agreed to the CA approach above.
- There were 3 categories of offences:
  - Full MR
  - *Strawbridge* offences
  - Absolute liability.
- A fourth category of strict liability offences for which a total absence of fault is a defence was later added.
  - Onus of proof on D (although Court said this may need to be reconsidered).
- "The general position is that recklessness suffices as MR in respect of either circumstances or results."
- "In cases such as the present in which the offence is not defined in terms which require actual knowledge or intention and nothing less, we consider that recklessness as explained in *G* will (at least usually and perhaps always) be sufficient to satisfy mens rea requirements as to circumstance and result. For these purposes, recklessness is established if:

a. The defendant recognised that there was a real possibility that:

i. his or her actions would bring about the proscribed result; and/or
ii. That the proscribed circumstances existed; and

b. Having regard to that risk those actions were unreasonable."

- i.e Supreme Court accepted the *R v G* formulation of the recklessness test, subjective and objective limb.
- In regards to the objective limb of b) consideration to the level of risk involved, counterbalanced by the utility of the actions of the defendant can be taken into account.
- Recklessness taken to remedy the problems with the "complete knowledge/innocent belief dichotomy."
- SC saw the instant offence as falling within the *Strawbridge* principle.
  - The Crown has no obligation to establish the state of mind of the defendant in respect to the status of the substance.
  - In the absence of evidence in the contrary, MR is assumed.

MISTAKE OF FACT

- There are two questions of evidence and burden of proof. Suh as an evidentiary burden.
- Two types of burden:
  - Probative burden: rests on the prosecution who have to prove every element of the crime beyond reasonable doubt. This comes directly from the presumption of innocence established in *Woolmington.*
  - The Crown has an evidentiary burden to raise evidence.
- If mistake of fact is to negate MR, the requirements of the AR must also be analysed.

- Mistake is not a defence in the technical sense, it means that the MR is not established.
- The burden the defence has is to raise and issue, if they want the court to consider whether or not they have made a mistake they have to to raise this as an issue in some way.
  - They must also establish their case on the balance of probabilities (which is usually enough to beat beyond reasonable doubt).
  - Although there is technically no legal burden on the defence, there may be in regards to evidential burden and proving the case.

- If your mistake is honest but unreasonable then you can be caught within negligence, however, your belief just needs to be honest.
    - But reasonableness can help solidify the credibility of your claim.

CTM v The Queen

- Mistake of fact is not a 'defence' but it is a circumstance that may deprive the facts of an ingredient essential to the offence.

R v Tulson

- Case of bigamy: a lady thought her ex was dead. She believed she was a widow and remarried but was then charged.
- Cave J: "Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy."
    - The mistake was in good faith and on reasonable grounds so the conviction was quashed

Director of Public Prosecutions v Morgan

- Principle authority on exculpatory mistakes.
- The accused claimed that the reasonably believed that the victim was consenting to intercourse.
- An exculpatory mistake will be relevant in one of two situations:
    - Where it relates to a definitional element of a crime of the offence; or
    - Where it relates to an excusatory claim.
- As in *Morgan,* the mistake only needs to be honest.
- Authority for the general principle that if the law requires intention or recklessness with respect to some element in the AR, a mistake, whether reasonable or not, which precludes both states of mind will deny criminal liability.

R v Wood [1982]

- The appellant was charged with cultivating cannabis. She asserted that she believed that it was not cannabis.
- Refers to...
- The reasoning from ***Sweet v Parsley*** in regards to proof was adopted.
- The decision from *Morgan* was applied in regards that there was no obligation on the part of a defendant to prove that she had reasonable grounds for the honest belief.
- Took away the requirement in *Strawbridge* that the belief had to be reasonable.

R v Strawbridge [1970]

- Similar facts to *Wood.*
- It is not necessary for the Crown to establish knowledge on the part of the accused and in the absence of evidence to the contrary knowledge on her part will be presumed "but if there is some evidence that the accused honestly believed *on reasonable grounds* that her act was innocent, then she is entitled to be acquitted unless the jury is satisfied beyond reasonable doubt that this was not so."
- Adopted the reasoning of ***Sweet v Parsley:***
    - "It is open to an accused person to point to evidence which tends to show that he or she did not know that the plant which was being cultivated was a prohibited plant."

Clarke v Police

- William Young J thought that our position on mistake of fact needed to be changed, as it promoted violence.
- It might be better to keep it however because it is better that the law provides protection, in the form of an excusatory claim that the defence honestly thought and believed in their reasonable claim.

R v Thomas

- CA held that where 'honest belief' is an available defence, it is for the prosecution to prove that the accused had no such belief *once an evidentiary basis has been established.*

R v Metuariki [1986].
- Affirmed the above.
- Appellant was appealing against his conviction for supplying a class A controlled drug.
- He believed that there was some psychedelic properties in the mushrooms but he didn't know what, and he didn't know that it was a controlled drug.
- CA accepted that he made a 'good faith' mistake as to the definition of the offence, not one of law but one of facts.
- Took away the requirement for a reasonable belief outlined in *Strawbridge.*

Police v Taggart
- D was found guilty of selling pills containing an alkaloid yohimba. He knew that this was in the pills but did not know that they were illegal and did not know it was a poison.
- It was held that his ignorance was a statutory position and was an ignorance of law.
- This decision was criticised in *Cameron v R* by William Young J.

IN NZ THE APPROACH TAKEN IN *WOOD* AND *METUARIKI* IS PREFERRED.
- Reasonableness is NOT required.
- BUT reasonableness is the strongest proof that a belief was honest and justified.

Cameron v R
- Incorrect legal advice is not a defence.
- Neither is mistake of law e.g If you didn't know that something was a controlled substance.

VOLUNTARY INTOXICATION

R v Kamipeli

COURT AND DATE

Court of Appeal - Wellington
June 1975

McCarthy P, Richmond and Woodhouse JJ.

FACTS
- The appellant had gone out drinking for the night.
- He believed that the deceased was trying to assault his friend.
- So he rushed up to the deceased and tackled him, then proceeded to punch and kick him.
- The deceased died of his injuries.
- The accused was charged under s 167 (a) or (b) of the Crimes Act.

RELIEF SOUGHT
- The accused wanted his conviction overturned.

PRIOR PROCEEDINGS
- Found guilty at trial.
- The judge at trial directed the jury that the accused had to be so drunk that his mind ceased to function altogether.
- He said that he had to be 'blind drunk'. "Acting as a sort of automaton without his mind functioning."
- He must be so drunk that he could not be responsible for his actions.
- The accused appealed on the grounds that this was a misdirection.

RESULT
- Appeal was allowed, accused conviction quashed and retrial ordered.

Held:

1. It is not for the accused to prove incapacity affecting the intent. If there is material suggesting intoxication the jury should be directed to take into account and to determine whether it is weighty enough to leave them with a reasonable doubt about the accused's guilty intent.
2. Drunkenness is not a defence, but it can taken into consideration. It is the *fact of intent rather than capacity for intent.*
3. The onus of proof always lies on the Crown; no presumption that a man intends the natural and probably consequences of his action. The responsibility of deciding whether the inference of intention should be drawn lies upon the jury.
4. It is always open to the jury to conclude that the Crown has failed to discharge the onus of proof of intent.

APPELLANT'S THEORY

- The trial judge gave too high of a threshold to find that there was no intent.
- Didn't have to be that drunk.

RESPONDENT'S THEORY

- Appellant not that drunk.

ISSUE(S)

1. Can intoxication be used as a defence for murder in NZ?
2. Is there a presumption that a man intends the natural consequences of his acts?

JUDGE'S REASONING

McCarthy P:

ISSUE 1:

- The basis of intoxication law in England was in *DPP v Beard.* This was the statement from Lord Birkenhead LC.
    - "2. That the evidence from drunkenness which renders the accused incapable of forming the specific intent.. Should be taken into consideration with the other facts proved in order to determine whether or not he had this intent...
    - 3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary... does not rebut the presumption that a man intends the natural consequences of his acts."
    - I.e you have to be so drunk as to not form intent, if you cannot show that, then you are presumed to have intended the results of your actions.
    - Drunkenness can be taken into account to determine whether someone has formed the intent necessary to constitute the particular crime.
    - Talked about how the intent must be 'proved' - hard to tell from the passage if he meant the onus to be on the prosecution or the defendant.
    - "If the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent... and he cannot be convicted of murder."
- There have been developments of the law since *Beard* and there are some differences in the law as such.
    - McCarthy P does not think that Lord Birkenhead intended a distinction between the Crown's burden in those cases when the general intent involved in MR is necessary and in those when the statute provides a particular intent is necessary (i.e basic v simple intent????)
        - Lord Birkenhead stated that he did not think that what he said was confined to cases of specific intent.
        - So whether it be a general or specific intent the burden is the same, the Crown must prove the intent required by the crime alleged.
    - *Beard* was about rape and so it was not a definitive judgement on intoxication.
    - The word "incapable" [in regards to being able to form intent] should not be rigid level of intoxication that must be applied. The jury must still be allowed to decide how they want.

    - The use of the word "proved" should not be taken to place the final burden on the accused.
- *Broadhurst v The Queen:*
    - Not for accused to prove incapacity.
    - Jury has to look at all the evidence and see if it is "weighty enough to leave them with a reasonable doubt about the accused's guilty intent."
    - Holds that you don't have to be 'incapable' - perhaps too high of a requirement: the jury just has to come to a decision in light of all the evidence.
    - It is about whether the accused cannot have formed the intent, not about his capacity to form it.
    - Two ways to approach the law:
        - Always necessary for the Crown to prove that the accused had the itent; and that proof may emerge from evidence made by the accused or made inferred from the totality of the circumstances.
        - OR the approach taken in *Beard* where there must be proof (or at least suggestion) of some incapacity in order to rebut the presumption that a man intends the natural consequences of his actions.
- The court chose to apply a modified version of the second approach above.
- They stated that the decision of lord Devlin (above) and the law in *Beard* has to be taken with the context of the case *Woolmington.*
- It was decided that bc of *Woolmington,* it is up to the prosecution to prove all the elements required for an offence.
- Drunkenness is not a defence itself.
- When a jury is deciding whether an accused has the intention or recklessness they must regard all of the evidence, including evidence re drunkenness.
- It is the fact of intent rather than the capacity of intent.
- There is no exception in the Crowns general duty to prove the elements of a charge in regards to drunkenness.
    - This is the same as the view held in Australia: *R v Farrell, R v Gordon.*
    - And in Canada.
- Then discusses that some cases have used the same language as the trial judge re that the accused must be "so drunk he does not know what he's doing" (as per *A-G for Northern Ireland v Gallagher*, citing *Reg v Moore*).
- *Bratty v A-G for Northern Ireland:* it is not every voluntary act which leads to complete acquittal, has to be really drunk (obiter).
    - McCarthy P notes that in the above two cases what was being said was obiter. It is easy to find a case acquitted when the person was super drunk.
- But what about when someone is very drunk but still knows what they are doing?
    - The jury is entitled to find whatever they want, just about whether intent is formed.
- A judge should direct that the test is not about whether the person would have done the crime if they were not drunk - this is too much of a burden to place on the jury.
    - If there is no evidence of drunkenness, he should advise the jury not to take it into account.
- If drunkenness is raised by the evidence, the jury must be left free to decide whether intent has been established on all the evidence, including that of intoxication.
- *R v Sheenan:* UK CA took the same position as above.

ISSUE 2:

- The use of the word "presumption" has widely been condemned e.g in *R v Gordon* (Australia).
    - "This Court has disapproved on several occasions of the course of charging a jury in terms of a presumption of intention, pointing out that it conceals the true position."
- *R v Hyam:* approved *Hosegood v Hosegood:* there is no 'must' about someone intending the natural results of their actions.
- Don't think that the word presumption should be used.
- It is always open to the jury to find what they want.

RATIO DECIDENDI

ISSUE 1:

- Where there is evidence of intoxication, the jury is entitled to take it into account, along with all other circumstances of a case, to determine whether the prosecution has shown the existence of the mens rea element beyond reasonable doubt.

ISSUE 2:

- There is no legal presumption in NZ that a man intends all the natural consequences of his actions.

- Holds that where a person is under the influence their liability will turn upon whether the alcohol had the effect of preventing the formation of the MR required for the offence.

POLICIES

- Drunkenness not a defence but can be taken into account for specific intent crimes.
- The jury can find whatever it wants.
- The onus of proof still lies on the Crown to prove the MR.
- There is no legal presumption that someone intends the natural consequences of his actions.
- There is conflict between principle and policy:
    - Principle: a person should not be guilty of an offence requiring MR if they could not form the MR.
    - Policy: people who are drunk can be very harmful and dangerous.
- NZ has no distinction between specific and basic intent, if you form MR you can't be charged and that's it.

The UK Position:

- The distinction of specific and basic intent came from *DPP v Beard.*
- In *Majewski,* they approved a long line of authority that intoxication was a defence for crimes of specific but not basic intent.
- But most crimes come in doubles, there is usually a specific intent crime that can be taken down to a basic intent crime if need be.
- But once the courts tried to explain the difference, they couldn't really do it.
    - Difference between policy and principle.
- H.L did NOT overrule anything said in *Caldwell* about self-induced intoxication.

R v Heard:

- It is hard to distinguish between specific and basic intent.
- So instead they kind of categorised them.

INVOLUNTARY INTOXICATION

***Reg v Kingston* (CA)**

COURT AND DATE

English Court of Appeal
May 1993

Lord Taylor of Gosforth C.J, Pill and Sedley JJ.

FACTS

- A man with pedophilic homosexual tendencies was in a dispute with a businessman and woman.
- The couple hired a man named Mr Penn to blackmail the appellant by photographing and videoing him in a compromising situation with a young man.
- Mr. Penn lured a 15 year old into his apartment and then drugged him, so as to make him unconscious.
- He then invited Mr. Kingston in and invited him to abuse the boy, which he did.

- The prosecution's case is that Mr. Kingston was drugged and thus 'intoxicated' by Mr Penn. (The jury accepted this.)

RELIEF SOUGHT

- Appeal on both charge and sentence.

PRIOR PROCEEDINGS

- At trial, the appellant was convicted by a jury of indecent assault.
- The trial judge instructed the jury that they must take into account involuntary intoxication in regards to their findings.
    - If he was so affected by them that he did not intent to commit the assault, then they must acquit him.
    - However, if they found that despite the intoxication, the intent was still formed, he must be charged ('a drugged intent is till an intent').
- The trial judge also answered two questions from the defence counsel re the defence of involuntary intoxication.
    - If the jury find that Mr Kingston assaulted the boy bc of an intent induced by the influence of drugs that were secretly administered to him, is it open to them to find him not guilty?
        i. The judge answered NO.
    - If the jury find that at the time of the offence, Mr Kingston was intoxicated by drugs secretly administered to him, can they find that this intoxication may negative the mens rea?
        i. Essentially, is it open to them to find that an intent was not formed.
        ii. The judge answered YES.

RESULT

- Conviction overturned, appeal allowed.

HELD:

- If the sole reason for someone going from intending to commit a crime to actually committing it is the inhibition that the law required is caused by the act of a third party, the purposes of the CL were not upheld in holding that person guilty of an offence.
- If drink or drug administered secretly cause people to form an intent which he would not have otherwise formed, the law should exculpate him because his operative fault is not his.
- Involuntary intoxication is capable of negating the MR.
- The direction of the judge was incorrect.

PLAINTIFF'S THEORY

- No right at common law.

DEFENDANT'S THEORY

- There exists a common law defence of involuntary intoxication:
    - A person is entitled to be acquitted if, although their act was intentional, the intent arose out of circumstances that the defendant is not to blame for.
    - Principle found in *Hale's Pleas of the Crown:*
        - People who are temporarily intoxicated by actions of their enemies are given the same excuse as other conditions such as insanity or madness.
    - Appears in *Pearson's Case.*
        - "If a party be make drunk by stratagem or the fraud of another, he is not responsible."
- It works as a defence.

ISSUE(S)

- Is there a defence at common law of involuntary intoxication negativing a culpable MR?
- Can involuntary intoxication negative MR?

JUDGE'S REASONING

Lord Taylor:

- The Judge acknowledged the above evidence presented by the defendant. Then cites further authorities.
- American Model Penal Code - distinction between voluntary and involuntary intoxication noted.
- The Law Commission's consultation paper on Intoxication and Criminal Liability: "Involuntary intoxication is always taken into account in determining the existence of a subjective MR."
- Indecent assault is a crime of basic intent: *Reg v Court, Reg v Culyer.*
- *Smith and Hogan on Criminal Law:* intoxication is a defence to all crimes where the drink or drug was taken involuntarily.
    - *Reg v Majewski* doesn't apply,
    - It applies as a defence for both basic and specific intents as negating MR.
    - If there is intent, even if D wouldn't do it when not drunk, the defence can't apply. (although it will be a mitigating factor).
- Glanville Williams noted that in *Reg. v Majewski,* it was seen that in cases of involuntary intoxication, the intoxication could act as the defence.
    - LJ just thinks that this can only be implied.
- Looks at other legislation namely the Public Order Act, which allows a defence of involuntary intoxication.
- *Reg v Allen;* not a defence for people who thought that they were drinking something of a lower standard/drank but didn't intend to get blackout drunk.
    - Rejected the idea that you can't look into whether someone would've acted the same way if they were not drunk.

Then answer questions about when involuntary intoxication negatives MR:

- Answers this question on 'first principles'.
- The importance of ensuring that members of the community are safeguarded in their persons and property is upheld in *Reg. v Majewski.*
    - But the purpose of the criminal law is to inhibit anti-social acts.
- If the only reason why someone committed an illegal act is bc of an intention formed due to a 3rd person drugging them, the principles of the criminal system are upheld - why would we want to prosecute someone who is at no moral fault for the cause of their actions?
    - Uses the quote from *Pearce's Case.*
- The intent formed is not criminal intent: the mens rea is negatived.
- Analogy between this and the rationale underlying duress.
- Should apply to BOTH basic and specific intent.
- There must be evidence capable of giving rise to involuntary intoxication. BUT once there is evidential foundation for the defence, the burden is upon the Crown to prove that the relevant intent was formed and that it was criminal intent.

RATIO DECIDENDI

- Issue 1: Kinda unclear but judging by the fact that the judge only really cites evidence in favour of the defendant I'm going to go for yes he thinks there is.

- Issue 2: "If therefore drink or drug, surreptitiously administered, causes a person to lose his self control and for that reason to form an intent which he would not otherwise have formed, it is consistent with the principle that the law should exculpate him because the operative fault is not his. The law permits a finding that the intent formed was not a criminal intent or, in other words, that the involuntary intoxication negatives the mens rea."

POLICIES

- Yes involuntary intoxication is a defence for both specific and basic intent crimes.

- It does matter whether you would have done it while sober, bc if the only reason u formed the intent relevant to the AR was because you were involuntarily intoxicated, you have the right to be acquitted.
- Where there is evidence, the ultimate burden of proof lies on the prosecution to prove the MR.

Reg. v Kingston **(House of Lords)**

COURT AND DATE

House of Lords
July 1994

Lord Keith of Kinkel, Lord Goff of Chieveley, Lord Browne-Wilkinson, Lord Mustill and Lord Slynn of Hadley.

FACTS

- A man with pedophilic homosexual tendencies was in a dispute with a businessman and woman.
- The couple hired a man named Mr Penn to blackmail the appellant by photographing and videoing him in a compromising situation with a young man.
- Mr. Penn lured a 15 year old into his apartment and then drugged him, so as to make him unconscious.
- He then invited Mr. Kingston in and invited him to abuse the boy, which he did.
- The prosecution's case is that Mr. Kingston was drugged and thus 'intoxicated' by Mr Penn. (The jury accepted this.)

RELIEF SOUGHT

- Appeal by the Crown to have CA decision reversed and conviction reinstated.

PRIOR PROCEEDINGS

At trial:

- The trial judge instructed the jury that they must take into account involuntary intoxication in regards to their findings.
    - If he was so affected by them that he did not intent to commit the assault, then they must acquit him.
    - However, if they found that despite the intoxication, the intent was still formed, he must be charged ('a drugged intent is till an intent').
- The trial judge also answered two questions from the defence counsel re the defence of involuntary intoxication.
    - If the jury find that Mr Kingston assaulted the boy bc of an intent induced by the influence of drugs that were secretly administered to him, is it open to them to find him not guilty?
        i. The judge answered NO.
    - If the jury find that at the time of the offence, Mr Kingston was intoxicated by drugs secretly administered to him, can they find that this intoxication may negative the mens rea?
        i. Essentially, is it open to them to find that an intent was not formed.
        ii. The judge answered YES.

On appeal at the Court of Appeal:

- Court effectively answered YES to the questions above.
- If the sole reason for someone going from intending to commit a crime to actually committing it is the inhibition that the law required is caused by the act of a third party, the purposes of the CL were not upheld in holding that person guilty of an offence.
- If drink or drug administered secretly cause people to form an intent which he would not have otherwise formed, the law should exculpate him because his operative fault is not his.
- Involuntary intoxication is capable of negating the MR.
- The direction of the judge was incorrect.
- "If therefore drink or drug, surreptitiously administered, causes a person to lose his self control and for that reason to form an intent which he would not otherwise have formed, it is consistent

with the principle that the law should exculpate him because the operative fault is not his. The law permits a finding that the intent formed was not a criminal intent or, in other words, that the involuntary intoxication negatives the mens rea."

RESULT

- Appeal allowed, conviction reinstated.

HELD:

- The absence of moral fault on the part of the defendant does not suffice to negative MR.
- Where it was proved that the necessary intent was present, a defence of involuntary intoxication is not open to the defendant as a means of acquittal.

APPELLANT'S THEORY

- CA was wrong, again, no right to this defence at common law.

RESPONDENT'S THEORY

- There exists a common law defence of involuntary intoxication:
    - A person is entitled to be acquitted if, although their act was intentional, the intent arose out of circumstances that the defendant is not to blame for.
    - Principle found in *Hale's Pleas of the Crown:*
        - People who are temporarily intoxicated by actions of their enemies are given the same excuse as other conditions such as insanity or madness.
    - Appears in *Pearson's Case.*
        - "If a party be make drunk by stratagem or the fraud of another, he is not responsible."
- It works as a defence.

ISSUE(S)

1. Whether, if it is proved that the necessary intention was present when the necessary act was done by him, a defendant has open to him the defence of involuntary intoxication?
2. If so, on whom does the burden of proof lie?

JUDGE'S REASONING

- First, goes through the trial judgement. Says basically the same thing as the CA except:
    - Highlights that there was not that much evidence in regards to the actual state of the respondent.
    - Sees that the jury accepted that the respondent had involuntarily taken a drug and that whatever drug he did take had not had such an effect on his mind that he did not intend what he had done.
- Then goes through the CA judgement:
    - The judgement was not one that was well-received.
    - Sir John Smith and Professor Griew: Surprising, dangerous and contrary to principles.
    - Although there is an instinctive attraction in the CL not penalising people who acted due to some cause outside of their control, and sometimes just mitigating a sentence doesn't do such a situation justice.
- We are concerned with disinhibition:
    - In ordinary circumstances, the pedo tendencies would have been kept under control.
    - The drug brought about a temporary change in the mentality o the respondent which lowered his ability to resist temptation: didn't cause the weird desire but enabled it to be released.
- **Three grounds on which the respondent might be free of liability:**
    - **Immunity flows from general principles of the law.**
    - **Immunity is established through authority.**
    - **The court should create a new common law defence of involuntary intoxication.**
- The CA adopted the first approach: if there is no blame, MR is absence; equated moral blame with MR. ATH smith thinks its good they at least looked at the principles first.

- No such a principle exists.
- You can still gave an MR and NOT be morally to blame.
- There are some offences that aren't really morally reprehensible.
- The 'rea' part refers to that the mind was guilty, not that it was morally wrong.
    - i.e conspiracy: a secret agent could conspire to a crime with a criminal by intending to carry through with an illegal act, but they are not morally guilty: *Yip Chiu-Cheung v the Queen,* where it was argued that D could not have been a conspirator bc there was not another person with a guilty mind to conspire with.

Therefore the ground of the respondent's argument that the absence of moral fault is sufficient to negative mens rea is rejected.

- In relation to the evidence from *Pearson's Case* used by the CA: Sir John Smith said that although loss of self-control through the act of a third party is not a defence, it can be a mitigating factor.
    - Like arguing that a person can be held not liable from an impulse brought about by an inherent medical condition, which just does not make sense.
    - Does not believe that there are any grounds based in principle.

- Then deals with the argument that the defence is already recognised.
- Deals with *Pearson's Case:*
    - Not good authority.
    - It is obiter.
    - The law concerning MR and intoxication was at a wholly different place then.
    - It would be "perilous" to place a decision on this old dicta.
    - Although the judge in the case was good, there is literally no information on the case.
    - Sir John Smith said it would be unwise to place a decision on that case.
- Then deals with *Hale's Historia:*
    - The gist of the passage is that it gives someone some 'privileges' if their intoxication was caused by a surreptitious act by their enemies.
        - The ground for this is that if you cannot reason correctly you cannot be tried for capital offences, because they lacked understanding and were not acting as reasonable creatures.
    - Within context, *Hale* is actually in accordance with existing law.
    - But either way, legal concepts from the 17th century aren't really relevant now and so you can't rely too much on authority of this kind.

Then he considers the line of authority from *Reg. v Majewski:*

- Law re insanity relates to M'Naghten Rules.
- Otherwise, it is not an answer for the defendant to say that they would not have done what they did had they been sober.
- As said in *Reg. v Sheehan,* a drunken intent is nevertheless an intent.
- As proof of intent self-induced intoxication can be taken into account as part of the evidence in some cases but not in others: unclear if this is a distinction about specific and basic intent. (ie kind of discussing in *Caldwell* how it can only be used as a partial defence for specific intent crimes, but becomes a substantive matter at basic intent crimes).
    - Sometimes the evidence is excluded as a matter of policy.
        - E.g if the condition proceeds from D's voluntary choice.
- There were two different rationalisations adopted in *Majewski:*
    - The absence of the necessary consent is cured by treating the intentional drunkenness (or more accurately the intentional taking of drunk without regarding its possible effects) as a substitute for the mental element ordinarily required by the offence. Intent is transferred from the taking of the drink to the commission of the prohibited act.
        - Kind of like the whole thing about intending natural consequences/transferred MR.
    - D cannot be heard to rely on the absence f the mental element when it is absence bc of his own voluntary acts.
- When you adopt these rationales in regards to involuntary intoxication, they fall away:

1. If intoxication was not the result of an act done with an informed will then there is no intent which can be transferred in the first place.
2. There is nothing in the law stopping you from bringing up a medical condition that you did not bring upon yourself.

- SO the position reverts to what it would have been if *Majewski* was not decided, the offence is not made out If the defendant was so intoxicated that he could not form an intent.
    - Where intoxication is involuntary, *Majewski* does not subtract the absence of intent but there is nothing to suggest that it adds a further defence.

Then he looks at a bunch of Scottish cases:

- *R v H.M Advocate:* the effect of ingestion of some drugs was to deprive D of his self control to the extent that he was incapable of MR and that it should thus be up to the jury to decide if they should acquit him on that ground.
    - This case was bound and took the view of...
    - *H.M Advocate v Cunningham:* evidence about the defendant's mental state could not result in an acquittal.
- In *R,* the court treated the case of *Cunningham* as one where the accused committed acts with which he was charged whilst he was not conscious of them and that he was in a state of non-insane automatism.
    - i.e the fact that they didn't allow a defence even when the situation was so extreme shows how strict they are about non-voluntary intoxication.
    - But on the extreme basis said that medical evidence should be allowed to be taken into account and the conviction was quashed.
- The decision was further explained in *Cardle v Mulrainey.*
    - Lord Hope:
        - To allow such a novel defence could lead to public policy concerns. But this is not so justified in cases where the defence is based on an inability to form MR due to an unforeseeable external factor that D cannot control.
        - An accused should be acquitted if the jury are not satisfied that the Crown has proved mens rea. This is consistent with the principle that the onus rests on the Crown.
        - The requirements are that the external factor must not be self induced, that it must be one which the accused was not bound to foresee, and that it must have resulted in a total alienation of reason amounting to a complete absence of self-control, provides safeguards against abuse.
        - I.e being REALLY strict about the defence is the only way forward.
    - Lord Allanbridge:
        - If the drugs put you in the state where you cannot form intend, you cannot have the necessary MR to constitute a criminal offence. (Agrees with *Cunningham*).
        - "Accused will not have the necessary MR if his mind is so affected by a non-self induced and unforeseeable factor that the result is a total loss of control over his actions which have led to the alleged crime being committed."
    - Lord Weir:
        - Reinstates the limits set out by Lord Hope.
    - Lord Brand:
        - Ppl can be acquitted if MR is not proved.
- Then looks as *Cardle v Mulrainey:*
    - A sheriff acquitted someone bc, even though he was fully conscious of everything, he was high on meth and was 'unable to refrain from criminal actions.'
    - High Court allowed an appeal on this decision, remitting the case to the sherriff.
        - If you know what you are doing you can't be regarded as having total alienation allowing you the defence.
        - Inability to exert self control is different from the requirement of "total alienation of the accused's mental faculties of reasoning and of understanding what he is doing."

    - A mental stimulus resulting in a lack of self control can mitigate the offence but can't acquit.
    - What amounts to total alienation changes on the facts of each case, not every weakness or aberration of the mind will amount to insanity.
- Thus finds that the Scottish cases agree with everything he has said and that mere disinhibition is not sufficient to find a defence.

- Then looks to Australian cases (which don't really say anything).
- And to Canada (*Reg. v King*).
    - Consistent with the view that in the absence of intention the involuntary intoxication would take a case such as the present outside *Majewski* and enable the defendant to rely on the absence of the necessary mental element. But there is nothing in the decision to say that if the mental element is proved that the defendant can be acquitted bc he was involuntarily drugged.

- Then references the American Model Penal Code.
    - Which at face seems to support the respondent but actually sys you have to be so drunk that it would establish irresponsibility (had it resulted from mental disease).

The court cannot find any material which is sufficient grounds for holding that the defence already established by the common law.

Then analyses principles:
- Professor Griew: the fact that it is framed as a defence shows that there was an MR formed; "It is precisely because the defendant acted in the prohibited way with the intent (the MR) required by the definition of the offence that he needs this defence."
- Law Commission paper: voluntary intoxication raises questions about whether MR can be formed (in the subjective sense) i.e it is to do with D's primary guilt.
    - But the excuse of involuntary intoxication, if it exists, would be superimposed on the ordinary law of intent.
    - What this is saying is that involuntary intoxication adds another layer to the law by creating a defence instead of following established ideas (which can be done in voluntary intoxication).
- To recognise a new defence would be a bold step.
    - There are not often modern recognitions of defences.
    - But the criminal law shouldn't stand still: if it is practical and judicial decision is better than legislation, the courts should not be deterred.
- So has to consider what type of defence would be created:
    - It would apply to all offences (apart from maybe absolute)
    - Complete answer to a criminal charge. The underlying assumption must be that D is free from culpability.
    - The defence applies only where the intoxication is due to the wrongful act of another and therefore applies not excuse where D has intoxicated himself by mistake.
    - Burden of proof is on P
    - The defence is subjective. The more susceptible the defendant to the kind of temptation, the easier the defence is to prove.
- This is not good for a number of policy reasons:
    - Would have to reconcile the difference between an impulse that is formed from a combination of innate drives and external disinhibition with the rule that impulse of a solely internal origin does not excuse, even though it might be a the symptom of a disease.
    - This defence is really similar to a defence of diminished responsibility, but they act completely different ways. The resemblance is misleading and would need to be sorted.
    - There a serious practical problems: witnesses would have to give a picture of a D's personality, there would need to be pharmacologists, and psychologists etc.

- The defence wouldn't be that hard to use. You would just have to get witnesses to say that you wouldn't act that way if you weren't sober - the judge has only this to go off so would have to ell the jury to acquit you if you have any legitimate doubt.
- The defence would require adjustment of existing principles and may require those involved to learn new criminal techniques. Although not grounds to not create a defence, justice makes no demands here. The interplay between the wrong done and the effects of the drug, D himself etc. are best left up to the judge, where they can be taken into account re sentencing.
    i. BUT obv in cases where there is mandatory life sentences this could be a prob, but this is not a sufficient reason to create the defence.
- Mandatory sentences make juries be nice anyway, and have stimulated the creation of partial defences that don't really work themselves.
- The Law commission said that the field of intoxication law should be expanded to include involuntary intoxication but this would take some time. BUT it said that the common law is not a suitable vehicle for this - the defence has to be created by statute only.

Therefore the judge answered the first of the respondent's questions NO (like the trial judge) and the appeal is overturned.

RATIO DECIDENDI

- Where it was proved that the necessary intent was present, a defence of involuntary intoxication is not open to the defendant as a means of acquittal.
- Burden is on P to prove the MR element, and since there is no defence, there is no question of burden of proof.

POLICIES

- If there is intent, there is intent, regardless of involuntary intoxication.
- BUT if they find that no MR was formed, they are entitled to acquit.
- Quite harsh on intoxication law.

Law Commission Report: Intoxication and Criminal Liability

- If D commits the external element of an offence with the required fault then, subject to any defence, D is liable for that offence.
- Answers questions about:
    - If D's state of involuntary intoxication reduced D's inhibition to such an extent that, although D was acting voluntarily and with the required fault, he or she could not resist to commit the offence charged; or
    - D's state of involuntary intoxication blurred D's moral vision to the extent that, although D acted with the required fault, appreciated what he or she was doing and could have acted otherwise, D did not appreciate the true moral gravity of his or her behaviour.
- In *Kingston,* the HL rejected the argument that reduced inhibitions brought about by involuntary intoxication resulting from the secret acts of the third party could be a defence at common law.
    - Unless relevant to a defence, the moral status or quality of an act does not affect its criminality.
    - Moral culpability reflected in sentencing.
- Reasons Lord Mustill rejected creating the defence:
    - Would be inconsistent with the principle that an irresistible impulse having an internal origin (which D is equally not responsible for) provides no defence is D acted with the required fault.
    - As a general defence, D would be able to avoid all liability despite the seriousness of the offence.
    - The defence will give rise to significant forensic problems in that the jury would need to hear evidence of these susceptibility is an expert evidence would need to be called on the disinhibiting effect of drug or range of drugs.
    - The different to be easy to manufacture bit difficult to disapprove.

    - The voluntary nature of these intoxication may be taken into consideration by the court as a mitigating factor when sentencing anyway.
- It was recommended that the common law position should be retained and that there should be no defence of reducing inhibitions or blurred perception of morality where D's condition was caused by involuntary intoxication.
- If created this defence would be relied on by D only in cases where it has been proved to the criminal standard then D committing the external elements of the offence charged with the required fault.
- Reduced inhibitions online moral vision should only have the effect of simply reducing the degree of the blame that can be attached to D.
- Evidence of involuntary intoxication should operate in the same way as many other mitigating factors.
- Prof Sullivan: the law should take into account D's lack of blameworthiness in such cases when attributing criminal liability.
    - This was the justification of the CA decision.
    - The Law commission did not find any sufficient reason to elevate the mitigating factor of reduced inhibitions or blurred perception of morality caused by involuntary intoxication to the status of a new defence that will entirely negative D's criminal liability.
- Another court of appeal argument was that other mitigating factors already have the effect of completely excusing D's otherwise proven liability so in voluntary intoxication should also entitle an absolute acquittal e.g duress.
    - But there is a difference between this offence and duress, incl. how the defence would be applied.
    - Extremely difficult to justify this defence as excusing all criminal liability when provocation in the UK does not.
- Blurred moral vision or disinhibition does not amount to insanity.
- There are public policy reasons to reject such a defence.
- Such a defence would be too easy for D to manufacture and so many offences are committed under the influence of alcohol.
- The defence is one that the crown would have no means of rebutting and D would be entitled to an acquittal if it was reasonably possible that the defence was true.
- Reversing the burden of proof would make it more difficult for to succeed. However the ability for D to fabricate evidence would still be very easy and the law standard of proof would easily be met and the crowd still have difficulties rebutting the evidence. Probable defendants could escape liability on an unmeritorious defence.
- The defence will be entirely subjective there would be no reasonable length of the test it would be hard for the jury to determine whether personally acted the way they did if they were sober and it is questionable whether witnesses will be able to throw light on this issue.
- It would be relatively easy to day to demonstrate that the reduction in his or her inhibitions from the consumption of alcohol or some other drug is what caused anti-social conduct. Public Safety requires that the strength of D's disposition to engage in antisocial conduct should not make it easier for D to claim a complete excuse of any crime committed in consequence.
- Allowing the defence there would be little reason why the law should not recognise a general character based excusatory defence there any inherent condition of irresistible impulse forward state is equally not responsible.
    - Whilst you could argue that there should be a general defence of diminished responsibility this will require legal reform from Parliament.
- Involvement consultation should be regarded as a mitigating factor that should not be elevated to the status of the excuse that prevents the attachment of liability.
- The consideration all the circumstances is best considered by judge in sentencing.

CONTEMPORANEITY

Thabo Meli
COURT AND DATE

Privy Council
Jan 1954.

Lord Goddard CJ, Lord Reid and Mr LMD de Silva.

FACTS

- Four appellants convicted of murder.
- There was a preconceived plot of the four accused to bring the deceased man to a hut and then kill him there.
- They would then fake an accident.
- The deceased man was brought to the hut and at least partially intoxicated, then struck over the head (according to the plan).
- The man was unconscious but not dead. It was assumed that the defendants thought the man was dead.
- The accused took out the body and rolled it down a cliff to make it look like an accident. The final cause of death was exposure when he was left unconscious.

RELIEF SOUGHT

- Appeal conviction.

PRIOR PROCEEDINGS

- It is an appeal but there is no info on the original case.

RESULT

- Appeal dismissed.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)

Appeal on two points:

- whether the conclusions of fact by the judge were warranted and;
- whether the accused are entitled to have the verdict quashed.

JUDGE'S REASONING

- Lord Reid
- It was alleged that there were two acts:
    - The attack in the hut and the placing of the body outside afterwards.
- These were alleged to be separate acts.
- MR was present at the first act, but whilst that was not the cause of death. But the second act was not accompanied by MR.
- Since the second act is what caused the death, the accused did not have the necessary MR for murder and thus are not guilty.
- The MR required for murder is intention to kill, therefore there could be no intention to kill when the accused thought the deceased was already dead.
- But they thought that since this was a preconceived plan, they should not divide up the series of acts. Therefore, the MR was still present throughout the act.

RATIO DECIDENDI

- Where there is a pre-concieved plan, if MR was present at the start of the plan, it carries through till the plan's completion as the acts of the plan cannot be separated.

POLICIES

- The above ratio and asserts the principle of MR.

R v Ramsay

COURT AND DATE

Court of Appeal Wellington
1967

Turner J, McCarthy J, TA Gresson J.

FACTS

- Accused of murder pursuant to s 167 a), b) or d) of the Crimes Act 1961.
- On NYE, D was driving his car and saw V. She got into the car and he drove off to his farm.
- V's body was found 22 days later on the appellant (D's) farm, it was subjected to considerable violence.
- There was a heavy blow of the skull that would have made her unconscious but would not have caused death.
- In her mouth, there was a clump of newspaper that would have blocked her air passage. The cause of death was deemed to be the asphyxia. The asphyxia was caused by the gag that was likely inserted after V became unconscious or by choking occurring due to a deep unconscious state.
- D claimed that he had been bribed by V's father to kill her but this was not true. It wasn't until trial that he admitted what really happened.
- What actually happened is that they were talking about stuff until she made a touchy comment. D became angry and he tried to hit V with a beer bottle. He struck the top of the door and part of the bottle hit V.
- He offered to take her back to town but them stopped part of the way. She tried to get out and he 'karate chop[ped]' her under the nose bit instead hit her throat.
- She became unconscious. D panicked.
- Be opened the boot of the car, put her in and stuffed the news paper gag in her mouth and locked her in the boot. D claimed she was still breathing at this time and he didn't realise the gag could stop her breathing.
- He drove to a friends place and had a yarn.
- When he got home, he realised she was dead so he put her in the pit lol.

RELIEF SOUGHT

- Retrial due to misdirection of the jury.

PRIOR PROCEEDINGS

- Trial judge instructed the jury that they could not split up the series of acts into separate ones, had to apply *Thabo Meli.*

RESULT

- Appeal allowed.

HELD:

1. The case cited by the judge (*Thabo Meli*) in his direction to the jury had no application to the instant case and was seriously likely to mislead the jury in its approach to the facts.
2. In every case involving paras b) or d) of s 167 of the Crimes Act whether there is a series of interconnected acts or not the knowledge to be ascertained is always the knowledge at the time when the act causing death was committed. **The MR proscribed by the statute must exist at that point in time.**
3. The jury should have been directed to identify the cause of death and should have been told to determine whether the act was performed with one of the states of mind required by paras b) or d).

Thabo Meli distinguished.

RESPONDENT'S THEORY

- The appellant killed V intentionally (pursuant to s 167 a)) so that she wouldn't tell his wife about what he had done.
- OR that the crime came under b) which states that D causes the person bodily injury that they know to cause death and are reckless to whether death ensues or not.
- OR again alternatively under d) which states that an offender for any unlawful object does any act that he knows to be likely to cause death and thereby kills any person, though he may have desired that his object should be effected without hurting anyone.
- Even if judge directed the jury wrong, there was always an MR present.

APPELLANT'S THEORY

- Maintained that the offence was not murder because:
    - It was not shown that the appellant meant to cause the death so a) did not apply.
    - It was not shown that he meant to cause bodily injury that was known to cause death therefore b) did not apply.
    - It was not shown at the time of committing the act which caused the death that the act was likely to cause death therefore d) did not apply.
- Application of *Thabo Meli* wrong:
    - Bc it was pivotal to the heart of the defence that it was at the very least reasonably possible that the girl died from asphyxia caused by that act and that the Crown had not established its reliance on paras b) and d) that at that point the appellant knew he was likely to cause death.
- Their whole case was based on a lack of knowledge intentionally.

ISSUE(S)

- Was there a misdirection of the trial judge in applying *Thabo Meli* and instructing the jury that they could not separate the series of acts and analyse whether there was the presence of the required MR at the time of the actual act/event that caused the death?

JUDGE'S REASONING

McCarthy P:

- Analyses that judges direction to the jury that they should regard the conduct as an indivisible series of acts dominated by one state of mind, and that they were not obliged to determine the intention or knowledge of the appellant in relation to any particular act which might be thought to have finally caused death.
    - Kind of difficult to answer whether it was incorrect.
    - The judge in the trial case took an approach similar to one of constructive liability.
- Thought that the reading to the jury of the headnote of *Thabo Meli* was unfortunate.
    - Then directed the jury that they can find D guilty if he had the intent even though he did not know that the gag would kill V.
    - Also talked about how D can be guilty even though he had no knowledge as long as the insertion of the gag and the death was a natural result of D's actions, this is the application of the presumption that D intends the natural consequences of his actions, this presumption was later overturned and removed from NZ common law by *Kamipelli.*
    - Jury were never told that the should look at the gagging as anything else than part of a series of interconnected acts.
- The judge accepted that where there is a preconceived plan to kill, and the specific facts of the case do not allow the course of action to be broken up into separate acts*, Thabo Meli* can apply and a crime is not necessarily reduced from murder to a lesser crime merely because the accused is under some misapprehension for a time concerning a particular result which one of the acts in the series might have.

    - The case was also specifically about intention and not knowledge (as there has to be here under s 167 b) and d)).
- BUT bc there was no plan here, *Thabo* Meli cannot apply, this creates a fundamental distinction in the two cases and means that the judges direction would have seriously misled the jury.
- ALSO even though the ratio of the case could apply, it would only apply to deliberate acts to kill under ss a). But not where P has not proved that the element of knowledge required by b) or d) was present
    - I.e more appropriate for direct intention crimes or where the Crown has firmly established the presence of knowledge.
- The offender under b) and d) "at the time of the causing of the bodily injury;... Must know then whether it was likely to cause death and he must be then reckless to that result,"
- While it might sometimes be helpful to look at a course of actions as a series of acts in order to ascertain a dominating intention, in situations where knowledge of consequences of a particular act is required, this is not as helpful.
- Doubts whether looking at a series of acts as that in order to find out knowledge will ever be helpful.
- **One must look at the individual act to ascertain whether the required knowledge was there (though not in isolation).**
- **When looking at s 167 b) and d) of the Crimes Act, whether there is a series of interconnected acts or not, the knowledge to be ascertained is always the knowledge at the time when the act causing death was committed. The mens rea prescribed by the statute must exist at that point in time.**
- The judge erred in telling the jury that the cannot divide the acts and that if it followed that the insertion of the gag was a natural result of the acts of D, the jury can find him culpable. This does not exist in law lol.
- The jury should have been directed to identify the act that caused the death and should have been told to determine whether that act was performed with one of the states of mind required by paras b) or d).
    - Doesn't even talk about a) bc P could not prove direct intention.
- These are subjective tests but they should be applied in the background of all the proved circumstances.
- Therefore there needs to be a retrial.

RATIO DECIDENDI

- One must look at the individual act to ascertain whether the required knowledge was there (though not in isolation).
- When looking at s 167 b) and d) of the Crimes Act, whether there is a series of interconnected acts or not, the knowledge to be ascertained is always the knowledge at the time when the act causing death was committed. The mens rea prescribed by the statute must exist at that point in time.

POLICIES

- Relevant MR and knowledge must be present at the time of the act that caused the death.

NEGLIGENCE

R v Yogasakaran

COURT AND DATE

Court of Appeal Wellington
1989
Cooke P, Richardson, Casey, Bisson and Hardie Boys JJ.

FACTS

- After a surgical operation, the patient was still under general anesthetic, an emergency arose as the patient was biting on the tube in her mouth and was having difficulty breathing.
- The accused who was an anesthetist, quickly decided to inject her with a drug called Dopram, which was the proper method of treatment.
- He instead accidentally injected a vial of Dopamine, which was entirely unsuitable for the purpose.
- It was given in such an amount which was an overdose and the patient died in consequence.
- The doctor held that he went off the label of the drawer, not on the packet.
- Charged with manslaughter under ss 155, 160 (2) (b) and 171 of the Crimes Act.
- S 155 provides that "everyone who undertakes (except in case of necessity) to administer surgical or medical treatment... is under a legal duty to have and to use reasonable knowledge, skill and care in doing any such act, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty."

RELIEF SOUGHT

- Overturn the sentence.

PRIOR PROCEEDINGS

- Trial judge instructed the jury that to establish a breach of duty of care under s 155 P must show an omission by the doctor to exercise such care as was reasonable in all the circumstances. The jury found the accused guilty.
- Convicted but discharged without sentence.

RESULT

- Appeal dismissed.

1. The direction given by the trial judge was in accordance with the Court's earlier decision and with the actual language of the Crimes Act. In the interests of the liberty of the subject or to avoid injustice, the CA probably should be ready to reconsider its own previous decisions. However, in this case, the grounds for departing from earlier decisions were not strong enough to justify the alteration of a rule which was an interpretation of the Act that was clearly open and has been adopted unequivocally. **The Court reaffirmed that although required to prove ordinary, causative negligence beyond reasonable doubt, the crown was NOT required to prove a high degree of negligence or gross or culpable negligence in order to warrant a finding of manslaughter pursuant to s 155 of the Crimes Act.**
2. The jury were entitled to find that, even in the kind of emergency that arose, the practice of reasonable skilled and careful anesthetists would be to make a quick check of the labelling. It could therefore not be said that the jury's verdict was unreasonable.
3. The words "except in case of emergency" are intended to cover the case of people that are not qualified medically and was not intended to emancipate a professional medical practitioner from liability.

RESPONDENT'S THEORY

APPELLANT'S THEORY

- Principle ground of appeal was that the trial judge should have directed the jury that what was required was a high degree of negligence (gross negligence) in line with the common law of England and the codified law as interpreted in Australia and Canada, rather than follow the law as settled in NZ so far.
- Dopamine in England (which is where D practiced) looked like Dopram here.
- Someone refilled the drawer wrong.

ISSUE(S)

- Must negligence in practice shown to be gross negligence beyond reasonable doubt?

JUDGE'S REASONING

Cooke P:

- Direction of trial judge accords with the language of the act as well as with *R v Dave* and *R v Storey.*
- *R v Storey:* the law around negligence in manslaughter has been considered settled in NZ; no more than ordinary negligence is required to be proved.
- In *Storey:* the test under both sections (s 155 and s 156) is reasonableness:
    - Myers CJ - "This term cannot be defined, but the standard must be set in each particular case by the jury applying their common-sense... it should be a 'reasonable' standard, the standard of skill and care which would be obsereved by a reasonable man... a mere mistake or error of judgement which should in a civil case prevent an act or omission from being imputed as negligence is an equally good defence on a criminal charge involving negligence".
- Accused argued that *Storey* should not be followed and the judge should have directed the jury that a high degree of negligence was required.
    - This is the standard needed in Australia, the UK and Canada.
    - The forerunner of the The Crimes Act (which was basically the same as what we have now) was supposed to mimic the *Stephen* code, at that time a case called *R v Spencer* outlined that P must show such gross negligence that would amount to an evil mind.
- But the counsel for P showed that there was also evidence at the time that normal negligence would suffice for manslaughter. Thus the net weight of evidence cancels out.
- Highly doubts that the law commission wanted "reasonable care" to be just not being grossly negligent.
- In the end of the provisions the Crimes Act should be given their natural and ordinary meaning in their context unless that produced some result so incongruous that parliament cannot have intended it.
- England has developed different standards of criminal and civil negligence. *Akerele v R:* needed to show gross negligence in terms of charging a medical professional with negligence.
    - Distinction adopted in statute law in Canada.
- Even if NZ law is so far inconsistent with everywhere else, we are bound by it and we have to stop and pause before we depart from it.
- Since the coming into force of ACC negligence causing personal injury by accident has ceased to be actionable in Civil Law in NZ.
- The other jurisdictions have their own issues in applying the distinction, especially in England since *Caldwell* fucked up the meaning of recklessness. At least in NZ the law is straightforward.
- Although the NZ position seems harsh, it is mitigated by the fact that the Crown has to prove causative negligence beyond reasonable doubt. Juries don't come to the decision of negligence causing manslaughter easily and there is wide judicial discretion in regards to the penalty.
- There has been no unjust case so far.
- If a charge were brought against a medical practitioner there is usually the direction that a doctor is not negligence if he acts in accordance with a practice accepted at the time as proper by responsible body of medical opinion, even though other doctors may adopt a different practice: *Maynard v West Midlands Regional Health Authority* [1985].
- The court should be more willing to depart from previous judgements when it is in the criminal field, but there is not enough reason to here, and so *Storey* was reaffirmed.

Second Ground:

- Accused submitted that there is no identifiable need for medical persons to be held liable for every omissions.
    - This is not the position anyway, a failure to exercise reasonable care must be shown.
- A doctor is under a duty of care like a person operating dangerous machinery.
- The exception in the statute is intended to cover laypeople.
- Accused wanted jury to be instructed that negligence only occurs if someone who was just as professional acted the same. This is dumb bc the trial judge told the jury to look as to if it was reasonable in that given circumstance.
- The jury would not have misunderstood their role.

The reasonableness of the jury's verdict:

- Not unreasonable.
- The jury found that even in that kind of emergency you can look at a packet - that is what expert witnesses said as well. The accused did not claim that he did not make any check.

RATIO DECIDENDI

- The Court reaffirmed that although required to prove ordinary, causative negligence beyond reasonable doubt, the crown was NOT required to prove a high degree of negligence or gross or culpable negligence in order to warrant a finding of manslaughter pursuant to s 155 of the Crimes Act.

POLICIES

- Criminal negligence is the same as civil negligence.

HOW DOES THE COURT CONTINUE TO JUSTIFY FOLLOWING STOREY?:

- Other jurisdictions have their own problems.
- The reasons to depart from it aren't enough here.
- At leas the NZ position is established.
- Judges can remedy injustices through sentencing etc.
- Don't want to be of injustice to the victim.

WAS THE SENTENCE APPROPRIATE:

- Yes

More negligence notes

- There has traditionally been reluctance to impose liability for negligence.
    - E.g in *Elliot,* the judges did not want to charge the girl but they felt they had to.
- Over the past few years we have become more prepared to out-rightly punish those who are negligence (e.g in strict liability).
- Objective liability means that people can be punished just because they are negligent or simply because they cannot raise doubts as to whether they have been.
    - OR there is absolute liability.
- Often parliament prohibits conduct but then says nothing about the MR. This can be read by the courts to be strict liability, absolute liability or a true crime offence requiring an MR.
- There are less serious offences where negligence is the norm.
    - It is often up to D to prove that there has been no such negligence.
- This was the development in *Strawbridge.*

- In the UK, mostly gross negligence will be the only thing that suffices. This is a gross deviation from the standard of care that a reasonable person would observe.
- The judicial statement of this is Lord Hewart CJ in *Bateman:*
    - *The facts must be such that in the opinion of the jury the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment.*
    - This can have issues:
        - *In the opinion of the jury:* gives quite a large role to the jury in regards to criminal liability.
        - *Such disregard... as to amount to a crime...:* The jury get to see if it's a crime:
            - Such a flexible standard.
            - Could be circular, you might use the argument to prove itself.
            - It can mean the jury will apply the law how they want.
- In NZ, we usually just used the standard of ordinary negligence (i.e in the tortious sense).

- We abandoned this view on the recommendations of Geoffrey palmer and in that it had some issues of application.

Clarkson and Keating Materials:

- Negligent: fails to exercise care, skill and foresight as a reasonable man in his situation would exercise.
- In extreme cases of death, parliament has been willing to depart from its regular stance and impose liability where there is an extreme lack of care.
  - Shows that there are degrees of negligence.
  - Only culpable where it becomes gross negligence.
- Negligence has recently sometimes been employed by serious offences e.g in rape - someone will be charged unless they reasonably believed that other person was consenting, this imposes a negligence standard.
- What if the person we want to impose liability on is not a reasonable man?
  - Whether a belief is reasonable must be looked at having regards to all circumstances.
  - INCLUDING taking someone's capacities into account.
  - Hart: those who we punish must have the normal capacities for doing what the law requires and a fair opportunity to exercise their capacities.
    - There is not always the reason to make this protest for someone who didn't think however.
- Negligence is a failure to foresee. ATH thinks there are degrees of this.
- If we want to have inflexible notions of negligence, and accused may sometimes be charged even though they could have not helped their situation.
- *Milton* and *Bannister:* sometimes you have to impose a blanket objective test in order to prevent ridiculousness within the law.

Is negligence permissible given the purposes of criminal punishment?:
Deterrence:

- Anglo-american theory of punishment.
- It is utilitarian.
- Theory that if you do X you will get Y.
- You are allowed to punish X to prevent Y from behaving in the same way.
- Treats humans as a means to an end.
- BUT a person won't be deterred if a person does not think that what they are doing is criminal - therefore deterrence does not justify using negligence as a basis of criminal liability.

Retribution:

- Germanic way
- Not so keen on this here.
- An everyday error in judgement doesn't necessarily mean you should go to prison.

Rehabilitation:

- People who are negligent aren't really in need of rehabilitation.

Incapacitation:

- No need to isolate people who have made a basic mistake.

E.g the case of *Lamb:*

- Two friends playing with a revolver. One of them who didn't know how it worked pointed the gun at the friend, pulled the trigger and shot him.
- D didn't know how the gun worked but know it was loaded.
- He was found negligent as there was a "total disregard of an obvious and serious risk."

- There are deep tensions between the criminal law and objective liability.

CROSSOVER BETWEEN NEGLIGENCE AND STRICT LIABILITY:
Strawbridge is an example of this:

- The court could have said that it was just negligence, but borrowed the jurisprudence and said that it was strict liability. A defence of absence of fault is a defence of no negligence (this is the link).
    - Decided both on no fault and that there was a mistake of fact.
    - If she was negligent to the mistake of fact she could have been liable.
- *Strawbridge* has been altered only very slightly in *Wood* where the requirement for a reasonable burden was taken out.

Difference between negligence and strict liability:

- In Strict liability you are charged regardless of fault, but you have the defence available to you.

Significance of *Strawbridge:*

- First NZ case that ameliorated the harshness of the use of strict liability.
    - Arguably puts pressure on people to think about what they are doing.
    - ATH does not think this is reason enough to punish people.

STRICT LIABILITY

Civil Aviation Department v MacKenzie

COURT AND DATE

Court of Appeal Wellington
Jun 1983
Davison CJ, Cooke, Richardson and McMullin JJ.

FACTS

- D was lying his plane quite low. The tail fin of the aircraft caught two telephone wires and dragged them along the ground before they fell off the tail.
- Two men on the river ran for cover.
- D was unaware of the collision.
- Charged under s 24 of the Civil Aviation Act 1964, of operating an aircraft in such a manner as to be the cause of unnecessary danger to persons and property.

RELIEF SOUGHT

PRIOR PROCEEDINGS

- The trial judge dismissed the charge holding that the aircraft had been operated without any fault.
    - Appellant appreciated that suspended wires posed a hazard, that he flew at an unnecessarily low height and that he caused unnecessary danger to the two men on the river but that the wires were difficult to see and the telephone posts previously on the riverbed had been removed.
    - Held that the defence of absence of fault under s 24(1) could apply to a pilot.
    - He thought that this had been satisfied by D on balance.
- On appeal at the HC, the judge held that the defence provided for in s 24 (2) was not available to a pilot, but that MR was an element of the offence.
    - Rejected the submission for the appellant that the absence of actual fault expressly provided for in s 24(1) was also available to the pilot.
    - But he adopted the reasoning of *Sweet v Parsley* and *Police v Creedon* that there was a mental element in the offence created by 24 (1). The element was fault on the part of the pilot causing unnecessary danger to persons or property.
        - No question of fault would arise unless D could point to evidence raising a reasonable doubt whether or not there was an absence of fault, if he was able to do that, then the jury would have to decide on all the evidence whether it was satisfied beyond reasonable doubt that there was some relevant fault on his part.

- This is an objective test of fault, Casey J thought that the district court judge probably applied a subjective one.

RESULT

- Appeal allowed.

Held:

1. S24(1) was a regulatory provision dealing with public safety. MR was an element of an offence under s24(1) and total absence of fault was a defence to the charge.
2. (McMullin J Dissenting): The burden of establishing absence of fault as a defence to a charge in respect of a public welfare regulatory offence should rest on the defendant (on the balance of probabilities).
3. Because there was no evidence of fault and the event was 2.5 years ago the appeal was allowed.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)

- What is the mental element (or MR) of the offence created by s 24(1) of the Civil Aviation Act?

JUDGE'S REASONING

Richardson J:

- Have to look at first principles: penal presumption as outlined in *Sweet v Parsley,* where there are two equally capable interpretations of a statute the one in favour of the defendant should be favoured. This includes when you interpret an act to be of absolute or strict liability.
- Once a court is satisfied that the provision is not one of absolute liability, the problem arises as to what form of qualification on absolute liability should be taken.
- A criminal provision will be presumed to have an MR unless the court infers an intention for the statute to be absolute.
    - You have to determine (after looking at the scheme and purpose of the statutory provision) what factor in addition to the external manifestation of conduct falling within the provision must be present in order to warrant attribution of criminal liability.
- S 24(1) falls within the principle of *Sweet v Parsley* and that the liability of the pilot is not absolute.
- The section is directed at those causing unnecessary danger. Parliament probably didn't want pilots to be guilty no matter how careful their conduct.
- The section is aimed at public safety.
- It is a serious rather than minor offence, long sentence or a high fine.
- Shouldn't read in intention, knowledge or recklessness. The emphasis of the section is on the act not the actor. Liability arises where the plane is operated in a certain way not whether a pilot operates the aircraft in a certain manner.
- Exculpation by absence of fault makes more sense than exculpation based on a state of mind.
- The defence given to the owner shows that a qualification on absolute liability for the pilot should also be based on fault considerations.
- So it is not an absolute liability provision and that exculpation should be grounded on absence of fault. Total absence of fault is a defence to the charge.

Who has the burden of proof?

- Traditionally the position of *R v Ewart* was held where D bore the onus of proof for strict liability offences.
- But in *Strawbridge* the court modified that approach in light of *Woolmington:* If there is some evidence that the accused honestly believed on reasonable grounds that his act was innocent then he is entitled to be acquitted.
    - 'On reasonable grounds' are the terms that negligence turns on.

    - There was a burden on the defence to point to something which could raise the issue but the ultimate burden of negating the defence is on the prosecution.
    - So there is evidentiary burden on the defence to adduce or point to evidence fit to raise the issue but the ultimate burden of negativing the defence in such a case is on the prosecution.
    - *Police v Creedon* adopted this bc of precedent, but said that it would perhaps be better suited to truly criminal offences.
- Then there is the case of *R v City of Sault Ste Marie* (Canada).
    - Sharp distinction between true crimes and public welfare crimes.
    - In public welfare offences there is a shift of emphasis from the prosecution of individual interest to the protection of public and social interests, the principle that punishment should in general not be inflicted upon those without fault applies except where the legislation has made it clear that it is an absolute liability offence.
    - Where the no fault defence applies, the burden of p roof should fall upon the defendant as he is the only one who will generally have the means of proof and it is not improper to expect him to come forward with the evidence in due diligence.
        - Three categories of offence in *R v Ewart*:
            - Those with MR which must be proved by P.
            - Those offences where the doing of the AR imports the offence leaving it open to the accused to avoid liability by proving he took reasonable care.
            - Absolute offences.
        - This does not conflict with *Woolmington.*
- It was made plain that what was said in the *Strawbridge* and *Creedon* judgements should not be regarded as settling the question.
- Said that we should follow *Sault Ste Marie*
    - Burden of proof resting on P is not whittled away in public welfare offences where due diligence is offered as a defence more and more bc absolute liability is too high.
    - The defendant knows better what they did therefore it is not unreasonable to prove no fault.
- It is an objective test of a high standard of care that is what a reasonable man would have done.
- There is a distinction between truly criminal and public welfare offences. So we are not whittling *down Woolmington.*
    - The burden of proof on D to show absence of fault does not apply where the main subject of inquiry is D's mental state.
    - The prosecution bears the burden of proving the mental element in the offence: a no fault defence allows the defendant the opportunity of exonerating himself by proving that he exercised all reasonable care. Where, as in *Strawbridge*, the presumption of mens rea operates the defendant is only required to point to some evidence which raises the issue and the ultimate burden of proof then rests on the prosecution. It should also perhaps be emphasised that where negligence is an express ingredient of an offence the onus of proof will rest on the prosecution in the ordinary way as it does in respect of other elements in the offence.

RATIO DECIDENDI

- In the case of public welfare regulatory offences a defence of total absence of fault is available unless clearly excluded in terms of the legislation and the onus of proving such a defence to the balance of probabilities standard rests on the defendant.

POLICIES

- There is an MR element in strict liability offences it is just that it will be assumed unless D can prove the defence of absence of fault.
- This does not apply for true crime offences where the burden is still on the prosecution.
- Looked at a number of factors when looking as to whether something is absolute or not:
    - The purpose of the statute - is it a public safety provision?
    - Has parliament outlined absolute liability?

- It is a serious rather than a minor offence.
    - Absence of fault in conduct is exculpatory but not necessarily absence of MR.

Millar v Ministry of Transport

COURT AND DATE

Court of Appeal Wellington
October 1986.

Cooke P, Richardson, McMullin, Somers and Casey JJ.

FACTS

- D was caught driving whilst disqualified.
- He claimed that he had an honest belief that the disqualification period had ended.

RELIEF SOUGHT

- Acquittal.

PRIOR PROCEEDINGS

- Convicted at trial as Millar had made no inquiries to confirm if he was still disqualified, and therefore he had not shown reasonable grounds for his belief.
    - Willy DCJ found that there was an honest belief but not a reasonable belief.
    - Looked at *Auckland City Council v King* which equated willful blindness with knowledge.
- Appealed to high court but was dismissed, granted leave of appeal to the CA on questions of law as to the mental element in the offence of driving whilst disqualified.
    - High Court judge found that no honest belief could be held. This is contrary to the DC decision unless we want to see willful blindness as being the same as guilty knowledge.

RESULT

- Appeal allowed, acquittal entered.

HELD:

- Driving whilst disqualified is an offence requiring mens rea.
- Millar's knowledge of the disqualification would be assumed in the absence of evidence suggesting otherwise.
- He would need to point to some evidence, but would not have to satisfy the court that he had reasonable grounds for his belief.
- The evidentiary and persuasive onus of proving guilty knowledge rested with the prosecution.
    - Bc this is the MR element of knowledge that must be proved, this decision is not inconsistent with MacKenzie, which notes that intention, knowledge and recklessness are different from a fault MR requirement (which is based in negligence).

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)

- Does driving whilst disqualified have a MR requirement.

JUDGE'S REASONING

Cooke P:

- Looking at how serious the penalties of an offence are can indicate whether there is a MR requirement. Usually, the higher penalty offences are those in which it can be assumed that parliament intended the existence of a mens rea element. *Gammon (Hong Kong) Ltd v A-G of Hong Kong.*
- In England, driving whilst disqualified is seen as a absolute liability offence.

    - This was seen to be the case in the NZ cases of *Dryden v Johnson* and *Lang v McDonald*.
- But in *Auckland City Council v King,* driving whilst disqualified became a *Strawbridge* type offence, meaning that D could avoid the imposition of liability if there was an honest and reasonable belief that he was disqualified (unless the jury believed that this was not the case beyond reasonable doubt).
- In aussie the opinion is divided as to whether it is absolute or simply strict liability.
- In *R v Prue* (Canada) it was taken that the inclusion of an offence into a criminal code must be taken to import a requirement of MR, in the sense of guilty knowledge, unless there were some clear indication to the contrary.
    - Minority judgement based on *Sault Ste Marie* that mistake of fact, if proved by the accused, would be a defence.
    - The judge of *Sault Ste Marie* did not even agree with this.
- Therefore, the cases on driving whilst disqualified are a wee bit confused.
- Although draftsmen tend not to say that something is absolute liability, there may be sufficiently clear indications that this is intended e.g by shifting onus of proof.
- Where the test and scheme of a statute provide no real help as to what kind of liability parliament intended, there are at least the following choices open to the court:
    - Simple MR: the offence requires MR which is knowledge of disqualification.
    - In the absence of any evidence to the contrary, it may be assumed that MR, in the sense of guilty knowledge, existed; but if there is any evidence to the contrary the onus falls on the prosecution to prove such knowledge affirmatively.
    - The *Strawbridge* and *Sweet v Parsley* approach: in addition to evidence, the accused has to have had an honest belief in facts which would make his act lawful, some evidence or basis for thinking that it was on reasonable grounds: in which event the onus falls on the prosecution to disprove honest belief on reasonable grounds.
    - Honest and reasonable mistake make a defence, which the burden of proof lays on the balance of probabilities with the defendant.
    - Similar to 4 but D has the burden of showing on the balance of probabilities that he and all those for whom he is responsible acted honestly and with all due diligence. This is the total absence of fault and is not confined to mistakes. These are mostly under the "convenient label" of a public welfare regulatory offence.
    - A lesser burden falling on D to show on the balance of probabilities simply that he did not do the act knowing of its wrongfulness. In other words a defence of honesty ignorance.
        a. But ignorance is no defence to the law in NZ?
    - Absolute liability.
- In Australia, some people view absolute liability and the responsibilities it imposes serves no purpose not served equally well by negligence anyway.
- In NZ there has been a few decisions favouring absolute responsibility in regards to indecent publications.
- Nevertheless in NZ the inclination now is to restrict rather than expand its scope. The compromise solution in *Civil Aviation Authority v MacKenzie* was seen as a way of softening the rigours of this doctrine, in the interests of fairness to the defendants, without unduly handicapping prosecutions brought to protect the interests of the public.
- Judge then shits on draftsmen for always making it hard for judges to determine fault requirements, even where there is express MR, there are issues with interpretation which are hard enough.
- Courts also haven't been consistent and have not been able to come up with easily applied guidelines for knowing how and when to displace a fault requirement e.g the test for absolute liability in *Gammon* which can be complicated to apply and leaves next to no room for MR requirements.
- Counsel for the ministry contended that the offence was one under class 5, or alternatively, class 7.
- Counsel for the appellant submitted class 2.

- A distinction between class 1 and class 2 seems so narrow as to not be worth preserving. Class 2 may be *called* Strawbridge without reasonable grounds. But once that complication is dropped it can be seens as one where guilty knowledge is an ingredient of the offence.
    - E.g as seen in the redefinition of rape *in Morgan*. And this is seen in *Woolmington* where it was seen that if a reasonable doubt remained aas to whether the killing was provoked the prosecution had not proved the malicious intention, or in other words the MR, required as an ingredient of murder.
- Seen in this way absence of guilty knowledge is similar to the defences of provocation, automatism etc.
    - There must be some evidence or material to raise the issue. In the absence of a foundation for a contrary view the offence will be inferred to have been committed unprovoked, knowingly, not in self-defence etc.
    - If there is a foundation, the judge's duty to direct the jury accordingly or to consider it himself when he is the tribunal of fact; and the prosecution will fail if reasonable doubt remains.
- Acknowledges *Sweet v Parlsey*, have to give the interpretation that best serves D.
- If applying this principle, categories 3, 4, 5 and 6 become harder to justify.
- Class 3 (*Strawbridge)* might be seen as a troublesome anomaly.
    - You would have to read in a subjective and objective MR formula.
    - The legislature should do this expressly.
- The best kind of justice can be achieved by class 5 and the defence of a total absence of fault.
- As a general approach to statutory offences when the words give no clear indication of legislative intent and there is no overriding judicial history, it will be right to begin by asking whether there is anything "weighty enough" to displace the ordinary rule that a guilty mind is an essential ingredient of criminal liability. If there is, you must then look at statutory purpose and the interests of justice to determine if they are best served by allowing a defence of total absence of fault, with the onus on the defendant.
    - This does not apply if there is clear legislative intent of one interpretation over another.
- There are groups of statutory provisions aimed at regulating the carrying on of various activities where parliament has not imposed absolute liability but it would be inappropriate to read in an MR requirement.
    - The object of this type of provision is best served by imposing liability prima facie if the defendant are shown to have committed the unlawful act, while allowing exculpation if there is proved to be a total absence fault.
    - This arises in instances in the *Mackenzie* type of case where the provision is directed at conduct having a tendency to endanger the public.
- The willful blindness rule, when applied corrected should be a major safeguard against spurious claims of lack of knowledge for driving whilst disqualified.
- Because the offence was created to make sure of court compliance, there is insufficient reason for declining to apply a MR - in this case knowledge.
- His knowledge of the disqualification is naturally to be assumed in the absence of evidence suggesting otherwise. If there is such evidence, the prosecution must prove knowledge beyond reasonable doubt.
- Affirmation that normally there is no criminal offence without a guilty mind.
- If the case is not covered by the above principle that is bc the provision relates to public safety and the proving of MR is not required as part of the prosecutions case. Two alternatives to this:
    - Acceptance that the defendant can escape liability by proving total absence of fault; second, absolute liability.
- Doesn't want to disturb already established principles.

RATIO DECIDENDI

- Driving whilst disqualified is a crime requiring guilty knowledge, this will be assumed unless evidence in the contrary can be provided, upon which it will be up to the prosecution to disprove beyond reasonable doubt.

POLICIES

- If there are weighty enough reasons to displace a MR requirement, one can apply the decision in *MacKenzie* and apply an absence of fault defence for public safety provisions, with the burden of proof resting on the defendant on the balance of probabilities.

- *Morgan* re rape no longer applies in NZ bc of changes made to the Crimes Act.

Stevenson v R

COURT AND DATE

Court of Appeal
2012,

Arnold, Harrison, Wild JJ.

FACTS

- S pleaded not guilty on two charges of attempting to enter into an arrangement with a person under the age of 18 years to provide commercial sexual cervices.
- BB was using an account on a website on a Sex Search web page under her own username, she was 14.
- Mr Stevenson then proceeded to email him and offer money in exchange for sexual services.
- BB said she was 66.
- Contact ceased for a while between them.
- Police tracked down D's number.
- The police then sent D a suggestive email from BB's address.
- D agreed to meet. He was then arrested at the meeting venue.

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT

- Appeal in relation to the offence not being one of strict liability dismissed.

HELD:

- S 22(1) of the Prostitution Reform Act 2003 is a strict liability offence.

APPELLANT'S THEORY

- On appeal he argued that the offence was not one of strict liability, so that in addition to the factual elements the Crown must also prove a guilty mind or intent as an element of the charge.

RESPONDENT'S THEORY

ISSUE(S)

- Is the offence charged on of strict liability?

JUDGE'S REASONING

- *Gammon (Hong Kong) Ltd v A-G (Hong Kong):* the presumption of an MR can only be displaced by clear or necessary implication if the statute creating the offence is assumed at an issue f social concern or public safety. Even then it must be shown that the imposition of strict liability will be effective to promote the statutory objectives by encouraging greater vigilance to prevent the commission of the prohibited act.
- This was applied in *Millar:* needed something really weighty enough to displace MR requirement. Then you have to ask if the statutory purpose would be best served by reading the offence as one of strict liability.

- Looking at the act, taken together ss 134, 134A and 149A reflect a clear statutory intention preceding the enactment of the Prostitution Reform Act. to create offences of strict liability where the offending involves sexual conduct with a person under 18 years of age.
- The provision creating absolute liability in the Reform Bill was taken out by the Justice and Electoral Committee. The present clauses of ss 20-23 of the Prostitution Reform Act were substituted. This is consistent with the legislature's rejection of absolute liability.
- S 22 is expressed in "unconditionally prohibitive terms." There is no requirement of knowledge and many other similar provisions do not require proof of a mental element.
- S 22 when looked at in context of the provision, stautory history and purpose and framework of the Prostitution Reform Act reflects a clear legislative intent to displace the presumption in favour of requiring proof of MR. This is a provision related to public safety.
    - The penalty is also high so can't be absolute.

RATIO DECIDENDI
- Strict liability has to be justified.
- S 22 is a strict liability provision where a defence of absence of fault rests on the D to prove on the balance of probabilities.

POLICIES

DEFENCES

Self-Defence
COURT AND DATE
R v Wang [1990] 2 NZLR 529 (CA)

CA - Bisson J.

FACTS
- D indicted for the murder of her husband. Charged w manslaughter, and sentenced to 5 years of imprisonment, applied for leave to appeal on charge and sentence.
- D and her husband had a party one night and D's husband got really drunk. He told her to call her sister in HK and ask for money.
- During the telephone calls the husband took over and started blackmailing the sister, threatening to kill D and her other sister.
- He then returned to bed and fell asleep, by which time D had decided to kill him.
- Tied bathrobe ties around him and attempted to strangle him with a cord.
- She stabbed him several times and then put a pillow over his face.
- Said to her friend that it was ok because if he didn't die their "whole family would be finished."
- Dr Ding said she was suffering from severe depression and had increased in intensity before the killing.
- Prob due to a gall-bladder infection, shit husband or postpartum.
    - This would have made her less able to deal with stress and would have believed that the husband would actually kill her.
    - Would have believed in that moment that all she could do was kill her husband.

RELIEF SOUGHT
- Conviction and sentence overturned.

PRIOR PROCEEDINGS
- Trial judge cited the principles of ***R v Kerr:*** there is was decided that the evidence did not disclose a sufficient basis for the jury to consider the question of self-defence.
    - Richmond J: no onus on the accused to establish defence but most point to evidence, judge must look at the facts as is most favourable to the accused.

    - 'not every facile mouthing of some easy phrases of excuse that can amount to an explanation'
    - If there is some evidence that could show self-defence this should be left with the jury - not enough for the judge just to think that it might be improbable.
- *R v Tavete:* the defence should be put to the jury where, from the evidence led by the Crown or from the accused, or a combination of both "there is a credible or plausible narrative which may lead the jury to entertain a reasonable possibility of self-defence."
- A reasonable person in her circumstances would have alternative options available to them.
- No immediate danger,
    - Imminence of fact and degree not a question of law.
- Pre-emptive strike may be self-defence.
- But no jury would consider this to be.

RESULT
- Appeal overturned for both conviction and sentence.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY
- Judge erred in not putting self-defence to the jury at trial.
- Can use it for a pre-emptive strike.
- What force is reasonable is always for the jury never the judge to determine.
- Open to the jury to think that D believed that the injury could happen at any time.
- Refers to *State v Stewart* in the USA:
    - D shot her husband while she was sleeping.
    - Got self-D at trial but then overturned on appeal - needed imminent threat.
    - But dissenting Judge said that this was the only moment she could actually do it.

ISSUE(S)
- Can self-D be used when D murdered her husband whilst he was sleeping, following violent threats made towards her and her family?

JUDGE'S REASONING
- Clear from *Kerr* and *Tavete* that it is for the judge to decide if there is evidence that is fit to put to the jury.
- Self defence should be put to the jury unless it is "impossible for the jury to entertain a reasonable doubt that the accused had acted in the defence of himself or another within the terms of s 48."
- 2 limbs of s 48 involving subjective view involving the belief of the accused of the circumstances and 1 limb involving the objective view of reasonableness of force.
- Trial judge no doubt would have seen that there was evidence of D or her family being under threat of harm.
- Psychiatric evidence showed that she would have believed that her husband would carry through with it.
    - And the only thing she would think to do would be kill the husband.
- Not reasonable for her to kill her husband when there were other options available to her (3rd way to read Wang).
- Entirely agreed with trial judge.
- No ordinary reasonable person would like that it was necessary to kill the husband when he was asleep. Therefore the defence is not open.
    - 2nd way to read wang: no imminent harm.
    - 1st way: unreasonable belief of harm.
- Re preemptive strike - used *R v Terewi:*
    - Glanville Williams argues that you should be able to use the defence where there is imminent danger.

    - But a threat which does not involve present danger can usually be answered by some other method.
- *R v Ranger:* Cooke P - affirms above.
- In this context, "force" also includes threat to use power.
- Reasonable force depends on the imminence and the seriousness of the threat and the opportunity to seek protection without using force.
    - If there are alternatives, pre-emptive strike may not be necessary.
    - *Beckford v R:* man about to be shot does not have to wait for the first one to act.
- What force is reasonable is always for the jury never the judge to determine.
    - Doesn't accept this. Judge must tell on the law if it should even go to the jury/is possible of giving rise to the defence.
    - Affirmed by *Kerr* and *Tavete*
- *R v Grice:* accused must point to evidence to suggest the defence.
- No correlation between the facts here and that of *Subramaniam* which concerned that D can think that the attack will come at any time:
    - Husband was not armed.
    - No imminent danger - couldn't have occurred at any moment.
- No jury would find that it is reasonable for her to have killed her husband at this time.
- In dealing with *State v Stewart,* cites other American case *Norman's* case:
    - The USA doesn't allow capital punishment so why would they let someone kill their sleeping husband.
- In *R v Whynot (Stafford)* the trial judge allowed self defence to go to the jury but was overturned in the Nova Scotia Supreme Court
    - Can't apply force to an imaginary assault.
- All codes have their origin in 'necessity' legal justification for repelling force with force.
    - Where there has not been an assault but a threatened assault, that there must be immediacy of life-threatening violence to justify killing in self-defence or defence of another.
    - *Terewi:* threat without present danger can normally be answered in such a way to avoid future danger.
- There must be a plausible narrative for the jury to entertain the defence in the case of a pre-emptive strike.
- There was no immediate threat to kill, this was not self-defence but lose of self-control.
- Therefore the trial decision was upheld.

Re sentencing:

- The depressive episode and social isolation would have also effected her husband.
- The judge did take their shit marriage and her depression into account.
- The nature of the killing means this is a relatively light sentence anyway.

RATIO DECIDENDI

- The danger must be immediate or imminent so as to render no other alternatives of avoiding future danger.
- The defence can only be put to the jury where it would not be impossible for the jury to entertain reasonable doubt that the defence is present.

POLICIES

- Immediate or imminent threat only.
- Cannot be used if there are alternative options.
- Ultimately up to the judge to decide if the facts would be able to entertain the defence so as to then put it to the jury.

Fairburn v R

COURT AND DATE

Fairburn v R [2010] NZCA 44

FACTS

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)

JUDGE'S REASONING

- NZ law recognises a justification of self-defence.
    - A person who is attacked may defend him or herself (or another) and may be legally justified in repelled force with force.
- Defence involved three elements:
    - Whether the force used was in self-defence
    - Whether in the particular circumstances the accused belief that to be so
    - Whether the force used was reasonable in the circumstances as the accused believed them to be.
- It is for the Crown to prove that the defence does not exist beyond reasonable doubt.
- Justification of self-D can be raised in almost any situation, this poses the question of when (if ever) it can be withheld from the jury.
- *R v Wang:* self-D should be put to the jury unless it would be impossible for the jury to entertain a reasonable doubt that the accused had acted in the defence of [herself] or another within the terms of s 48.
- Lord Diplock: reasonable is not a point of law for the judge. *A-G for Northern Ireland.*
    - Court may want to revisit this.
- In Canada, an "air of reality" test is applied to every element.
    - Truly fanciful propositions (on each element) will not be advanced to a jury - Court has a preliminary screening function.
- What if the accused's belief is unreasonable.
- In NZ, an unreasonable belief that force was necessary may still support a defence provided that the belief is honestly held.
    - There must be an honest belief in the requisite danger.
    - Even an insane delusion might require the defence to be put to the jury.

RATIO DECIDENDI

POLICIES

McNaughton v R

COURT AND DATE

McNaughton v R [2013] NZCA 657; (2013) 26 CRNZ 775.

FACTS

- Accused shot a member of an opposing group during pre-organised fight.

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

- Partial defence of excessive self-defence by substituting a verdict of manslaughter for murder where D intended to act in self defence but in doing so used more force than is reasonable.
- We should recognise the partial defence because it exists at common law which parliament has preserved. (under s 20 which states that any defence at common law still remains so long as it is not inconsistent with other sections of the act).
- Relies on *R v Hutchinson:*
    - The law is always speaking.
    - Common law defences which would have been recognised in 1961 by s 20 should not be regarded as frozen in time.
    - They may be developed following other jurisdictions provided they are not inconsistent with the act or any other enactment.

ISSUE(S)

JUDGE'S REASONING

NZ:

- Simister and Brookbanks are of the opinion that the partial defence of excessive self-defence is not available in NZ.
    - Law is conflicting but D will be liable for using excessive force (as per s 62 of the Crimes Act)
    - *R v Godbaz:* using excessive force to repel assault was not protected by self-defence and itself constituted an assault.
    - So s 62 in cases where there is excessive force resulting in death then D will be liable for murder.
- *Daken v R*
    - Other jurisdictions can have excessive self-D mitigate criminal responsibility but these authorities do not apply in NZ.
- Law Com wanted to include stuff about battered D's, the report resolved not to endorse the defence's introduction in NZ instead proposing a sentencing discretion for murder.

Australia:

- *R v McKay* - Victorian Supreme Court
    - Excessive self-D reduced murder to manslaughter.
    - *R v Howe* confirmed the partial defence.
    - Privy council rejected it in *Palmer v R.*
    - *Viro v R* majority in the High Court followed *Howe* and not *Palmer.*
    - *Zecevic v R* the existence of the partial defence was rejected.
- The partial defence of excessive self-D is no longer part of the common law of Australia, to the extent that it is not enshrined in statute in some states.

England:

- No partial defence.

Canada:

- Not part of the law - *R v Faid.*

USA:

- Wayne LaFave: imperfect self-defence: not innocent of crime but not guilty of murder.

- Recognised in Irish Supreme Court.
- Little statutory support.

Conclusion:
- In dealing with *Hutchinson:*
    - Does not stand for the creation of a new defence which was not present in 1961.
    - Section 48 is a self-contained definition of the defence of justification.
    - Glossing it would be inconsistent with its scope and meaning.
- *Wallace v Abbot* - Elias CJ: there is no partial defence, but if the jury rejects both self-D and the specific intent required for murder then it may properly convict of manslaughter.
- Law Commission chose not to endorse the introduction of a partial defence.
    - Raises issues of importance re criminal jurisprudence.
- *Clegg:* change of the type proposed is a matter for parliament.

RATIO DECIDENDI
- Partial defence of excessive use of self-D does not exist in NZ.

POLICIES

COMPULSION

R v Raroa
COURT AND DATE
NZCA - 1987

Bisson J

FACTS
- D (Mr Raroa) was charged with 4 offences under s 176 of the Crimes Act
    - Helping Williams and Pope to conceal the bodies of Wilson and Hartley in assisting them to avoid arrest (1 separate charge for each V with William and Pope).
- One additional offence under s 228(2) for entering a boat called *Buda* (in using it to discard V's bodies).
- Pope and Williams went to Raroa's house with two other men, who had apparently narked on them for stealing four pigs.
- Had an argument, left the house.
- When Mr Raroa returned home, his wife told him about the incident and that they had left to shoot the other two men.
- When Pope and Williams returned, they were not with the other men.
- They warned the accused that if anyone narked on what had happened, they would end up the same way.
- At that point Raroa did not believe they were dead and had not been asked to do anything.
- Upon returning from a concert, D's wife told him that Williams called and said he wanted D's help with the two boys, to take them onto the *Buda* and dump them overboard.
- So D went.
- Pope and Williams had a gun which they kept loaded between them in the car, or one of them always was in possession of.
- The three men put Wilson's body in the van. The murderers put the other body in the van.
- Then the accused helped Pope put the bodies in the *Buda* and concealed it. He then helped them throw the bodies overboard.

RELIEF SOUGHT
- Appeal against conviction and sentence.

PRIOR PROCEEDINGS

TRIAL DECISION:

- The judge viewed it as a continuing expedition when the accused left home in the van and went along. He knew of their purpose, he knew of the shotgun, and he knew the men did not return with the victims. Even if he didn't believe it at first he should've been satisfied once the men came back.
- Therefore all of the elements of all four charges were borne out beyond reasonable doubt.
- Judge referred to *R v Teichelman* [1981]: "strict requirements" for the defence.
- Judge then set out the requirements of the statute:
    1. The threat must be of death or GBH
    2. The threat must be to kill or inflict that harm immediately if the demand is not met so that there is no opportunity of seeking help or protection.
    3. The person making the threats must be present whilst the offence is committed so that his ability to carry out the threat is apparent and there is no chance of escape.
    4. Must believe that the threat will be carried our immediately.
- Then summed up *Teichelman.*
    - "Belief in the inevitability of immediate and violent retribution for failure on his part to comply with the threatening demand which provides the justification for exculpation from criminal responsibility."
- "Fear is not enough" to be excused under compulsion.
    - Made no protest, argument or excuse.
    - Not under any imminent threat if he did not do what was asked. Not a standover situation.

RESULT

- Appeal dismissed.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

TRIAL:

- The words "so that there was no opportunity of seeking help or protection" was too much.
    - Dealt with in *R v Hudson,* referred to by Lord Morris of Borth-y-gest.
        - Two girls gave false evidence, claiming a person that threatened them was sitting in the courtroom.
        - The CA said that the defence should go to the jury, but said: "It is always up to the Crown to prove that the accused failed to avail himself of some opportunity which was reasonably open to render the threat ineffective, and on this being established the threat in question can no longer be relied on by the defence."
- Even tho there was no express threat re helping them dispose the bodies, the threat existed and Mr Raroa believed there to be one.

ISSUE(S)

- Can compulsion be put to the jury when, in absence of any express threat relating to a particular demand, the accused was fearful of an implied threat if he failed to help dispose of 2 bodies?

JUDGE'S REASONING

- In regards to the words "so that there was no opportunity of seeking help or protection": similar to *M'Growthers Case* (1746) to establish a clear duress the defendant must have resisted or fled from the wrongdoer if that were possible.
    - Same in Prof. Rollin Perkins' *Criminal Law.*
- Position in the CA is that of *Teichelman:*
    - Compulsion is for 'standover situations'. "Must be evidence of continuing threat... made by a person present while the offence is being committed and so is in a position to carry out the threat or have it carried out then and there."
        - 2 basic elements: proximity and immediacy (or maybe imminence?).

- "Continuing threat" and opportunity to seek help and protection is a question of fact in each case relevant to the belief of the accused at the time he claims to have acted under compulsion.
    - Justification cannot be on "antecedent threats" (*A-G v Wheelan*)
- These words are not to be taken as requirements of the defence but things to be taken into account when determining the belief of the accused.
    - *Lynch v DPP of Northern Ireland* - Lord Wilberforce: "whether the appellant had taken every opportunity to escape from the situation of duress."
- Addition of the words by the judge did not amount to a misdirection.

- NOT an objective test; the belief that the threat will occur does not have to be reasonable and does not have to be one that a reasonable person with reasonable firmness of character would be expected to resist.
    - Different for duress: Objective test should be applied *(R v Howe* [1987] House of Lords).
- Although objective test is not open in the wording of s 24, the reasonableness of the can come into play re the credibility of the belief held by the accused.

- When the murderers threatened Raroa, he was not asked to assist with the disposal of the bodies and the words to not relate to this.
- No threat was made if he failed to give assistance.
- The threat need not be in words for the purposes of s 24.
- But it must be a particular kind of threat associated with a particular demand.
- There is no support for D to have believed that there existed an implied threat that he would be shot if he did not help.
    - Never said "they made me do it."
    - Talked about how he helped but never mentioned that he had be coerced into it.
- Accepting Mr Bedo's point that there was an imminent threat would mean bringing non-existent threats into the scope of s 24.
    - *R v Frickleton* [1984]: Mere apprehension is not enough to provide a defence.
- Fear is not enough without the absence of a particular threat.
    - Similar in Duress (*Lynch v DPP for Northern Ireland*)
- So the appeal is dismissed.
- Appeal for sentence also refused - pretty fair considering 2 people are dead.

RATIO DECIDENDI

- Although a belief does not have to be reasonable, there must exist some kind of threat of imminent danger from someone who is present when the offence occurs, so that they have the ability to immediately carry out the retribution.

POLICIES

- Fear is not enough.
- Ultimately up to the Crown whether they want to put compulsion up to the jury.

Wikita

Wikita [1993] 2 NZLR 424.

Court of Appeal

FACTS

- 5 counts of ill-treatment, neglect and death of a child.
- Wikita was the mother and was in a relationship with the co-D called Smith.
- They burnt the child in hot-water and then neglected medical treatment.
- She was convicted on all 5 counts, but was convicted of manslaughter and not murder on the fourth count.

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT
- Appeal dismissed.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY
- They submitted the defence of duress, which existed separately from compulsion, arising from the threats made against her by Smith.

On appeal:
- The trial judge declined to leave the defence of compulsion for the jury to decide.

ISSUE(S)
Is compulsion available as a defence where the threatener, after posing threats associating with a particular demand to the accused, would leave for periods of time?

JUDGE'S REASONING
- After discussing the availability of the common law defence of duress where persons are charged as parties to offences for which the defence of compulsion is excluded, the court went on to consider whether the trial judge was correct to rule that the presence requirement under s 24 rendered the defence available to wikita.

Decided:
- Trial judge; looking at the nature of the threats made, s 24 ceased to become available when there was an omission or failure at a time when Smith was not present, presence at the time of the offence is an essential requirement.
- There were times when he was not present, during this time, the ground of exemption was lost when she had the opportunity to get help.

RATIO DECIDENDI
- If the threatener is not present, and a reasonable method of help is attainable, D loses the ability to use the defence of compulsion under s 24.

POLICIES
- S 24 is usually strict in the presence requirement, especially when there are prolonged periods of absence from the threatener.

R v Neho
COURT AND DATE
R v Neho [2013] NZAR 646; [2009] NZCA 299.

CA
Randerson J

FACTS
- Convicted on 2 counts of falsifying a document and 8 counts of dishonestly using a document.
    - Dishonest use of two separate credit cards.
- Trial judge ruled there was insufficient evidence to put compulsion to the jury.
- Appeals on the grounds that there was enough evidence to put the defence to the jury.

- D borrowed money over a period of time from women who were partners or wives of the Porirua chapter of the Mongrel Mob.

    - She associated with a Mongrel Mob.
- She was required by the members of the Mongrel Mob to carry out the offending in order to repay her debt.
- Mongrel Mob threatened to harm her or her children if she did not steal the goods.
    - "kick the living daylights out of her"
    - Hurt or sexually assault her two daughters.
    - Afraid to go to the police.
- Prospective gang member would always go with her, they would be inside or waiting outside to do something if the goods were not stolen.
    - She believed that this would happen straight away.
- The shop assistant who saw D steal the goods the last time said that she didn't see anyone outside.

RELIEF SOUGHT
- The appeal to be overturned.

PRIOR PROCEEDINGS

RESULT
- Appeal dismissed

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)
- Whether D could use the defence of duress.

JUDGE'S REASONING
- Compulsion codifies the defence of duress which may apply where criminal offending is carried out under threat of death or GBH by other person.
- The position of NZ is in *Teichelman:* Richardson J set up some precise limits and identified the elements of the defence:
    1. Must be a threat to kill or cause GBH
    2. Kill or GBH immediately following refusal to commit the offence.
    3. Person making the threat must be present during the commission of the offence.
    4. Accused must commit the offence in the belief that otherwise the threat will be carried out immediately.
    - "Belief in the inevitability of immediate and violent retribution for failure on his part to comply with the threatening demand which provides the justification for exculpation."
    - 'Standover situations' - accused fears instant death if he does not do what is told.
    - Before the matter can go to the jury there must be evidence of a continuing threat of immediate death or GBH made by a person who is present while the offence is being committed and so is in a position to carry out the threat.
    - Not entitled to have the defence put before the jury unless there was evidential foundation for the defence (*Salaca v The Queen*)
- D must have no other realistic choice than to break the law.
- "If there is a reasonably available opportunity for the offender to see help, or protection, or to escape, the defence will not ordinarily be available."
    - *R v Raroa*
- *A-G v Wheelan:* if there was a reasonable opportunity for the will to reassert itself, no justification can be found in antecedent threats.
    - Not absolute rule but should be taken into account.
- This case raises issues about the immediacy of the threat or presence of the people making the threat.
    - Whether the appellant had any choice but to offend.

Held:

- Evidence falls short of what is required to present compulsion to the jury.
- No evidence that the person or persons making or continuing the threats of harm to the appellant of her children was or were present when the offence was committed.
- Not enough detail in the evidence.
    - Does not establish people making the threats were sufficiently proximate.
- Linked to this is immediacy - assault unlikely to occur in the store or in the carpark.
    - No evidence they were with the kids or that she would be taken to another place.
- Appellants offending occurred over a period of time.
    - Her idea to repay the debt this way.
    - Since she stole willingly, the defence is not available anyway.
    - She had options.

RATIO DECIDENDI

- Where no immediacy or presence can be established there is "insufficient evidence to go to the jury of a continuing threat of immediate death or GBH made by a person present while the offence was being committed and who was in a position to carry out the threat or have it carried out 'then or there'".

POLICIES

- Cannot rely on antecedent threats.
- Cannot do it out of own will.
- Proximity and immediacy.

Akelue v R

COURT AND DATE

Akelue v R [2013] NZSC 88; (2013) 36 CRNZ 417.

NZSC - William Young J

FACTS

- Faces charges of importing and conspiring to supply methamphetamine.
- Drugs bought into NZ by a courier and intercepted at Auckland Airport.
- She was taken to a hotel to be held.
- D met her there.
- D knew that she had important drugs and that he approached her in order to obtain the drugs which were them passed on to another person.
- Maintains he was coerced into the offending by a cousin living in Nigeria and known as Zuby.
- Zuby threatened to kidnap and kill members of his family in Nigeria.
- His wife refers to phone calls from Zuby on the night of D's arrest. Others confirm the kidnapping of the uncle previously.

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT

- Appeal dismissed, s 24 doesn't cover these facts.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)

- Can s 24 be applied as a defence where D was facing threats from someone who was in another country but had access to D's family?

JUDGE'S REASONING

- Compulsion has always been effected by policy considerations.
- Proportionality between that harm threatened and the harm caused.
- D should show firmness of character and seek assistance or do anything possible.
- The defence must address:
    - Proportionality
    - The level of coerciveness (including absence of practical alternative to compliance).
- What offences should be excluded is a policy question.
- The operation of s 24 depends on the criteria of the immediacy (of the harm that is threatened) and the presence (of the person making the threats). Satisfaction of this will be indicative of coercive circumstances leaving nothing but compliance.
- But under things that may not meet immediacy and presence can be coercive.
    - Another approach would be to treat the rationale as the rule, so that the defence was available if there was a high level of coercion and no practical alternative to compliance.
        - But there is a greater risk of arbitrary outcomes if more things are put to the courts.
- Presence and immediacy not part o f duress.
    - Depends on D not having had a reasonably practicable way of avoiding compliance with the threat.
        - But this test is objective and not subjective like s 24 so somewhat more restrictive.
- Other features were described by Lord Bingham in *Hasan:*
    - D will usually be morally innocent.
    - Allowing compulsion may allow criminal to set up systems of immunity for crimes committed by their associates.
    - It is for the crown to disprove the defence.
    - Coercion falling short of compulsion comes in re mitigation of sentence.
    - Lord Bingham wants to tighten the conditions to be met before duress may be successfully relied on.

- S 24 as applied in NZ is very much in accordance with its terms.
- Harms do not explicitly be directed towards D only.
- But they must have an immediate character and derive from someone who is present at the time of the offence.
- Doesn't encompass these facts:
    - *Ruzic:* to allow would mean "amount to construing presence as absence and immediate as sometime later."
- The legislative purpose is that if there is time to seek assistance, the defence is not necessary.
- No inconsistency w NZBORA.

RATIO DECIDENDI

- S 24 is applied rigidly and the person making the threat must be present at the time of the offence.

POLICIES

- Constructive presence is very strict.
- No evidence that this threat would be able to occur immediately, so defence couldn't go to jury.

NECESSITY/DURESS OF CIRCUMSTANCES

Kapi v MOT

COURT AND DATE

Kapi v MOT - CA

Gault J

FACTS

- Charged with failing to stop after an accident.
- He had a few beers then drove home and hit an empty parked car.
- Kept going because he was scared that people would beat him up
- Because it's Porirua and he thought Samoans would beat him up (there were no Samoans there).

RELIEF SOUGHT

- Acquittal.

PRIOR PROCEEDINGS

District Court:

- Required evidence of an immediate threat of death or serious bodily injury.
    - "No reasonable basis for the defendant to be so apprehensive for his safety."

High Court:

- Honest belief in danger is all that matters - this is sufficient to warrant acquittal if a person honestly of that belief reasonably would have acted in the circumstances as D acted.
    - Met with an argument of proportionality.
    - Asked for judicial notice of violent life in Porirua.
- HC accepted there was a defence of necessity as protected by s 20.
- The defence requires:
    - "really extraordinary emergency
    - Honest belief
    - Ordinary common sense and prudence test.
- "honest belief is firmly limited to reasonable grounds before the honest belief itself can be accepted"
- Judge held that there were no reasonable grounds on which the defence could be made.
    - Invitation of judicial notice was rejected.

RESULT

- Appeal dismissed.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

A. That a defence of necessity/duress of circumstances is available in NZ by virtue of s 20.
B. That an honest belief in danger is enough to trigger the defence.
C. The other response elements of the defence are also satisfied in this case.

- Relies on Lord Lane CJ in *R v Graham:* desirability of maintaining a consistent approach to defences. Consistent with other defences e.g duress and provocation is necessity was available where there is an honest belief of imminent peril subjectively determined and resulting in conduct in breach of the law that is reasonable for a person with that belief to take.
- *R v Thomas:* subjective belief can make a defence - no floodgates argument because there are subjective safeguards in the determination of honesty of a claimed belief and the objective test of reasonable response to the belief.

ISSUE(S)

- Does the defence of duress of circumstance exist in NZ?
- Can it apply in the present case?

JUDGE'S REASONING

- *R v Woolnough* (NZ): Richmond P referred to the defence as existing by virtue of s 20.
- The defence exists at least in the UK.
- *R v Martin* (UK):

- English law does recognise the defence in extreme circumstances.
- Most commonly it is duress (i.e compulsion).
- But can arise from other objective dangers threatening the accused or others. - Duress of Circumstances.
- Defence is only available if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.
- The issue should be left to the jury to determine the following questions:
  - Was D impelled to act as they did because of what they reasonably believed to be the situation they had good cause to fear that otherwise death or serious personal injury would result.
  - Would a sober person or reasonable firmness, sharing the characteristics of the accused have responded to that situation by acting as the accused acted?
- Yes to both q's means acquittal.

- *R v Conway:* Woolf LJ
  - Duress is an example of necessity.
  - Works the same as compulsion - distinction is that the threats come from a person.
  - Defence of circumstances is available only if from an objective standpoint the defendant can be said to be acting in order to avoid a threat of death or serious injury.
  - *R v Howe:*
    - Must limit duress any an objective criteria in the terms of reasonableness.
    - The law requires D to have the self-control reasonably to be expected of the ordinary citizen in the situation.
    - Must be a reasonable mistake.
    - Approved the same 2 questions above in martin.
  - *Conway* rejected that the defence is based in subjective belief.
- Parliament has deliberately restricted the s 24 defence.
- S 24 means that duress (by a person) is not preserved at common law.
- Seeing as the defence of D of C/wider necessity is available in Privy Council, should also be available in NZ.
- If the defence is to be codified, it should be done by the legislature.
- There is judicial reservation towards expanding necessity.
- *R v Loughnan:* Essential element for the defence that the belief in imminent violence must reasonably be held.
- *Perka v the Queen* (Canada) - Dickson J's analysis of the defence of necessity:

"1) could be a justification or an excuse...

3. No vindication of the deeds of the actor...
4. Criterion is the moral involuntariness of the wrongful action...
5. Involtariness measured on the basis of society's expectation of appropriate and normal resistance to pressure...
6. Negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity...
7. Actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle;
8. The existence of a reasonable legal alternative also disentitles to be involuntary the act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law;
9. ... only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril...
10. Where the accused places before the Court sufficient evidence to raise the issue the onus is on the Crown to meet it beyond reasonable doubt."

- Criteria 5 was decided against the appellant.
- Re the Lord Lane comment: rests on the assumption that when parliament changed self-D to be subjective it also changed necessity. But then there would be inconsistency with provocation.
  - Distinguished from self-D in that it is an excuse.

- There is support for the *R v Thomas* argument - but this kind of change would have to be in legislation.
- If available in NZ, the defence ATM requires at least an honest belief formed on reasonable grounds of imminent peril of death or serious injury. Breach of the law is only excused where there was no realistic choice but to act in that way. Even then the response can be excused only where it is proportionate to the peril.
    - We need some kind of objectivity to it.
    - Quite a tight defence.
- The absence of actual peril would go to the reasonableness of the belief.
- In this case, he had other actions.
- Did not raise an honest belief in death or GBH.
- Also confirms that CL defence of compulsion does not exist.

RATIO DECIDENDI
- Prob available.
- If available in NZ, the defence ATM requires at least a belief formed on reasonable grounds of imminent peril of death or serious injury. Breach of the law is only excused where there was no realistic choice but to act in that way. Even then the response can be excused only where it is proportionate to the peril.

POLICIES
- Changing the substance of the defence requires legislative action.
- We will prob just follow persuasive authority for it.
- There must have been no other choices - must have been involuntary.
    - Must be proportionate
    - Must be in response to a reasonable belief of imminent peril of death or serious injury.
- Perhaps not too keen on necessirty proper in nz

R v Kawiti
COURT AND DATE
High Court

Salmon J

FACTS
- Charged with driving whilst disqualified and driving with excess blood alcohol.
- She was terrified of being assaulted and was in unbearable pain as a result of a previous assault.
- Mr Nathan assaulted Ms Kawiti.
- She ran away because she thought that she was going to die or suffer severe injury.
- She had to leave because she did not know where to go and didn't know anyone.
- She thought that if she went inside she would be beaten up again.

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)
1. Whether in a criminal prosecution pursuant to the Transport Act 1962 the defence of necessity is available to the defendant; and, if so

2. Whether the ingredients of the defence are as set out by the Court of Appeal in *Kapi v MoT.*

JUDGE'S REASONING

- The extent of the defence of necessity has not yet been determined in NZ.
- The defence has been partially recognised in the defence of compulsion.
    - This is not available here.
- Held in *Kapi* that subjective belief was not sufficient.
    - "requires at least a belief formed on reasonable grounds of imminent peril of death or serious injury."
- Affirms the approach in *Kapi.*
- English courts recognised where there is threats from not a person.
- The CA has recognised that the defence exists
    - *R v Witika:* "Justice requires that no defence should be excluded unless it is clearly unavailable."
- Notes *R v Conway, R v Martin, R v Howe and R v Willer.*
- The defence of duress of circumstances is only available if "from an objective standpoint" the defendant can be said to be acting in order to avoid a threat of death or serious injury.
    - "Essential limit" - *R v Howe.*
    - If a mistake is to excuse what would otherwise be criminal, the mistake must be a reasonable one.
- *Principles of Criminal Law* text: "for such a defence... to be available in NZ, the defendant must possess a belief formed on reasonable grounds of imminent peril of death or serious injury, notwithstanding that this may appear unreasonably to limit the availability of the defence in respect of relatively trivial offences."
- Draw the conclusion that the defence is available where the perceived threat is one of imminent death or serious injury to D or another person.
- The ingredients as in *Kapi:*
    - "belief formed on reasonable grounds of imminent peril of death or serious injury. Breach of the law then is excused only where there was no realistic choice but to act in that way. Even then the response can be excused only where it is proportionate to the peril."
- Simister and Brookbanks:
    - Perceived threat must be one of imminent death or serious injury
    - D's perception of the threat must be either correct or reasonably based.
    - Action must be in response to the perceived threat
    - Response must be proportionate in the sense that a sober person of reasonable firmness sharing certain characteristics of D would have responded in like manner. (The qualifying characteristics remain to be settled).
    - The defence is not available to murder or attempted murder.
    - Defence is not available where the source of the threat is another person.
- Any additional criteria than *Kapi* should be case by case.

RATIO DECIDENDI

1. The defence of duress of circumstances is available where the duress is not that of persons.
2. The ingredients of the defence are at least those set out by the CA in *Kapi.*

POLICIES

- Objectively true belief - there must have been some threat of death or GBH.

Police v Matsubara

COURT AND DATE

District Court Whangerei

Oct 2003

Judge G V Hubble

FACTS

- After a first visit from the police, Mr Matsubara was set upon by a group of youths who opened both the passenger door and the driver's door.
- They were using racial slurs and assaulted and robbed him.
- He felt the situation was such that the threats to his person and his vehicle justified him in driving from the scene, at least to the point where he was out of sight of the robbers.
- He didn't think that locking the car or calling the police was reasonable because of how he had already been treated.
- He feared that there would be a serious assault on his person.

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)

- Is the defence of duress of circumstance available here?

JUDGE'S REASONING

- Where the source of the defence is duress of circumstances, the defence is one of necessity of common law, preserved by s 20.
- The issue here is compulsion though
    - *R v Maurirere:* once there is sufficient evidential foundation for the defence, it is for the Crown to exclude it beyond reasonable doubt.
- The foundation of the defence of necessity is based on a reasonably perceived threat of serious physical injury or death; it is not necessary to prove that the threat with which the defendant was confronted was an actual or real threat.
- The following ingredients are common to both compulsion and necessity:
    - The perceived threat must be one of imminent death or serious injury
    - D's perception of the threat must be either correct or reasonably based.
    - D's action must be in response to that perceived threat.
    - D's response must be proportionate in the sense that a sober person of reasonable firmness sharing certain characteristics of the defendant would have responded in like manner.
    - The defence is not available to murder or attempted murder.
- *Kapi v MoT:* the defence is only available if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.
    - "No realistic choice but to act in that way."
- *R v Martin test:* Issue should be left with the jury to judge the two question:
    - Were they impelled to act because of what they reasonably believed the situation, they had good cause of fear that death or serious injury would otherwise result;
    - If so, would a person of reasonable firmness sharing the characteristics of the accused have responded to that situation by acting as the accused acted.
        - If the answer to both is yes then there should be acquittal.
- Satisfied that there was an evidential foundation for compulsion.
- There were reasonable grounds to believe that he would suffer further injury.
- The moving of the car 50m was proportionate to the fear.
- The prosecution could not exclude the defence.

RATIO DECIDENDI
- Necessity is available here.

POLICIES
- Action must be proportionate to the perceived threat.
- The prosecution has the burden of disproving its existence once the evidentiary burden has been discharged.

INSANITY/AUTOMATISM

R v Campbell

COURT AND DATE
Court of Appeal

1997

Tompkins J

FACTS
- When the appellant was younger had two traumatic experiences:
  - Jug of hot water fell on him and had injuries which received some bullying later in life.
  - Subject to sexual abuse.
- The appellant and his gf broke up, he became depressed and an alcoholic.
- He went to the deceased's house. He helped the deceased move some timber.
- The deceased put his hand on the appellants thigh and gave him the same expression his abuser have him.
- He then lost control and beat the deceased to death, the claimed that he thought he was being up his abuser the whole time.
- He testified that he had no control over what he was doing.
- He then did random things to try and cover up the crimes e.g taking his car and locking the house.

Medical Evidence:
- 2 psychiatrists and a psychologist.
- First doctor: Reached the diagnosis that the appellant was suffering from PTSD. Accused would have felt he was 7 again and his actions were beyond his control. Emotional reaction of a 7 year old.
- Psychologist: had a PTSD flashback, can't control his reaction to such a flashback. The longer it has ben held in the more violent the outburst.
- Second doctor: non-declarative memory which is not rationalised and so there is an intense response - not to do with the trigger but the intense trauma. Unlikely that the person is able to control their actions.

RELIEF SOUGHT

PRIOR PROCEEDINGS
Trial Judge:
- No authority that he can just be acquitted.
  - NZ has no form of diminished responsibility unless there is insanity etc.
- Refused to put this weird third defence to the jury.

RESULT
Appeal dismissed.

CROWN'S THEORY
- Such a defence is not available - can only be a defence if automatism is found.

- There is no defence of diminished responsibility.

DEFENDANT'S THEORY

- Should be a full acquittal based on acting involuntary
  - But not automatism or insanity.
  - Cannot be held guilty if he was not in control.
- The issue was outside of insanity and automatism but still warranted an acquittal.
- It was up to the Crown to prove that there was control over actions.
- Involuntary actions because of PTSD - BUT not insane.

ISSUE(S)

Can D receive a full acquittal without pleading insanity or automatism given that he has history of trauma and may not have been in control of his actions?

JUDGE'S REASONING

QUESTION 1: Is there an evidential foundation?
The Boundaries of Automatism:

- "If a person can be shown to have acted without conscious volition, that is involuntary, because of the operation of the outside events on a sound mind, that can amount to the defence of automatism."
- Used the Test in *R v Cottle* [1958]:
  - "Action without conscious volition... doing something without knowledge of it, and without memory afterwards of having done it - a temporary eclipse of consciousness that nevertheless leaves the person so affected able to exercise bodily movements."
  - Emphasis on the lack of consciousness.
- *Bratty v A-G for Northern Ireland:* essential requirement is the lack of voluntariness.
  - Doesn't have to be unconscious.
  - "act which is done by the muscles without any control of the mind"
- *R v Burr:* "Unconscious involuntary act." Person must be at least temporarily unconcious.
- Requirement for lack of consciousness has not been adopted in NZ: *Kilbride v Lake.* - just an altered consciousness which leads to no volition.
  - Not responsible if there is no other course of action available.
- *Ryan v R:* Accused can be acquitted without insanity if the jury finds that there is reasonable doubt that the deed was voluntary or willed.
  - *R v Radford:* the action is not subject to the will.
- *R v Falconer:* suggests that automatism D only have evidential burden and P must disprove beyond reasonable doubt.
  - "exempting qualifications" are what make you non-insane automatism v insane automatism.
    - They are exempting to the mental malfunction.
  - Dean and Dawson JJ: reasonable doubt that actions were not voluntary would be enough to mean acquittal.
- Said that he was not acting involuntarily

QUESTION 2:

- Courts try not to define the factors of disease of the mind too closely.
- (more holistic approach now).

Continuing danger test:

1. Has it manifested in violence?
2. Is it prone to recur.

- Comes from the obiter in *Bratty v A-G for Northern Ireland.*
  - The 'it' in step 2 is the mental disorder.
- Modified in *Stone:*

    - The 'it' is the trigger.
- Problems:
    - Has some counter-intuitive consequences.
    - Courts can't be fortunetellers.
    - Some things don't manifest in violence but need treatment.
    - Both under and over inclusive.

Internal/External Factor:

- Internal factor leans towards insanity.
    - If external - psychological blow that would cause any normal person to react.
        - Not "ordinary stresses and disappointments of life." - Ritche J in *Rabey*
- Linked to continuing danger - if internal more likely to occur.
- V difficult to apply e.g *quick.*

Conclusions:

- A person cannot be acting unconsciously and not come under insanity or automatism.
    - Can only be sane or insane automatism.
- Legally insane if you come under the definition of s 23.
- "Sane automatism if he lacks the ability to control his actions because of the operation of some outside events on a sound mind, what has been described as a psychological blow resulting from external events, but is not suffering from a disease of the mind."
- If neither you are legally responsible for your actions.
- Judge correct in that there is no defence in this case.
- Diminished responsibility is not a defence in NZ.

RATIO DECIDENDI

- "Sane automatism if he lacks the ability to control his actions because of the operation of some outside events on a sound mind, what has been described as a psychological blow resulting from external events, but is not suffering from a disease of the mind."

POLICIES

- Holistic in NZ.

Rabey

COURT AND DATE

Canadian Supreme Court - 1981

Ritchie J

FACTS

- D assaulted a fellow student with a rock sample he stole from the geology lab.
- He liked her. He found a letter she wrote to her friend talking about how she didn't like him.
- He was reaLy uPseT :((
- Anyway went to meet her and felt some kind of 'flash'
- Then they were talking and he started choking her (doesn't remember).
- He alerted a teacher that he had thought he had killed her. He only partially remembers this encounter.
    - Teacher said he looked v nervous, was coherent in his speech.
    - Unable to convince him that he had not killed the girl.
    - Everyone said he was usually alg.
- Made a sppeeeeeeedy recovery.

Medical evidence:

- Dr Orchard: No evidence of neurological disease, no indication of psychotic process.
    - Probable that he was in dissociative state.

    - Caused by a "psychological blow."
    - Probably not caused by something internal, probably won't occur.
    - Prob not a mental illness.
- Dr Roswell: not in a dissociative state, just went into an extreme state of rage.
    - If he was in a dissociative state, this was a disease of the mind.
    - Rabey said he didn't remember stuff after the act, meaning he had neurosis (a disease of the mind). But could prob recover and likely recurrence was negligible.

RELIEF SOUGHT

PRIOR PROCEEDINGS

- Ontario court of appeal found that the ordinary stresses and disappointments of life were not enough to be an external cause. So the dissociative state had to be internally caused.
- Found him NGRI.

RESULT

- Majority: Appeal dismissed, NGRI upheld.
- Minority: should allow appeal, complete acquittal reinstated.

PLAINTIFF'S THEORY

- Is trying to get D to be found to have a disease of the mind.

DEFENDANT'S THEORY

- Although the appellant was capable of action he did not know where he was going.
- Does not want to be found insane.
- D claim that his behaviour was caused by a psychological blow, and intense emotional shock which induced a dissociative state, during which time the appellant was neither conscious of, not able to control his conduct.

ISSUE(S)

- Whether, when Rabey beat to death his fellow student that rejected him, it was enough to constitute a psychological blow large enough to mean he was acting under non-insane, rather than insane automatism.

JUDGE'S REASONING

RITCHIE J:

- The meaning of "automatism" re non-insane automatism has been defined in *R v K:*
    - "unconscious, involuntary behaviour, the state of a person who, though capable of action, is not conscious of what he is doing. It means an unconscious, involuntary act, where the mind does not go with what is being done."
- Since *Bratty v A-G for Northern Ireland,* the question of what constitutes "disease of the mind" is for the judge to decide.
    - But the presence/absence of the disease of the mind is for the jury.
- Then goes through old authority:
    - About whether the disease is from some factor internal to the accused, as opposed to a malfunctioning of the mind that was the result of some kind of transient external factor e.g concussion.
        - Internal leans towards disease of the mind but external does not.
    - Particular transient mental disturbances may not be able to be properly categorised as one or the other and should be looked at on a case by case basis.
- "The ordinary stresses and disappointments of life which are the common lot of mankind do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of 'disease of the mind.'"

- Seems that this breather had a weird love for the young woman which caused a weird condition in his mind under the influence he acted unnaturally and violently to something which a normal person would not have reacted in the same manner.
- Can't just fully acquit him because he might not actually be that dangerous - he will be reviewed under the Canadian Criminal code anyway.
- Should set aside the appeal.

DICKSON J (Dissenting):

- Absence of volition is always a defence to a crime.
    - Defence that the act is involuntary entitles the accused to a complete and unqualified acquittal.
- The crown bears the burden of proving the voluntary act.
- Question about whether there was automatism resulting from a "psychological blow."
- At common law, you are not guilty of a crime if you committed it if in a state of unconsciousness or semi-consciousness.
    - Man is responsible only for his conscious and intentional acts.
- *R v Kemp:* in the eyes of the common law "if a man is not responsible for his actions he is entitled to be acquitted by the ordinary form of acquittal, and it matters not whether his lack of responsibility was due to insanity or any other cause."
    - Common law has changed a bit - insanity now means a qualified acquittal.
- Automatism is successfully invoked in circumstances where criminal action is committed unconsciously.
- Insanity and automatism are separate and distinct defences.
    - But both about D's knowledge and control over his criminal act.
- Insanity has disease of the mind but automatism does not.
    - Insane automatism is automatism caused by a disease of the mind.
- *R v Cottle:* automatism may occur "where the mind is temporarily affected as the result of a blow, or by the influence of a drug or other intoxication. It may on the other hand be cause by an abnormal condition of the mind capable of being designated a mental disease."
- Should be guided by principles of criminal responsibility.
- The key bits of insanity law is the idea of a "disease of the mind" which makes u unable of appreciating the nature and quality of an act or knowing that it is wrong.
- No act can be criminal without voluntariness.
- Although he has the presumption of sanity, D has placed before the Court evidence sufficient to raise an issue that he was unconscious.
    - No burden of proof is imposed upon the accused raising the defence beyond pointing to facts which indicate the exitence of such a condition.
- Whether lack of consciousness relates to MR or AR or both may be important in cases of absolute liability.
- No person should be committed to a hospital unless the have a disease of the mind.
- Originally NGRI because although there was no sign of disorder, shit's whack.
- There are policy considerations:
    - Might make the criminal law less credible if someone can get away with something just by raising automatism.
    - Success depends on psychiatrists.
    - Floodgates kind of argument.
- Where the condition is not a disease of the mind, no policy is served if they are hospitalised.
- Thinks maybe Ontario Court of Appeal was wrong ab that it is internal - no clear evidence to support that.
    - They found that he wasn't insane at trial, and you can't just throw away the findings of the jury.
- If the appellate Court found that emotional stress can never constitute an external factor, this is not correct.
- If the controlling factor is the degree of emotional stress, this is for the jury to decide.

- Doesn't accept that an extraordinary external event can cause a state of dissociation only if a normal person subject to that shock would react in that way.
    - Insanity is subjective - must look into the accused's state of mind.
    - If there was an emotional blow with an automatic reaction, but no disease of the mind, there is no reason automatism should not be available
        - Just because someone else didn't lose consciousness, doesn't mean they didn't.
        - Also doesn't depend on the intensity of the shock.
- BUT agrees that there must be a shock.
- Glanville Williams: automatism is any kind of weird mental state where there is no MR due to lack of consciousness but there is no insanity.
- Also the practical question of whether the jury will believe it.
- Old test was the recurrence of danger test.
- Dickson reckon the real question is whether violence is going to be repeated. (So the *Bratty* formulation of continuing danger).
    - As well as internal/external
- If it's not likely to occur, no point finding them insane.
- 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 of his part.
    - Should be supported by medical evidence.
- 'Disease of the mind' will be defined day by day and case by case as new medical evidence comes out.
- Because there was no evidence supporting recurrences and mental health issues, there should be no point to not give full acquittal.

RATIO DECIDENDI

- Majority: where there is psychological blow that is not more than the ordinary stresses and disappointments of life, and no person would react as D did, then the automatic state is most likely caused by disease of the mind.
- INTERNAL EXTERNAL TEST AB HOW A NORMAL PERSON WOULD REACT
- Minority: it is not about the 'size' of the blow, it is about whether there was or was not voluntariness. In the absence of medical evidence, there should not be an insanity verdict given and automatism should still remain open to the jury.

POLICIES

- Recurrence of danger AND violence can be used
- Internal external
- Weighing up policy:
    - Credibility of the law
    - Floodgates
    - Easy to fake
    - Public safety
    - Psychiatrist evidence could be skewed.
- Disease of the mind is an ever-changing definition.

R v Parks

COURT AND DATE

Supreme Court of Canada 1992

Lamer C.J.C, La Forest J

FACTS

- D was sleepwalking and attacked his parents in law.
- He drove to their house whilst asleep.

- The year before the incident was particularly stressful for the respondent.
- Several members of his family suffer or have suffered from problems such as sleep-walking, adult enuresis, nightmares and sleep-talking.

RELIEF SOUGHT

PRIOR PROCEEDINGS

- Trial judge chose to put only the defence of automatism to the jury, which first acquitted the respondent of first and then second degree murder.
- Was also acquitted for attempted murder.
- Court of Appeal unanimously upheld the acquittal.

RESULT

- Appeal dismissed
- Acquittal allowed

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)

- Is sleepwalking insane or non-insane automatism?

JUDGE'S REASONING

LA FOREST J:

- Trial judge correct to put only non-insane automatism to the jury.
- In distinguishing between automatism and insanity, the judge must also consider policy arguments.
- Although spoken of as a defence, automatism is actually a negation of the AR (voluntariness).
- Where the automatism has rendered the accused insane, then the accused is not entitled to a full acquittal, but to a verdict of insanity.
    - This is insane automatism.
- When the defence of non-insane automatism is raised by the accused, the trial judge must decide whether to leave this up to the jury
    - Determine whether there is some evidence to support leaving the defence with the jury.
        - Evidential burden rests w accused, mere assertion is not enough.
    - Consider whether the condition alleged is, in law, non-insane automatism.
        - If there is evidence pointing to this, the defence can be left with the jury.
- Issue for the jury is one of fact: did the accused suffer from or experience the alleged condition at the relevant time?
    - Onus rests on the prosecution to prove the absence of automatism beyond reasonable doubt.
- In the present case, no question that the accused has laid the proper foundation for the defence of automatism.
- Question of law: is sleep-walking properly classified as non-insane automatism, or does it stem from a disease of the mind, thereby leaving only the defence of insanity for the accused.
- If the accused pleads automatism, the Crown is then entitled to raise the issue of insanity, but the prosecution then bears the burden of proving that the condition in question stems from a disease of the mind.
    - *Rabey*:
        - "the legal or policy component relates to (a) the scope of the exemption from criminal responsibility to be afforded by mental disorder or disturbance, and (b) the protection of the public by the control and treatment of persons who have caused serious harms while in a mentally disordered or disturbed state. The medical

component... is medical opinion as to how the mental condition in question is viewed or characterised medically.
        - The concept of disease of the mind is capable of evolving."
- Because "disease of the mind" is a legal concept, a trial judge cannot rely only on medical opinion.
    - This is why there is also the 'legal' component.
- Usually two distinct approaches:
    - Continuing danger test and internal cause theories.
- They stem from a concern for public safety.
- *R v Swain:* the '"pith and substance" of the legislative scheme dealing with individuals acquitted by reason of insanity is the protection of society from dangerous people."
- Continuing danger theory:
    - Any condition likely to present a recurring danger to the public should be treated as insanity.
- Internal cause theory:
    - A condition stemming from the psychological or emotional make-up of the accused, rather than some external factor, should lead to a finding of insanity.
- Share a common theme of fear of recurrence.
    - Internal weakness more likely to observe recurrence than an external effect.
- Internal cause has got some support - e.g *Rabey.*
    - Should be decided on a case by case basis.
- 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.
    - E.g sleepwalking lol.
    - Often criticised as unfounded on the development of law.
- Martin J.A in *Rabey:* sleepwalking is an example of a condition that is not well suited to the internal cause theory.
    - Certain factors can be characterised as either internal or external sources of automatistic behaviour.
- Continuing danger test comes from an obiter by Lord Denning in *Bratty.*
    - "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."
    - Has not been universally accepted.
        - The converse is ridiculous, so why should we accept this test - (Martin J.A)
- Dickson J sought to revive the test: *Rabey*
    - "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 of his part."
- House of Lords revisited the question of disease of the mind in *R v Sullivan:*
    - Mind refers to M'Naghten rules and reason, memory and understanding.
    - If the effect of a disease is to impair these faculties so severley as to have either of the consequences referred to in the latter part of the rules, it matters not whether the impairment itself is permanent or transient and intermittent, provided that it subsisted at the time of the commission of the act.
    - Purpose was to protect society against recurring danger. The duration of a temporary suspension of mental faculties is not a conclusive reason.
- The consideration of recurrence as a non-determinative factor in the insanity inquiry.
    - The duration of the condition is not relevant - can be temporary or permanent (*Diplock*).
- Relative impermanence is particularly inconsequential if it is prone to recur.
- Recurrence suggests insanity, but the absence of recurrence does not preclude it.
    - Recurrence is one but a number of factors to be considered in the policy phase of the disease of the mind inquity.
- Neither of the two policy approaches determines an obvious result.
- There is almost no likelihood of recurrent violent somnabulism.
    - Finding of insanity is less likely but that doesn't mean absolute acquittal
    - The internal cause theory is not particularly helpful in this case.

    - Have to look to other factors for sleepwalking.
- Super hard to fake sleep-walking.
- Only those who act voluntarily with the requisite MR should be punished by criminal sanction.
- No compelling policy factors that say D was not suffering from non-insane automatism.
    - It is for the Crown to prove that sleep-walking 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.
- Accused should be acquitted.
- Disease of the mind is a matter of fact for each case - Dickson J (*Rabey*).

RATIO DECIDENDI
- Disease of the mind is a question of law that includes the continuing danger test, the internal cause test and policy factors. It is to be decided on the facts and by a case by case basis.

POLICIES
- Evidential burden on D
- If the accused brings their state of mind into question, P must prove beyond reasonable doubt that they were insane.
- It is up to the judge to put it to the jury.

R v Stone
COURT AND DATE
Canadian Supreme Court - Bastarache J

FACTS
- D accused of killing his wife.
- They went to visit D's children. The visit lasted 15 mins because the life was acting up.
- The wife continued to yell and him and then felt a whoosh sensation.
- When he came to he had stabbed her 47 times.
- Later when he fled the country (lol) he remembered in a dream that he actually stabbed her twice before the whoosh sensation.
- He returned to Canada and spoke to a lawyer, then surrendered himself to the police.

RELIEF SOUGHT

PRIOR PROCEEDINGS
- Trial judge mistakenly said that he had to be unconscious the whole time.

RESULT
- Appeal dismissed, finding of insane automatism.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)
- Was D suffering from sane or insane automatism?

JUDGE'S REASONING
BASTARACHE J:
Psychiatric evidence:
- Dr Janke: dissociation can be caused by a psychological blow and is often accompanied by partial to complete memory loss.
    - Unaware of when violent dissociative episodes recur.
    - Thought D was in a dissociative state.

    - Largely dependent on the truthfulness of what D was saying.
    - No evidence that the appellant suffered from a psychiatric condition.
- Dr. Murphy:
    - No scientific way of ruling out a claim of dissociation once it has been made.
    - It is unlikely that the appellant was in a dissociative state.
    - The fact that Donna was the trigger and the victim makes the claim a bit shift.
    - Said that Dr's should be wary of dissociation claims made in a legal context.

...

- In *Parks,* La Forest J recognised that there were two approaches to the disease of the mind inquiry:
    - Internal cause theory and recurring danger test.
    - Internal cause theory is the dominant approach.
- But a more holistic approach like in *Parks* is to be preferred (taking into account the above and policy considerations).

Internal cause theory test:

- Developed in the context of psychological blow automatism.
    - Trial judge must compare the accused's automatistic reaction to the psychological blow to the way one would expect a normal person in the same circumstances to react in order to determine whether the accused had a disease of the mind.
    - The nature of the alleged trigger is at the centre of the comparison.
        - *Rabey:* Martin J.A: "ordinary stresses and disappointments of life... do not constitute an external cause constituting an explanation for a malfunctioning out of the mind that takes it out of the category of 'disease of the mind.'"
            - Dickson J: "dissociation caused by a low stress threshold and surrender to anxiety cannot fairly be said to result from a psychological blow."
        - A "shocking psychological blow."
- Trial judge must consider the nature of the trigger and determine whether a normal person in the same circumstances might have reacted to it by entering an automatistic state as the accused claims to have done.
- Court drew the line between stressful situation and extremely shocking events.
- Defence of non-insane automatism is usually for cases where the triggers are what normal people would find extremely shocking.
    - Involuntariness caused by any less severe of a factor can be presumed to be triggered internally and as such constitutes a disease of the mind which can only give rise to insane automatism.
    - Dickson J had a much lower threshold: any shock would do.
- The position of the majority in *Rabey* (how would a normal person respond) is preferable than the lower threshold said by Dickson J
    - Evidence of an extremely shocking trigger will be required to establish that a normal person might have reacted to the trigger by entering an automatistic state.
        - "the ordinary person is assumed to be a person of normal temperament and self-control." (*Falconer*).
        - In the shoes of the person.
- It is thus a contextual objective test: must be assessed from the perspective of a similarly situated individual.
    - This requires that the circumstances of the case be taken into account.
    - (the objective standard (Disease of Mind) only effects the classification of the defence into insane/sane, not whether the AR has been made out or not)
- Objective component of the internal cause theory does not affect the burden of proof on the issue of whether the accused voluntarily committed the offence.
- In each case, the trial judge must determine whether and to what extent the theory is useful given the facts of the case.
    - He or she has the discretion to disregard the theory if they think its application would not accord with policy concerns (e.g as done in *Parks*).

The continuing danger theory:

- There is a need to ensure public safety.
- Any condition which is likely to present a recurring danger to the public should be treated as a disease of the mind.
- Two issues are particularly relevant:
    - The psychiatric history of the accused and
    - the likelihood that the trigger alleged to have caused the automatistic episode will recur.
    - (we have adopted the *Bratty* version of this in NZ e.g the recurrence of the violence/mental disorder but not necessarily the *Stone* formulation).
- While a continuing danger test suggests a disease of the mind, a finding of no continuing danger does not preclude a finding of disease of the mind.
- Both approaches are relevant - they are factors not theories.
- The greater the anticipated frequency of the trigger in the accused's life, the greater the risk posed to the public and, consequently, the more likely it is that the condition alleged by the accused is a disease of the mind.

Other policy factors:

- There may be cases where the continuing danger and internal cause is not enough to give a conclusive answer.
- Must also consider policy factors.
- They are not a closed category of policy concerns.
    - Allow judges to answer questions about law and fact.
    - Whether society needs protection and what the accused should be subject to.

H. *Available defences following the determination of the disease of the mind question:*

- If the judge thinks what is suffered from is not a disease of the mind, only the defence on non-insane automatism will be left with the jury.
    - As the judge will think there is enough evidence that D was acting involuntarily on the balance of probabilities.
    - The jury must then decide if the D has acted involuntarily on the balance of probabilities.
    - Successful sane automatism leads to an absolute acquittal.
- Judge should begin by going through policy factors.
- If the judge concludes that the alleged condition is a disease of the mind, only insane automatism will be left with the trier of fact.
    - P must prove beyond reasonable doubt that it was insanity
- The question of whether it was automatism absorbs the question of voluntariness.
    - Rejection of the defence means rejection that the act was involuntary (*Bratty*).

I. *Application to the present case*

- The appellant claimed both sane and insane automatism.
    - Trial judge said only insane automatism should be left with the jury.
        - Must be evidence of unconsciousness throughout the commission of the crime.
            - Doesn't have to be throughout - just has to be impaired consciousness.
            - Lack of voluntariness, rather than consciousness, is the key part of automatism.
- The holistic approach means that everything has to be case by case.
- The trigger was not extraordinary external events.
- So the trial judge reached the correct conclusion.
- No substantial miscarriage of justice occurred.
- Appeal dismissed.

RATIO DECIDENDI

- A holistic approach must be taken when considering the disease of the mind question.

POLICIES

- Case by case basis
- Nothing is decisive.
- You have to take both tests and policy factors into account.
- Must be more than the ordinary stresses and disappointments of life.

Yesler

COURT AND DATE

High Court - 2007

Lang J

FACTS

- Mans owned a porn shop but was getting it bit stressy about it.
- Went home and everything was fine.
- Went to cook some chicken but his wife had sliced it too thicc ://
- So she told him to come inside and she would cook it.
- He then went upstairs and then everything went maroon like he was looking at everything through a stained glass window.
- Lost consciousness, woke up to his wife dead and him pointing the knife to his own chest.

Medical Evidence:
Dr Mendel: No chance it was not automatism.
Dr McCormick: Dissociative state

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT

- Non-insane automatism should not have been left to the jury (appeal dismissed?)
- NGRI

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

- Put forward the defence of automatism

ISSUE(S)

- Should sane automatism have been put to the jury as a defence?

JUDGE'S REASONING

- The Crown bears the onus of negativing any reasonable possibility that the stabbing was caused by non-insane automatism.
- D has to show that it was more likely than not that it was sane automatism.
- The cause of the automatism is the key issue - if it was caused by a disease of the mind, the appropriate verdict will be one of NGRI. If there is no disease of the mind, it will be sane automatism.
- Internal/external test and recurring danger test often used.
- The internal/external test was applied by Fisher J in *Police v Bannin.*
    - He rejected the recurring danger test because of policy issues:
        - If a person can react in anyway that would make him be violently automatistic, then that is a threat to the community.
        - Law doesn't let internal cause people go even if there is a high chance that the automatism will never happen again.

- *Ericsson v Police:* Blanchard J cited the *Rabey* internal/external test but questioned whether it was applicable.
- *R v Stone:* more holistic approach
    - Internal/external
    - Recurring danger
    - Issues of policy
    - All of these factors were considered and given more or less weight depending on the circumstances.
    - Bastarache J: If the psychological blow or trigger is sufficiently shocking that an ordinary person might go into an automatistic state, the verdict is non-insane automatism.
    - If the ordinary person would not go into such a state, this points to disease of the mind and an internal cause.
    - In considering how an ordinary person would react the circumstances of the accused must be taken into account.
    - *R v Falconer* (Australia): accused automatistic reaction must be assessed from the perspective of a similarly placed individual. BUT NOT SUBJECTIVE TEST - CONTEXTUAL OBJECTIVE
- Judge's can take into account evidence before them in order to assess the likelihood of the recurrence of violence - Bastarache J
    - Two issues would be relevant:
        - Psychiatric history of the accused
        - Likelihood the trigger alleged to have caused the automatistic episode will occur.
    - Holistic approach includes these AND policy:
        - Whether society needs protection
        - Whether the accused should be subject to supervision
        - Credibility of the criminal justice system.

Application to the present case:
- Should adopt the holistic approach in *Stone.*
- No reasonably jury would reach the view that these would amount to such an extreme shock or psychological blow that it might cause an ordinary person in the accused's circumstances to enter into an automatistic state.
    - No more than the ordinary stresses and disappointments of life.
- Must have been internal
    - Also evidence suggests he has depression.
- Applying recurring danger: triggers likely to recur and he does pose a threat
- Should not have an unqualified acquittal.
- His care should be monitored.

RATIO DECIDENDI
- The approach to automatism and insanity in NZ is the holistic approach in *Stone.*

POLICIES
Holistic approach:
- Internal/external
- Continuing danger danger
- Policy:
    - Whether society needs protection
    - Whether the accused should be subject to supervision
    - Credibility of the criminal justice system.

INCHOATE OFFENCES
ATTEMPTS
PROXIMITY

R v L

COURT AND DATE

Supreme Court - 2006

Judgement Delivered by Tipping J

FACTS

- 49 y/o woman was found guilty of attempted sexual violation of a 15 year old male.
- She was also found guilty of sexual violation of the same complainant on a separate occasion.
    - Her appeal against these was dismissed by the Court Appeal.
- 15 y/o complainant said that appellant grabbed his penis and tried to put it into her vagina. He said he would not let it go in. She tried a couple more times and then he stopped and told her that he could not do it.

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT

- Conviction for attempted sexual assault should be set aside.
- We do not consider the setting aside of the conviction for attempt requires the conviction for sexual violation to be set aside as well.

RESPONDENT'S THEORY

- Attention needs to be given to all aspects of the completed offence.

APPELLANT'S THEORY

- Appeal relating to the legal ingredients of the crime of attempted sexual violation and the way in which the Judge directed the jury on that topic.
- "Having an intent to commit an offence" comprehended only an intent to achieve penetration without consent or the want for the sex to be non-consensual.
- The intent has to be for the circumstances too.
- Intent focusing on lack of consent.
- The belief for consent need not be on reasonable grounds.

ISSUE(S)

- Must the accused in an attempt to sexually violate also have intention in regards to the circumstances of the offence.

JUDGE'S REASONING

- A completed offence of sexual violation of the present kind involves:

1. Intentional penetration
2. Without the consent of the complainant; and
3. Without the accused believing, on reasonable grounds, that the complainant is consenting.

- First element requires the Crown to prove the physical act of penetration accompanied by the necessary mental state.
- Second element requires proof of non-consent.
- Third requires that the Crown probe that either the accused believed that the complainant did not consent or believed on grounds that were unreasonable.
- Important phrase in s 72 is "having intent to commit an offence"
- Two approaches:
    - *Shepherd v R:* prosecution must prove an intent to carry out the proscribed sexual activity without the consent of the victim.

    - *R v Khan* (UK): prosecution must prove the statutory elements of sexual violation, namely, intent to have a sexual connection with the complainant without the complainant's consent and without believing on reasonable grounds that the complainant consented."
- Answer lies essentially in the Crown's approach.
- By analogy, only MR under 167(a) suffices for attempted murder.
    - This focuses on the results.
    - The alternatives e.g recklessness are not enough for the attempted because the intent required in s 72(1) is not directly related to the result, that is death.
- Intent should not be focused on lack of consent.
- This would cause too large of a disparity between attempted sexual violation and the full offence.
- The correct position is that in *Khan.*
- *R v Millard v Vernon:*
    - Mustill LJ: the result, namely the act of sexual intercourse, must be intended in the full sense.
    - Russell LJ: same analysis can be made of the offence of attempted rape:
        1. The intention of the offender is to have sexual intercourse with a woman
        2. The offence is committed if, but only if, the circumstances are that
            a. The woman does not consent and
            b. The defendant knows that she is not consenting or is reckless as to whether she consents.
- Only difference is that the rape actually takes place.
    - MR is exactly the same.
- The attempt relates to the physical act, the mental state is the same.
- Recklessness in rape and attempted rape arises not in relation to the physical act of the accused but only in his state of mind when engaged in the activity of having or attempting to have sexual intercourse.
- Although it is case by case.
- The intent is to have sexual intercourse and the commission of the offence happens in the presence of the circumstances.
- Difference between the offences is that the rape has not occurred.
- Reasonable grounds is required for both the complete and attempted offence.
- Consistent with the general policy of rape cases.
- In other offences, knowledge will always be enough, but sometimes a lesser standard i.e one of negligence or recklessness can be enough to satisfy the MR.
    - *R v L* does not settle the LRC debate for all attempt offences, but would likely be persuasive.

RATIO DECIDENDI
- Intention in intended sexual violation relates only to the physical act of intercourse (the conduct and the result). Intention is not required for the LRC of lack of consent.
- Supports the Simister and Brookbanks view.

POLICIES
- MR of attempt and the full crime are basically the same.
- Difference lies in the full commission of the physical act.

Wylie
COURT AND DATE
Court of Appeal

Woodhouse J.

FACTS
- Charged with attempting to procure a narcotic.

- Police went into a house with a search warrant, they were there when a telephone call came through. It was answered by one of the detectives.
    - The man on the other end of the line said he was Keith and asked if he could come and buy some cocaine.
    - The policeman said yes.
- The two respondents showed up to the House and asked to see the cocaine.
- They then found to have $651 dollars on Wylie and Wylie was the one that drove the car to the house.

RELIEF SOUGHT

- Crown appeals seeking the acquittal to be quashed and convictions reinstated.

PRIOR PROCEEDINGS

Trial:

- Prosecution established necessary intent required for the offence of procuring a narcotic.
- Even though there was no transaction the acts had gone beyond a mere preparation and amounted to attempt in the legal sense.

HC:

- Speight J reached a contrary conclusion based on the law of contract.
- There had been no agreement on price and there was no offer to buy.
    - Wanting to inspect meant that there was not enough intent.

RESULT

- Conviction restored, appeal allowed.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)

- In going to a house to obtain narcotics, but not agreeing at what price, had D's committed an act that was sufficiently proximate to constitute an attempt for the full offence?

JUDGE'S REASONING

- Focus turned onto the AR of the offence.
- Always two questions when it comes to intent:
    1. Does the evidence establish an intent to commit the crime?
    2. If so, was the conduct of the accused sufficiently in law to amount to an attempt?
- The magistrate reached the conclusion also by looking at the telephone conversation.
- Disagrees with the HC judge: artificial to hold that intent was not formed because of a common-sense recognition that the situation was in itself something that carried risk.
- The question is whether they had deliberately set out to buy cocaine, whether or not they recognised that the price or quality would defeat that intention.
    - i.e you're always going to risk quality and stuff.
- The second matter is whether the conduct of each of the accused in going to the house and opening up negotiations was merely preparatory and too remote, or whether the magistrate was correct.
- The issue of proximity is a question of law by way of s 72 (2).
- The real question is whether they were already trying to procure the cocaine.
- There is no abstract test for attempt yet:
    - It is up to common sense to determine in each case whether the accused has gone beyond mere preparation. This is the approach in *R v Smith.*
        - Must be a diligent attempt.
    - Reached a stage where it had amounted to "real or substantial" or "real and practical steps" towards the actual commission of the crime.

        - Conduct must be immediately and not remotely connected with the commission for the crime.
- They had made the phone call and clearly wanted to get some drugs. They had translated that into action by showing up to the house.

RATIO DECIDENDI
- In going to the house they had taken real and practical steps towards the commission of the crime, with clear requisite intent, thus committing an act sufficiently proximate to constitute an attempt of the full offence.

POLICIES
- Translated their intention into action.
- "Real and practical steps" towards the commission of a crime.

Wilcox
COURT AND DATE
Court of Appeal

Woodhouse J

FACTS
- D had hatched a plan to rob a post office and had taken certain steps with that purpose in mind.
    - Bought an air rifle.
    - Bought a balaklava.
    - Found transport.
    - Was literally on his way to the post office, 1 kilometer away when they were stopped by the police.
    - Literally admitted that he had intended to rob the post office (but said he was then directed them to his mates house so that he could pull out of the plan."

RELIEF SOUGHT

PRIOR PROCEEDINGS
Trial judge:
- Basically said to the jury that he had done all the acts for the purpose of robbing the post office.
- Described to the jury the important distinction between mere preparation to commit the robbery and acts that were "immediately or proximately connected with actually carrying it out."
- Outlines that he decides whether the acts were sufficiently proximate.
- Both intent and a sufficient AR were needed.
    - Not enough that if you change your mind you didn't have the requisite MR at some point.

RESULT
- Appeal allowed, convictions quashed.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY
- Defence is twofold:
    - No part of the activity was enough to constitute attempt.
    - He changed his mind partway through the journey to the post office, so even if the AR was sufficient, he lacked the requisite intent.

ISSUE(S)

- Did the actions of Wilcox really pass beyond preparation and qualify as an actual attempt?

JUDGE'S REASONING

- The defence that the AR requirement had not been met relies on conduct.
- Elementary that before anyone can be found to be guilty of the completed offence of an attempt to commit some crime it must be shown that both he had the necessary criminal intent and also that the intent had been accompanies by an act or omission done "for the purpose of accomplishing his object."
- Not every act or omission done for the purpose of accomplishing the criminal object will be sufficient to lead to a conviction.
- Ss (1) is the statutory limitation.
- Independent and careful attention to MR and AR are required, esp. in this case because the admission by Wilcox has a strong tendency to add a significant to what he did at various stages which the acts themselves may not justify.
    - Seems to suggest completely separating AR and MR.
- Summary by the trial judge criticised in two respects:
    - The idea that they had done all the acts necessary must have left the jury satisfied that the initial purchase of weapons was sufficient by itself to constitute an offence.
    - And the reference to acts "cumulatively" was not enough to remove this idea.
    - The judge should not have suggested that the whole pattern of conduct be looked at - the purchase of weapons or balaclavas by themselves do not mean anything so should not be read up to give increased significance. They must be able to constitute an attempt by themselves - need something much more clearly preparatory.
- Do not think that at the time they were stopped by the police, the D's were doing anything more than getting themselves in a physical location close to the post office from which an attempt at robbery could be directly launched.
    - Literal meaning of proximate.
    - Has to be a step in the actual offence itself.
- *Hendersen v the King* - Supreme Court of Canada:
    - Must be an act *immediately connected* with the offence.
    - Going to the place where the crime is planned is not enough to constitute attempt.
    - Must be a close relation between the victim and the author of the crime.
- Then looked at the second defence of no intent:
    - Changing your mind can be used as a defence.
- Appeal allowed.

CRITICISMS:

- The interpretation is very literal.
    - Very narrow understanding of what can be an attempt - basically everything but the result.
    - It would mean police would have to wait a stupid time to intervene - would mean law enforcement would become really weird.

RATIO DECIDENDI

- D had not gotten themselves in a sufficiently proximate position to begin the offence and thus no attempt was constituted. D must take a step in the actual offence itself.

POLICIES

- Really high threshold - almost the completed offence.
- Asks questions of when police should intervene.
- Has to literally be at the place - literal reading of proximate.
- Cannot read things up by looking at it in conjunction. The acts have to be enough to constitute an attempt by themselves.

Drewery

COURT AND DATE

Court of Appeal??

Williamson J

FACTS

- D set fire to a car.
- Made an arrangement with the owner to do so, so that he could defraud an insurance company.
- D would have gotten paid after the insurance money was claimed.
- D admitted to the crime.
- The appellant was charged and convicted of arson, and was charged with attempted false pretenses.

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT

- Appeal dismissed, conviction upheld.

PLAINTIFF'S THEORY

- Clear evidence of intent and an act done to facilitate the object.

DEFENDANT'S THEORY

- Prosecution failed to prove that an attempt had been made.
    - No admissible evidence that the car had ever been insured.
    - Insufficient admissible evidence to establish that the vehicle involved had been falsely represented as having been stolen.
    - No evidence that anyone had even tried to contact the insurance company and take out a claim.
- *R v Robinson:* a person 'robbed' his own shop to claim insurance. He was not convicted as Lord Reading said it was just preparation of evidence to enable him to carry out the crime and not a step towards the commission of it.
    - Step taken by D in that case was an act *remotely* leading to the commission of an offence and not an act *immediately* connected to it.

ISSUE(S)

- Were D's actions sufficiently proximate?

JUDGE'S REASONING

- Conceptual problems in holding a person to be guilty of attempt when they have an intent to commit a crime and have carried out act/s in furtherance of that intent but have been unable or prevented from carrying out the substantive offence.
- Backs *Wilcox* approach of common sense dictating what acts are sufficiently proximate or not.
- *Haughton v Smith:* Lord Reid - "the act must be proximate to and not remote from the crime itself. The accused must have begun to perpetrate the crime.
- The decision of *Wilcox* is difficult to reconcile with other decisions, esp in other jurisdictions.
    - There were steps taken towards the commission of the act.
    - Common sense would say that the act went beyond mere preparation.
- You cannot just look at something having unequivocal intent and then just say oh yep it's close enough.
- It is a matter of degree - if the evidence of intent is strong and clear the proximity does not have to be as great as in cases where evidence of intent is reliant upon inferences to be drawn from the nature of the act itself.
    - If intent is not that strong, we might want a more proximate or clearly preparatory act.

- S 72(3) got rid of the unequivocality rule: act's that are sufficiently proximate don't have to really outrightly portray a guilty purpose.
- *DPP v Stonehouse:* fake drowning so his wife would thought he died and claim life insurance. House of Lords said that this was sufficiently proximate (even without the insurance being taken out) because Stonehouse had done all the physical acts within his power which were necessary for the offence.
    - Lord Diplock : "Acts that are merely preparatory to the commission of the offence... are not sufficiently proximate to constitute an attempt... they do not indicate a fixed, irrevocable intention."
- That decision was criticised by Lord Edmund-Davies in *R v Robinson.* (Wrong in thinking that all the preceding acts were mere preparation e.g going to the place to drown etc.)
    - Emphasised the importance of considering the full offence.
- Approves *Wylie:* it is about common sense.
- Re this case - intent is strong independent of inferences from the acts themselves.
- The act of burning the car and getting paid was condition upon the money being obtained from the insurance company, meaning that the appellant's actions were closely connected with the offence.

RATIO DECIDENDI
- When there is clear intent, the proximity does not have to be as immediate.

POLICIES
- Can look at the acts in their totality.
- Doubts *Wilcox.*
- No unequivocality rule.

R v Harpur
COURT AND DATE
Court of Appeal

Chambers J

FACTS
- Man began a texting relationship with a woman.
- It began to become more explicit until he started talking about what he wanted to do to young girls/has done.
- The woman went to the police.
- With their help she staged a meeting between him and her imaginary nieces (10 and 4 y/o).
- When they went to meet D was actually faced with a policewoman who then arrested him.
- This trial is an appeal concerning the conviction of attempt to sexually assault the 4 year old.

RELIEF SOUGHT

PRIOR PROCEEDINGS
- DC followed *Wilcox* and meant that there was an acquittal.

RESULT
- Conviction upheld, appeal dismissed, *Wilcox* overturned.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY
- Issues with *Wilcox*
    1. Suggesting that acts should not be looked at in context is wrong.

    i. Determining whether acts are proximate means taking in all the circumstances, including the evidence of intent.
2. Wrongly focused on what was left to do rather than what had been done. (Contrary to *Wylie*).
3. Conflicts with earlier CA authority of ***R v Bateman.*** (Where an abuser was lured to a place by victims, charged and was proximately close).
4. Wrong to say that more than one act can't be looked at.

ISSUE(S)

- Was initially dismissed when *Wilcox* was applied but HC judge wanted an appeal up to the CA with the following questions:

1. Was I correct in finding, as a matter of law, that the acts done with intent to commit the offences of sexual violation were only preparation for the commission of those offences, and too remote to constitute attempts to commit them under s 72(2) of the Crimes Act?
2. If not, was my decision to discharge the accused pursuant to s 347 of the Crimes Act erroneous in point of law.

Crown applied for full court to challenge *Wilcox* (accepted).

JUDGE'S REASONING

- S 72 is written in very broad terms.
- Not all acts leading up to a crime may be sufficient for attempt, they may just be mere preparation.
- The breadth of s 72(1) suggests that parliament wanted the courts to use their discretion to apply it in a way that was conducive to justice in each case.
- Subs (2) separates the role of the judge and the jury.
    - The section enshrines common law concepts?
    - Judge should withdraw attempt charge from the jury if the judge considers, on the basis of the Crown evidence (even if accepted) that the offender never got beyond merely preparing to commit an offence or that his or her acts were otherwise too remote.
- Subs (3) reverses the unequivocality rule: an act can constitute an attempt even if it does not unquivocally show intent.
- Parliament painted a broad canvas for the courts to apply.
- If the parliament didn't want to be prescriptive then the Courts shouldn't.
- *Wilcox* has been subject to a lot of criticism.
- Addressing the *Wilcox* issues:
    - Yes; everything should be looked at in context (***R v Boudreau***), analysis of the AR must be viewed in conjunction with the MR.
        i. *"More remote AR will be accepted if the intent is clear"* (*Boudreau*).
        ii. Artificial to look at things separately - esp. because MR is driving the whole thng.
    - Court can look at what remains to be done, but this is not determinative, the Court simply erred in its evaluation of the facts.
        i. Should focus on what has been done, what remains to be done.
    - Prefer the approach to *Bateman.*
    - More than one act can be looked at cumulatively.
- *Wilcox* was wrong.
- Practical considerations:
    - Doesn't matter that the crime was factually impossible.
    - We should not make the police wait ages to intervene.
    - Without having real children, there is nothing more that Mr Harpur could have done.
- Common law rules about proximity and immediacy apply re attempt - e.g the ones in duress.
- Impossibility was a slight issue here because the kids did not exist but it does not matter because it is a factual impossibility and not legal impossibility.

Didn't want to apply a strict test but said that the American model penal code could help.

- Real and substantial step test is helpful but not conclusive: substitutes fuzzy words for more fuzzy words.

American Model Penal Code

- Section 5.01. Criminal Attempt.
  (1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
  (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or
  (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
  (c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.
  (2) Conduct That May Be Held Substantial Step Under Subsection (1)(c). Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:
  (a) lying in wait, searching for or following the contemplated victim of the crime;
  (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
  (c) reconnoitering the place contemplated for the commission of the crime;
  (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
  (e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;
  (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
  (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

RATIO DECIDENDI

- Acts constituting an alleged attempt can be looked at in their entirety, within the context of evidence of intent.

POLICIES

- Can't separate MR and AR.
- Prefers the approach in *Wilcox* but still a bit skeptical of the real and substantial step test
- Can look at acts cumulatively.

Johnstone v R

COURT AND DATE

Supreme Court

Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ.

FACTS

- Ms A went to her sleepout behind her family home.
- 30 min later her father went outside to get firewood and discovered the appellant crouched on the back lawn in dark clothing, wearing a beanie and carrying a torch, evidence that he was armed with a garden fork.
- Mr A chased the appellant to a nearby property.

- The appellant escaped after threatening Mr A, he was subsequently apprehended by the police.
- Appellant had observed the property and family on several occasions prior to the night in question.
    - Had been seen on the property six weeks earlier.
    - Appellant's car had been seen parked outside a neighbouring property on several occasions.
    - Their wheelie bin of rubbish had disappeared.
    - Note pad with the number of the wheelie bin company found in the appellant's flat.
    - Six cigarette butts belonging to the appellant had been found across the road.
    - Security lights were triggered.
- Witness said the appellant was obsessed with teenage girls and spoke of them constantly - spoke about how he wanted to rape and abduct a teenage girl when his parole expired.

RELIEF SOUGHT

PRIOR PROCEEDINGS

- Convicted following a jury trial on one count of attempted sexual violation by unlawful sexual connection.
- Leave granted on one question only.

First Trial:

- High Court
- Convicted of attempted sexual violation.

First Appeal:

- CA
- Two concerns
    1. Trial judge had erred in ruling under s 72(2) that the appellant's acts on the night in question had gone beyond mere preparation.
        - The judge adopted the approach set out in *Harpur.*
        - CA concluded that the judge's conclusion was right - but this is based on an assumption that the appellant intended to rape Ms A.
    - (This ruling by the CA is what is under present appeal).
    2. The judge had misdirected the jury that the AR of an attempt would be made out if the jury found the appellant did not intend to rape Ms A on that night but on another night.
        - CA noted that this had not been the part of anyones case.
        - If it was for another night then the judge would need to reconsider.
        - Not intending to commit the rape that night meant that the act was not sufficiently proximate, it allowed the appeal and retrial.

Second Trial:

- Judge directed the jury in accordance with the first CA appeal.
    - Directed jury that if it was proved that D intended the rape for a different night then it would not have proved beyond reasonable doubt an attempt to commit sexual violation.
- The appellant was convicted.

Second Appeal:

- Appeal on the basis that presence on the property is not sufficiently proximate.
    - CA pointed out that this issue had already been resolved.
    - Dismissed the appeal.

Appeal to this court:

- The argument advanced by the appellant is that *Harpur* should be overruled.

RESULT

- Appeal dismissed.

CROWN'S THEORY

- Probably focused on *R v Harpur.*
- Separating MR and AR would revive the unequivocality rule.
    - Therefore *Harpur* should not be regarded as making new law.
- Can't double count the MR i.e use MR to prove MR and the MR to prove the AR.

DEFENDANT'S THEORY

- Focused on *R v Wilcox.*
- Intended to commit burglary.
- *Harpur* should be overruled.
- *Harpur* should at least be distinguished (advanced in first CA appeal)
    - Evidence as to intent was less clear.
        - CA disagreed.
        - The Crown case is the one to be accepted.
        - Arranging to meet for someone to then commit an offence was considered an attempt - lying in wait (*Bateman* and *Harpur*).
        - Impractical for the police not to intervene.
- Wrong to include intent when examining proximity of the AR.
    - There needs to be come immediate or proximate connection.
    - Acts can inform MR but not vice versa.
    - Accepting the Crown case meant accepting an act that was very remote.

ISSUE(S)

Whether the trial judge was wrong to conclude that the actions of the applicant on the night of the alleged offending were sufficiently proximate to constitute the AR of an attempt.

JUDGE'S REASONING

O'REGAN J:

- s 72 requires both an intention to commit an offence and an act or omission giving effect to that intention.
    - In many cases it is only the actor's intention which indicates that an apparently (or possibly) innocent act or omission is criminal in nature.
        - It is for this reason that intention has been described as the essence of the crime re intent.
- Per the language of s 72(2) the act or omission relied upon must be "immediately or proximately connected to the offence".
- It need not unequivocally show an intent to commit the offence.
- The question of proximity is a question of law for the judge.
    - It will necessarily involve an evaluation of the facts, on the basis of the Crowns' case, but leaves it to the jury whether the acts or omissions relied on by the Crown have been established beyond reasonable doubt.
- Inchoate offences raise the risk of the criminal law overreaching.
- Judges perform an important gate-keeping role, it comes down to judicial evaluation.
- The case here is about proximity; whether the acts relied upon by the Crown were sufficiently proximate to the intended offence to constitute an attempt.
- *Harpur* is seen as taking the more expansive approach.

Discussing *Harpur:*

- *Harpur* challenged *Wilcox:* submitted that it was wrong to suggest that the judge should not consider acts of the alleged offender in the context of evidence as to intention when making his/her decision under s 72(2).
    - Wrong to completely separate MR and AR.

    - Also accepted that conduct can be looked at cumulatively. S 72 does allow conduct to be looked at in its entirety.
    - Rejection of real and substantial step test - but including American model penal code examples.
        - SC supports the usefulness of those examples.
- Briggs Article: *Harpur* allowed things to be looked at more as a whole
    - Propensity evidence can be used - i.e the D has done it before/is likely to do it/looks like they were trying to.
    - Evidence is then recycled to help the AR over the proximity threshold.
    - Following the Crown's case will almost always leave to conviction because intention is usually clear.
        - Professor Briggs notes that this case would likely not be found to constitute rate in other jurisdictions.

English Approach:

- *R v Geddes:*
    - Person was waiting to assault someone in the toilet with a rope and knife.
    - House of Lords held that they had not actually tried and were just putting themselves in the physical position.
    - The decision has been widely criticised.
- The English law still has the unequivocality rule and does not use the same words as s 72 and therefore the cases aren't much help.

Our Assessment:

- Taking the Briggs approach just would not work.
- Ignoring intention would make it very hard to find an attempt, acts of a D would fall short of an attempt unless:
    - The defendant had done everything possible to commit an offence but failed to achieve their aim.
    - The defendant's actions were so close that they could only constitute an attempt.
- Agree that putting intent to one side would be seen as reviving the unequivocality rule.
- Where there is clear intent to commit the completed offence, the maker of the "more than mere preparation" decision has available to him or her information about what the defendant's ultimate plan was, which enables him or her to assess more accurately whether the defendant's acts amount to an attempt to commit the planned offence.
- Without that information, the acts may be seen as equivocal, and the decision-maker could not be confident that they amount to an attempt to commit a particular offence. This does not turn mere preparation into an attempt.
    - It is recognising that where clear intent is shown, the decision-maker has a basis to determine whether the conduct is more than mere preparation.
- An act that is done in the context of a known plan can be classified as preparation or proximate with greater certainty than when the plan is unknown (or is excluded from consideration).
- The decision in *Harpur* is correct in finding that the determination as to whether acts have gone beyond mere preparation cannot be decided in the abstract without consideration of the evidence of intent.
    - The extent that *Wilcox* said to the contrary, they disagree.
    - Advancing towards the sleepout cannot be examined under s 72(2) without looking at the intent to sexually violate a teenage girl.
- Agrees with *Wylie:* cannot hold that intent has not been established in the case of abandonment or when a plan changed - esp when it is associated with the recognition that the change of circumstances may require a change of plan.
- The finding in *Harpur* is correct and was applied correctly in the CA appeal.
- Agree that conduct can be looked at in its entirety.
- Practical considerations do not control the decision the judge is required to make under s 72(2).

RATIO DECIDENDI
- Lying in wait is enough to constitute an attempt when intention is clear on te Crowns' case.

POLICIES
- Intention and the AR cannot be separated, and acts may be looked at in their entirety.
- Affirms *Wylie* and *Harpur.*
- Overrules *Wilcox.*

IMPOSSIBILITY

R v Donnelly
COURT AND DATE
Court of Appeal

Turner J

FACTS
- Charged with receiving stoel good.
- But he didn't receive them.
- The records were given back to their owners so even if they were received. They could not be considered stolen.

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)
- Whether the judge was correct in directing the jury pg 176 CM.
- Whether it was possible for a person to be convicted of attempting to commit a crime even though unbeknownst to them it was in the circumstances not possible to commit it.

JUDGE'S REASONING
- Question of law - even if the parcel had showed up at the post office, would he be capable of receiving stolen goods?
    - When stolen good have been given back to the owner, or when a legal title is obtained, the subsequent receiving of is not an offence, even if the person doesn't know that it is no longer stolen.
- People who set out to commit crime can fail for a number of reasons.
    - They may change their mind early on, not having done anything.
        i. Not guilty.
    - Change your mind but too late to deny that there was an attempt.
        i. Not guilty of an offence, but guilty of attempt.
    - Prevented by some kind of outside agency from doing an act necessary to complete the commission of the crime.
        i. No defence that you were prevented by an outside agency.
    - No outside interference but may fail to complete the commission of the crime through ineptitude, inefficiency or insufficient means.
        i. No defence.
    - What he is proposing to do is factually impossible.

        i. Physical impossibility is no defence by the wording of s 72(1) ("whether in the circumstances it was possible to commit the offence or not.")
        ii. (Arguable that *Donnelly* was actually this).
    - May do everything they set out to do but what they have done is not actually a crime. (exculpatory)
- It is the sixth kind of case which the present case is concerned with.
    - Impossible for a crime to be committed at the time that he got to the parcel office, as even if he had received the goods they had already been restored to the owner.
- But the physical impossibility i.e the fact that they were there is not what prevents conviction. It is the legal impossibility of receiving stolen goods.
    - Even if he had received the goods, they would not be stolen, because they would have already been returned to their owner.
- Could D even be said to have intended to commit the offence? Because the acts which he intended did not constitute an offence?
- What the appellant intended to do was something that was in fact not a crime. If he was to be convicted it would be on this belief that what was attempted was a crime even though it was not.
- A belief that something is not a crime when it is, is not a defence.
- Mistaken belief that what he was doing was a crime should convict him if in fact all the acts that he did or attempted to do would not actually amount in a crime in law.
    - We are concerned with acts rather than thoughts.
    - All D's actions without intent would leave D guiltless in front of the law.
    - *R v Percy Dalton (London) Ltd:* "a step on the way to the doing of something, which is thereafter done and which does not constitute a crime, cannot be regarded as an attempt to commit a crime."
    - This is the accepted position in NZ.
- Not necessary to strain the words of the provision and the conviction must be set aside.

CRITICISMS:
- *Donnelly* is out of line with international law.
- In UK, the *Donnelly* kind of thing would also be no defence.
- Courts would maybe reject *Donnelly* if it were to happen again rn.

RATIO DECIDENDI
- Legal impossibility is enough to exculpate where the actions of the defendant would leave them innocent notwithstanding any evidence of intent.

POLICIES
- Anything but legal impossibility is not enough to exculpate.
- Actions must themselves be innocent in the sense that they would not be able to amount to a full offence.

CULPABLE HOMICIDE
MANSLAUGHTER

R v Lee
UNLAWFUL ACT MANSLAUGHTER S 160(2)(A)

COURT AND DATE
Court of Appeal, 2005

Anderson P, McGrath, Glazebrook, Hammond and William Young J

FACTS

- D performed an exorcism on V and she died.
- D had a small church that he had formed.
    - He had finished his ministry training, the person who was supervising him said that there was nothing to be concerned about.
- V was a member of his church and lived with Mr Lee.
- One of Mr Lee's church practices was exorcisms know as "deliverences."
    - He began one on V.
    - No suggestion that the exorcisim was intended to be for any purpose other than the salvation and spiritual welfare of V, D was not accused of meaning to cause V any harm.
- Charged on alternative counts of unlawful act manslaughter s 160(2)(a) with the unlawful act being assault and s 160(2)(b) of negligent manslaughter by omitting without lawful excuse to have and to use reasonable knowledge, skill and care of the exorcism.
    - Convicted of s 160(2)(a).
    - (Also a consent to harm case but not concerned with that here).

- The precise cause of death is unknown, although V had two broken ribs and a broken sternum.
    - Not inconsistent with the Crown's case that the cause of death was manual strangulation.

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT
- Appeal allowed, conviction quashed and retrial ordered.

PLAINTIFF'S THEORY
- No requirement to make an objectively dangerous direction.
    - Not a statutory element of the offence but a common law requirement.
    - Significance will depend on the unlawful act relied upon.
- Assault done clearly more than trivial.
- The judge's direction was not wrong - clear that jury must be satisfied that the application of force caused the death.
- It is clear that the omission was the application of force in an unsafe manner.

DEFENDANT'S THEORY
Submissions on objective dangerousness:
- Judge misdirected the jury on the elements of the offence for count one.
- Crown had to prove that any application of force was objectively dangerous and that it was the substantial and operating cause of death.
    - Whether a reasonable person would have considered the act dangerous.
    - Open to the jury to conclude that the pressure was not objectively dangerous.
    - He had performed several other exorcisms.
- Jury struggling with the concept of how the assault could have caused the death if the amount of force is irrelevant.

ISSUE(S)
- Can Mr Lee be convicted of unlawful act manslaughter here?

JUDGE'S REASONING
Discussion of objective dangerousness:
- In NZ the Crown must prove that the unlawful act in s 160(2)(a) was objectively dangerous, although different language is usually used.
    - *R v Myatt:* "must be an act likely to do harm to the deceased or to some class of persons of whom he was one."

    - This is a longstanding common law gloss - for manslaughter it must unlawful and dangerous.
    - It is an objective test - whether an onlooker would have thought it was objectively dangerous.
        - Doesn't have to be physical harm.
- To found a charge of manslaughter, the unlawful act must cause death.
    - Likely to be relatively unusual for something that causes death not to meet the threshold of being objectively dangerous.
- Not part of the statutory definition - it is a common law gloss.
    - Accept that whether a judge needs to direct the jury of objective dangerousness will depend on the nature of the act alleged e.g in *R v Rapira* no direction was given because using the baseball bat was part of the common purpose.
    - Ok to direct not using the words 'objectively dangerous' but similar ones.
- Applying pressure to the neck is objectively dangerous.
- Artificial in this case to look at the act causing death in isolation.
    - If the act causes death is part of a series of actions, and those actions, when viewed as a whole, are objectively dangerous then the test would be met.
- Jury would have understood that the result of the application of force is irrelevant - they would have known that the assault must have caused the death.

Other issues:

- Major departure because Lee's method was not a normal or proper way to conduct exorcisms.
    - Don't accept this - you have the right to manifest different religions as you want.
- Consent is not a defence but may be taken into account when assessing if there has been a major departure.
    - Honest but unreasonable belief in consent would not be relevant.
    - Same for when the jury is assessing reasonableness where there has been recklessness, even if consent has been withdrawn as a defence on Public Policy grounds.
- Where consent is not withdrawn the issue of reasonableness will be subsumed in the consideration of consent, which if not disproved by the Crown, will be a complete defence.

RATIO DECIDENDI

- The unlawful act used by s 160(2)(a) for manslaughter must be objectively dangerous
    - But you do not always need a jury direction in that way.

POLICIES

- Consent can be taken into account for 'major departures' in negligence standards.
- Can look at the causes of death in a series if they all caused the death - if the series of dangerous actions is objectively dangerous then the requirement will be met.

R v Q

NEGLIGENT MANSLAUGHTER - OMISSION UNDER S160(2)(b)

COURT AND DATE

Court of Appeal - 2016

Miller, Mallon and Peters JJ

FACTS

- Appellant's 6 week old baby died. She was suffocated whilst D was breastfeeding her.
- She had a longstanding opiate addiction, was proscribed methadone. This can cause insomnia so also prescribed zopiclone.
- Midwife had no concerns about her engagement with her baby.
    - She was aware of the risks of co sleeping.

- D told the midwife about how she had taken some drugs and drank alcohol over the Xmas period - midwife told her not to do that because the alcohol could be passed on to the baby through her breastmilk.
- On Feb 2, she took her methadone and collected her zopiclone prescription.
    - She spent most of the day around the house - but she was very sick and tired.
- She called her mother that evening and then drank a bit. She was not drunk.
- Put baby to bed - took zopiclone, fed the baby and went to sleep.
- Then woke up and everything was normal - but had another 2 drinks.
- Fed the baby but was struggling to stay awake. Then went inside to feed the baby in a safe feedings position and then woke up to the Plunket nurse telling her she was on the baby.
    - D became distressed and tried to perform CPR.
    - Noticed D smelt of alcohol but was not drunk.
- She was charged with the manslaughter of her baby.
    - Charged under the omission for failing to take reasonable steps to protect the child against injury.

Medical Evidence:

- Shouldn't have methadone, zopiclone and alcohol together.
- Result of the analysis of the appellants blood:
    - High amounts of zopiclone.
        - But not conclusive toward either her or the Crown's argument.
- Result of the babys blood:
    - Bit of alcohol but doesn't mean it was ingested.
    - No drugs.
- One doctor said the combination of alcohol and drugs was not necessarily problematic because D was used to them also she was v tired.

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT

- Conviction quashed.
- Retrial ordered.

PLAINTIFF'S THEORY

- D had consumed significant amounts of alcohol.
- She took zopiclone (sleeping pills) while drinking and having her baby in her care.
- Failing to adhere to warnings as to the danger of breastfeeding her baby while intoxicated or following the consumption of drugs.
- Did attempt to feed her baby whilst in an intoxicated state.

DEFENDANT'S THEORY

ISSUE(S)

- Whether the Crown proved a major departure from the standard of care expected of a reasonable person and whether any such substantial departure was a substantial and operative cause of death.

JUDGE'S REASONING

MALLON AND PETERS JJ:
Conviction Appeal
The Law:

- Manslaughter is committed if a person kills another person by culpable conduct without murderous intent. Omitting without lawful excuse to perform a legal duty is a relevant form of culpable conduct.
- Duty is that of a parent or guardian to provide necessaries and protect from injury s 152 - must take reasonable steps to protect the child from injury.
- Parent is only criminally responsible for omitting to discharge this duty if, in the circumstances, the omission is a major departure from the standard of care expected of a reasonable person to whom the duty applied.
    - *R v Hamer:* objective test - falling below a standard of care of a reasonable person and that being a major departure.
        - State of mind may be relevant to grossness or ciminality.
    - Personal characteristics do not 'modify' the 'universal' standard of care: they may be relevant to the argument that the accused knew the risk that was being taken, it could be useful for the 'lawful excuse' element.
        - E.g disability can be a lawful excuse.
        - Reasonable and honest ignorance of medical care can be a lawful excuse.
- Acts of willfulness are relevant to the case against the accused: evidence of deliberate omissions accompanied by foresight of risk might be material in determining whether there was a "major departure" under s 150A.
    - Relevant only because it is easier to charge them like that - easier for the crown to prove its case.
- Must be established that the failure to perform the legal duty directly or indirectly killed the child
    - Causation
    - Substantial and operative cause - doesn't have to be the only cause.
    - For the jury - not limited to medical evidence.
- Whether it is gross negligence depends on degree
    - Judges can disagree down to what we even base that major departure on.
- Tried to charge her under s 152(a) which is the failure to provide necessaries - trial judge ruled this way:
    - No this was wrong.
    - *R v Lunt:* this subs is concerned with failure to provide goods and services to sustain life. The problem was not her not feeding her baby, it was failing not to protect her from injury.
    - But this didn't necessarily disadvantage D because the judge ruled that subs a) and b) had to be shown. But meant a) was the focus of the trial which was unfortunate.

Several possible causes:

- Under s 152(b) the Crown had to prove that the appellant failed to take reasonable steps to protect her child from injury and that this was a major departure from the standard of a reasonable person in the circumstances (grossly negligent) and that her culpable conduct was a substantial and operating cause of the baby's death.
- Because the culpable acts relied on by the Crown were the alcohol and the zopiclone, it had to be shown that taking these was a major departure and that they were an substantial and operating cause of death - they needed to be examined for the elements of the case to be made out.
    - But there were lots of other reasons incl. her tiredness etc which could have contributed to D falling asleep/ the death.
- Jury needed to understand that they had to focus on the alcohol and the zopiclone because that's what the Crown relied on.
    - But the circumstances could still be relevant.
- Judge's question trail did not focus on this, nor did the summing up on s 153(b)
- Ordinarily it would be appropriate to defer to the jury's assessment of the evidence.
    - But this is unsafe because of the unclear closing addresses and in the absence of a direction to focus on the acts of the charge itself.

    - This meant that D was portrayed in an unduly harsh light.
- Lots of factors that could have made her fall asleep:
    - Taking the methadone and zopiclone is not necessarily problematic
    - The use of alcohol was not necessarily problematic
    - Did not appear to be intoxicated
    - Not clear that zopiclone was even 'in play' when she fell asleep
    - Not necessarily a major departure to take zopiclone at 5 am.
    - She was sick and tired.
    - Feeding her baby in a safe position.

Prejudicial evidence

- The discussion between the midwife and the appellant isn't really relevant.
    - *R v Fenton:* background matters might be inadmissible if they are not relevant or if their probative value was slight and exceeded by their potential or unfair prejudice.
    - She never even received a warning about feeding her baby when tired/in certain positions
        - She recognised the risk of not drinking.
- Judge should've instructed jury that there was unfair prejudice.

Conclusion:

- We don't consider the jury's assessment safe.
- Ultimately decided that there was a jury misdirection, there needed to be a focus on the particular departures that were causative of death.
    - Normally a safe feeding position
    - Hadn't been warned against feeding that way.
    - Outside of zopiclone and alcohol there may not have been a major departure.
- Conviction quashed.
- Retrial ordered.

MILLER J:

- Dismiss the appeal and dissent.
- Although wrong of the judge to put s 152(a) to the jury, nothing turns on it.
- Thinks there was a major departure - gross negligence standard met.
- Risk of harm was smothering through sleeping whilst nursing - this must be guaged at the time she decided to feed the baby.
    - Quantity of alcohol was substantial
    - Life just tells u when u drink and ur tired ur finna fall asleep
    - Esp when ur on meds.
- Uses the wording of s 152: "the jury might then conclude that the appellant ought to have taken reasonable steps to protect her baby from risks."
- Jury don't need to conclude that it was enough of a precaution that she was in a safe position.
- No defence that she didn't know about the risk.
    - It is an objective standard.
- Open to the jury to conclude that the appellant's actions were a major departure from the standard of care of a reasonable person.
    - Not all of her actions were culpable but the sequence is important.
    - All of the aggravating factors to her sleeping were for her to manage, the jury could have well found that the alcohol and zopiclone was the substantive and operating cause
        - Evidence clear to that effect.
    - Looking at all of the actions may help decide whether what you did was a substantial departure in the grand scheme of things.
    - (Miller is not completely wrong - some precedent to show that looking at the factual context is important too).
- Agrees that summing up should have been clear about being about the alcohol and the zopiclone. The crown case also should have focused on this.

- But no miscarriage of justice.
- There should have also been direction about irrelevancies - Crown conduct was bad but then the defence counsel fought back so alg.

RATIO DECIDENDI

- The acts relied upon for omissions liability under s 152(b) must be shown to be a major departure form the standard of care expected of a reasonable person charged with that duty, and they must be a substantial and operating cause of death.
  - Decided that we need to tell the jury to single out the acts that are in question.

POLICIES

- Should focus on the acts relied upon in the charge.
- Objective test - don't need to have an appreciation of risk
- Gross negligence ONLY
- Stuff about necessities - it has to be a failure to provide something.

Dissenting:

- Can look at acts cumulatively within their context.
- Open to the jury to find that certain precautions are not enough.

Perry v R

CAUSING A PERSON BY THREATS, FEAR OR DECEPTION TO DO ANACT THAT CAUSES THEIR DEATH: S 160(2)(d)

COURT AND DATE

Court of Appeal, 2017

Kós P, French and Miller JJ

FACTS

- There was a plan to intimidate a small-time drug dealer.
- They took him to a warehouse.
- V was clearly skitzing on meth. They threatened him and then he ran away. They then found him again and pulled the weapon.
- He escaped again.
- V took fright and hid in a shallow levee.
- The Group abandoned their search for him.
- He drowned.
- Both Mr Perry and Te Tomo were convicted as principals or parties but unsure which.

RELIEF SOUGHT

PRIOR PROCEEDINGS

- Judge treated the running and hiding as a combined act, and that this was reasonably foreseeable.

RESULT

- Appeals allowed
- Convictions quashed
- Retrials ordered.

PLAINTIFF'S THEORY

- Judge did not err in directing about foreseeability.
- Running and hiding not distinct acts.
- Judge did say that running couldn't cause death.

- Summing up did focus on the actual acts.

Issue 2:
- Jury specifically instructed to look at whether the actions of V were reasonably foreseeable.
- No need to direct on proportionality - a truly disproportionate response would not be reasonably foreseeable.

DEFENDANT'S THEORY

- Argued that the hiding and not the running had caused V's death, and so the charge should be amended to reflect that.

Issue 1 - Te Tomo:
- Could only be liable as a principal if
  - He caused V to hide where he was found
  - It was reasonably foreseen that V would hide in the manner that her did.
  - V's actions were a reasonable and proportionate response to Te Tomo's actions.
- Run and/or hide was the wrong direction - running could have not caused death.
- The jury was not focused on what actually happened but what the Crown said had happened.
- The actions were unusual.
  - The specific actions must be foreseeable - not just any actions.

Issue 2:
- Possibility that the V's acts were so unusual that they broke the causal chain.
  - Jury should've been asked if D's actions were proportionate to the threat or within the ambit of reasonableness and "not so daft as to make it his own voluntary act which... broke the chain of causation." (*R v Williams*).

ISSUE(S)

1. Was the judge's direction as to foreseeability of the running and/or hiding causing the death correct?
2. Did the judge misdirect the jury on causation of death?

JUDGE'S REASONING

- Charged with manslaughter and assault with attempt to rob.
- Not known whether the initial manslaughter conviction was as a principal or a party.
- This can happen because:
  - If you have acted in a group and you have acted together than we know that there is one principal, then the parties' liability is derived from the principals' liability.
  - Doesn't matter who is the principal and who is the party - the conviction of manslaughter is entered the same.
  - The problem only occurs when it is unclear whether one person was actually involved.

Issue 1:
- The charge, the question trail and the summing up all needed to focus on the act of the deceased that was said to have resulted from the defendant's acts and to have caused the death.
  - Formulation of the charge was the incorrect - imprecise compound of the two actions.
  - Same with the jury stuff.
- But probably didn't misdirect the jury.
  - Judge told them they had to consider BOTH so they did consider the hiding.
- Jury had to be satisfied that the acts caused V to hide in the levee.
- The judge did direct the jury that Vs actions needed to be a natural consequence of D's actions.

- Judge did not misdirect the jury on the issue of foreseeability.

Issue 2:

- Judge directed that it needed to be a substantial and operating cause - didn't have to be the only cause.
- *R v Williams:* sometimes it will be necessary to give the jury an extended causation direction as to a disproportionate response by the deceased potentially breaking the chain of causation.
- *Royall v R:* "the question could only arise in circumstances where the V does something irrational or unexpected... much may turn on the nature and extend of the well-founded apprehension of the victim; and it is to be expected that persons fearful for their own safety forced to react on the spur of the moment will not always make a sound or sensible judgment and may act irrationally.
    - Reasonably foreseeable that when you scare someone, they would act in the way that they did.
    - Question about what the reasonable person would foresee when you threaten them.
    - Other members noted that the Crown needed to establish that the victims attempt at self-preservation was proportionate and reasonable.
    - "to hold that the accused was criminally responsible for harm which was not intended and which no reasonable person would have foreseen was likely to result form his or her conduct would be an onerous imposition of the criminal law."
    - Can also look at whether the actions were 'unreasonable' or 'daft' - this is what the defence put forward.
    - This would put us in line with English law.
    - Also consider whether V's actions are unusual enough to be considered a novus actus (don't necessarily need them to be for the it to be seen as taking liability off of D).
- *R v Tomars* [61]*:* objective test of culpability under s 160(2)(d):
    - The D caused the V to fear violence or otherwise threatened V
    - That fear was not an insignificant cause of V's response
    - That response was the kind of action that could reasonably have been foreseen by a reasonable and responsible person in the defendant's position
    - That response contributed in a not insignificant way to the death of the deceased.
    - Considerations of proportionality are in step (c).
        - The foreseeability is on the response - it must be reasonably foreseeable from D's position.
- "A response so disproportionate to the D's act as to be irrational and beyond the contemplation of a reasonable and responsible person standing in his shoes will excuse D as to step 3."
    - Court goes on to say that if there is a threat of violence, and the fear causes V to act in the way that they did, which was foreseeable, and that caused death, we don't need tests about proportionality - in NZ the test about proportionality is around 3) - something unproportionate will not be foreseeable.
        - Court rejected the English approach.
- But in this case the kind of reaction would reasonably have been contemplated and is not an insignificant cause of death, no other policy things need to be considered.

    No misdirection.

RATIO DECIDENDI

- Test for culpability for s 160(2)(d) is that in *Tomars:* no direction to proportionality of the response is needed, as the response must be foreseeable for a reasonable and responsible person in the position of D.
- The act which has 'caused' the death must be the one that is charged/considered.

POLICIES

- Proportionality comes into step 3.

MURDER

Shadrock v R

S167 MURDER - S 167(D)

COURT AND DATE

2011 - Court of Appeal

O'Regan P, Stevens and Wild JJ

FACTS

- Shadrock and four associated planned to snatch a handbag from a shopping mall carpark and flee.
- The person he had stolen the handbag from pursued Shadrock.
- Shadrock's car hit V.
- The victim died.
- (Jury must have accepted that Mr Shadrock saw Mrs Wang in front of, or very near, the vehicle prior to impact in order to return a verdict on either charge.)

RELIEF SOUGHT

PRIOR PROCEEDINGS

- Trial judge put s 167(b) and (d) to the jury.
- Judge relied on *R v Piri:* not necessary that once the essential elements of a crime are completed, s 167(d) can't apply.
    - You need to flee with the stuff to have stolen it.
- Instructed the jury that he didn't need to have hit Mrs Wang deliberately.
    - Just that he would have known when he hit her that his actions were likely to cause the death of Mrs Wang.
        - Actual and conscious appreciation, real and substantial risk.

RESULT

- Appeal allowed, retrial ordered.

HELD:

- S 167(d) required an unlawful purpose - being the commission of the crime, and also an act, distinct from the commission of the 'unlawful purpose' crime that was known to be likely to and did actually cause death.
- If the fatal act had occurred once the other offence had concluded, that might not have amounted to murder under s 167(d). Steps taken to escape don't always count. The court had to define when and in what circumstances the offence had concluded and it could not merely be when the legal elements were completed. Question of fact in each case whether the fatal act was sufficiently linked to the 'unlawful object.' Victim was taking steps to recover her property so open to the jury to find that the offence was continuing. Correct to leave 167(d) on the alternative basis.
- It ought to have been left for the jury to decide whether, on the evidence, the facts fell within the 'unlawful object' element of s 167(d). The failure to leave the 'unlawful object' element to the jury to decide, with an adequate direction had resulted in a miscarriage of justice.

PLAINTIFF'S THEORY

Applicability of s 167(d);

- Appellant intentionally assaulted Mrs Wang with intent to cause bodily injury with knowledge that it was likely to result and reckless to whether death ensued (s 167(b)).
- OR appellant had hit Mrs Wang with the vehicle he was driving whilst engaged in an unlawful object and with knowledge that his actions were likely to cause death (s 167(d)).
    - Judge determined if the assault occurred whilst fleeing the scene, this would apply.

- Unlawful object doesn't have to be a discrete crime.
    - Could be an object that is linked with the successful implementation and completion of the crime.
- There is English authority to suggest that the unlawful object does not end simply at the point where the crime is complete.

DEFENDANT'S THEORY

- Leaving the scene of the crime is not an unlawful object because it is not in itself illegal.
    - Unlawful object requires a criminal offence.
        - The offence of the theft was complete. There was no motive or purpose (intention) to complete a different offence.

ISSUE(S)

- Meaning of the words 'unlawful object;'
    - Whether the unlawful object in s 167(d) must be a criminal offence; and
    - If so, does the act causing death have to occur during the commission of the offence, or is it enough that the act take place at a time and in a place sufficiently proximate to the commission of the offence?

JUDGE'S REASONING

ISSUE ONE: APPLICABILITY OF s 167(d):

- Contest between parties centers of whether a criminal act is actually required, and if so, how proximate the fatal act must be to that criminal act in order to be committed "for an unlawful object."

ORIGINS OF S 167 (d):

- *R v Timoti:* it is a qualified application of the felony murder rule.
    - Murder committed in the course of committing another felony - MR is felonious intention or constructive malice.
        - Constructive malice abolished in the UK.
    - *Archbold:* "it seems... that the doctrine that, if a person while committing or attempting to commit a felony, undesignedly kills another, the killing amounts to murder, would not be limited to a felony of such a kind that the actual commission thereof would involve at least a threat of force towards the person killed."
- *R v Stone:* Conviction of murder upheld where, D raped V and she died in the commission of the rape, although D had no murderous intent.
- *R v Vickers:* constructive malice: generally used where a person causes death during the course of carrying out a felony which involves violence.
    - Malice aforethought - can be express, inferred or implied intention to kill.
        - Must take the consequences of the actions you are committing.
- After abolishing constructive malice, the provision then said "in the course or furtherance of" another offence.
    - Suggests fatal act must be done prior to or as part of the unlawful act.
    - Suggests that the fatal act must be committed so as to achieve the outcome of successfully committing an unlawful act.
    - Such language that the fatal must be carried out during the felony is across lots of cases.
- But these don't really help in answering the question of when the 'felony' is completed.
- S 167(d) has a more restrictive version of felony murder.
- English Royal Commission on Indictable Offences:
    - An intent to commit any felony is 'malice aforethought.'
    - "If a person intends to kill and does kill another, or if, without absolutely intending to kill, he voluntarily inflicts any bodily injury known to be or likely to cause death, being reckless whether death ensues or not, he ought in our opinion to be considered a murderer if death ensues."

- But all the examples discuss constructive malice where acts occurred whilst in pursuit of another crime.

IS A CRIMINAL OFFENCE REQUIRED?

- In Canada, an analogous provision has been read down so that 'unlawful object' means 'the object of conduct which, if prosecuted fully, would amount to a serious crime, an indictable offence requiring MR.'
  - So can't be strict/absolute liability.
  - This has to be viewed w caution because their statutory context is a bit different.
  - They wanted to limit the meaning of the word.
- In England - the position is that there must be proximity between the fatal act and the intended offence (at the same time or before hand also) and the offence must be a criminal offence.
- D relied on *R v Piri* and *R v Hakaraia.*
- *R v Piri:* court doesn't like this judgment - they treated the unlawful act (kidnapping/detention) as separate from the fatal act (exposure to the elements) and they didn't really understand this.
- Also don't like *R v Hakaraia.*
- So they looked at it from first principles.
- "The right approach to s 167(d) is to require that there must be an unlawful purpose, being the commission of a crime, and also an act (that is, distinct from the commission of the "unlawful purpose" crime) that is known to be likely to cause death and actually does cause death."
  - Canadian approach has merit - has to be a criminal offence but does not have to be serious.
  - MUST be distinct.
  - "We consider the 'for unlawful object' element in s 167(d) requires the commission of another crime... effectively s 167(d) means "if in committing a crime the offender does an act that he or she knows is likely to cause death, and does kill someone, though her may or she may have wanted to commit the crime without hurting anyone."
- Prefer *R v McKeown* and *R v Aramakutu.*
  - Consistent with *Adams* on Criminal Law.

ISSUE 2:
RELATIONSHIP OF FATAL ACT TO THE OTHER OFFENCE

- Theft is a discrete criminal offence.
  - In a technical legal sense, the theft was complete at the time of the death.
  - (Also could put forward the argument that the act was continuing).
- Accept that escaping from the scene of a crime is not in itself a criminal offence but making sure the person does not get their stuff back is part and parcel of theft.
- Driving the car towards Mrs Wang was close in time and place to the theft.
  - In a factual sense, could be said that the crime was continuing because he was trying to permanently alienate the bag from Mrs Wang.
  - Question is if this is sufficiently proximate enough to the theft so as to be committed for the unlawful purpose of the crime of theft.
- Crown relied in *R v Watson, R v Bouhaddaou* and *R v Willett.* These are not directly relevant here as they were factually different/considered different 'sections' of murder/manslaughter and came from different statutory contexts.
  - *Willett* kind of relevant - Court says it supports the view that the Court should be reluctant to take a narrow view of the unlawful act in the context of liability for manslaughter.
  - You can kind of try to marry the legal definition to the factual sense of the cases (but this could raise a problem).
- Looked at the NZCA decision of *R v Wickliffe:* significant because the use of a gun occurred during a continuation of the criminal plan to commit aggravated robbery, even if he was trying to exit from the store at the time the fatal act occurred.
  - Element of connectedness between the planned criminal offence and the fatal act.
  - Court contemplated that the unlawful act included the escape.

    - Illustrates policy considerations: the whole point of s 167(d) is to catch out people who have willingly created situations where they are likely to resort to violence - not fair that they can get away with it.
- In addition to the element of doing an act "for any unlawful object" s 167(d) also contains that the offender does an act "that he knows to be likely to cause death."

FACTORS RELEVANT TO WHETHER ACT FOR ANY UNLAWFUL OBJECT.

- Whether the assault can be said to have been "for" the object of carrying out the theft.
- On one hand the "for" might focus on the purpose of the action that led to the death. On the other hand, the word "for" might suggest the need for a causative link between the murderous act and the unlawful object and that the murderous act must occur before or whilst carrying out the unlawful object.
- Fatal act must be committed so closely to the unlawful object that it can properly be said that it forms part of that object.
    - Need to work out how close it needs to be.
- Most definitions of proximate look at space and time.
    - Can also mean the act immediately following or very close to.
    - Driving over the good was very close in time and place to the theft.
- The nearer the fatal act is in relation to the theft, the more likely it is to be sufficiently close to be part of the unlawful object.
- *R v Harpur:* the act to be committed in pursuit of the criminal intention must be "immediately connected" with the intended criminal act.
    - Also not necessary that the offender is actually at the intended location of the crime if they have done everything otherwise to carry out the commission of the crime.
    - Not necessary that there should be an act that unequivocally shows intent.
    - Case-by-case judgement.
        - Emphasis on time, place and circumstances - *taken cumulatively.*
    - Policy between murder and attempts is different tho.

DISTINCTION BETWEEN THE UNLAWFUL OBJECT AND ITS AFTERMATH:

- The Court must draw a distinction between the unlawful object on the one hand and its aftermath.
    - Escape from the scene of the crime can fall into either of these categories, depending on whether the fatal act is part of the continuing offence or not.
    - If the fatal acts occur once the offence has concluded, that might not be murder under s 167(d).
- Putting an escape within the boundaries of an offence may make s 167(d) difficult to limit in any principled manner.
- It will be a question of fact whether the fatal act is sufficiently linked to the "unlawful object." to constitute murder.
- It might be a fine judgement.
- The nature and elements of the other crime will be important.
    - "Can it be said that commission of that crime had ended before the fatal act, or is it that fatal act properly regarded as having occurred whilst the crime was still being committed?
- We think the more usual situation under s 167(d) will be one where the accused does an act causing death in the course of committing a crime and that act can properly be characterised as having been for the purpose of committing that crime.

WAS s 1679(d) AVAILABLE IN THIS CASE?

- V was trying to get her bag back.
- Open to the jury to mean that this meant the offence was still continuing.
- The two acts had particular immediacy.
- This case could fall under s 167(d) so the judge was alg to leave it as an alternative.

RATIO DECIDENDI

ISSUE 1:
- The unlawful object must be a criminal act that is distinct from the fatal act.

ISSUE 2:
- The fatal act has to be sufficiently linked to the commission of the 'unlawful object' offence - it is a case-by-case judgment.

POLICIES
- We consider the 'for unlawful object' element in s 167(d) requires the commission of another crime... effectively s 167(d) means "if in committing a crime the offender does an act that he or she knows is likely to cause death, and does kill someone, though her may or she may have wanted to commit the crime without hurting anyone."
- Case by case baby
    - The commission of the crime doesn't necessarily end when the legal elements are complete - it has to be successful.
- A continuous unlawful object depends on the facts of the case, an offence is not necessarily complete when all the legal elements are done.
- Unlawful object must be occurring at the time of the fatal act.
- There may be a problem with including escape in s 167(d) - may become very hard to limit.

Shadrock v R
S 168 MURDER

COURT AND DATE
High Court

FACTS
- Hit V with his car after he robbed her and she died.

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT
- S 168 could not be relied upon by the prosecution.

PLAINTIFF'S THEORY
- Trying to charge under s 168(a)
- Guilty of murder if he meant to cause GB injury for the purpose of resisting lawful apprehension in respect of the offence of theft.
    - V was trying to do a citizens arrest.
    - Accused resisted this by hitting her with his car.

DEFENDANT'S THEORY
- Can't use s 168 for the following grounds:
    - Insufficient evidence to support the argument that the victim was attempting to apprehend the accused.
    - Insufficient evidence that D was resisting apprehension as opposed to facilitating the commission of the offence of theft or facilitating flight.
    - V had no power to lawfully apprehend the accused.

ISSUE(S)

JUDGE'S REASONING
- S 168 is weird because it doesn't even require murderous intent.

History and Development:

- Codification and development of the common law felony murder rule and the concept of constructive malice.
- Origin discussed by the Privy Council in *Kahn v State of Trinidad and Tobago:* "penalised those who engaged in serious crimes of violence if death, even unintentionally, resulted.
- Constructive malice infringes the general principle that persons ought not to be punished for consequences of their acts which they did not intend or foresee.
    - This was done in the UK - their felony murder rule was abolished.
    - Canada has similar reservations: *R v Martineau:* murder needs proof beyond reasonable doubt of subjective foresight of death and that a special mental element with respect to death is necessary before a culpable homicide can be murder.
        - Considered inconsistent with their charter of rights and freedoms.

RATIO DECIDENDI

- Felony murder is not kwl

POLICIES

- Felony murder

PARTIES LIABILITY

Larkins v Police

COURT AND DATE

Hight Court - Eichelbaum J

Appeal against a conviction.

FACTS

- The appellant was charged as a party to the breaking and entering of a building. Him and his mates were allegedly seen stealing from a bottleshop.
- He was apprehended in the front seat of a car that was linked to the offenders.
- Larkins said that after attending a party, he had fallen asleep in the back of the car and the next minute he was at the police station.
    - Then said that he was at the bottle store and ran off when someone attempted to warn him. He then ran back to the car.
- D then said that he went to the bottle store to see what was happening and he say the other people there. He then decided to act as a lookout for them.
- When the cops came he ran back to the car and was then caught there.

RELIEF SOUGHT

- Acquittal

PRIOR PROCEEDINGS

- No dispute that the premises had been broken into with intent to commit a crime.
- The prosecution could only hope to succeed on the basis of the evidence provided by the accused in his statement.
    - Directed himself correctly in accordance with *R v Lord and Doyle.*
- Judge concluded that the statement by D was correct even though it differed from a witnesses statement.
- Held that the judge had aided the principal participants in the burglary by acting as a lookout.
    - He was assisting/helping by being a lookout - even if they didn't know that he was assisting them.
- Judge was satisfied that D knew a burglary was planned, and was taking place when he acted as a lookout.

- Conviction entered.

RESULT
- Appeal allowed, conviction quashed.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)
- Could D be held as a party, aiding or abetting a principal, when the principal is not aware of their aid?
- Could D be held as a party, aiding a principal, where the offence is completed?

JUDGE'S REASONING
Time factor
- Where the allegation of a D's involvement as a party is founded upon aiding and abetting it is elementary that the act relied upon must occur prior or contemporaneous to the commission of the offence.
    - Subsequent assistance makes D an accessory after the fact.
- No proof that D's actions took place at the time of the burglary (which is complete once the breaking and entering occurs).
- Stronger inference that it was already completed when D came to the scene, meaning that the conviction cannot stand.

Whether knowledge by principal required
- The first argument raises the question whether the principal offender needs to know whether they are being assisted in order to be convicted as a party.
- Lord Widgery CJ - *A-G Reference:*
    - There is usually previous contact between the party and the principal, with the result that each know what is happening in the other's mind.
    - In the absence of a "mental link" there can be no aiding, abetting or counselling.
    - BUT this does not apply for procurement.
- Aiding and abetting, even to a common design, does not have the same elements as conspiracy.
- A number of texts deny the need for a 'meeting of the minds.'
- Satisfied that at the common law there is no requirement of consensus re aiding and nothing in s 66 to say that there needs to be.
    - BUT you can still be liable for aiding or abetting if there is no knowledge of it from the principal.

Whether actual assistance required
- Issue is whether proof is required that the acts of the secondary party was of actual assistance to the principal offender.
- Even if the offender, as a lookout, does not have an active role (esp when the principal is aware of it) does come between aiding and abetting.
    - Therefore in most cases, where there is principal knowledge, there does not need to be much of an inquiry where the act falls within (a)(b) or (c) of 66(1).
    - However, where there is no knowledge, there may be more of an issue.
- The dictionary definition of aid suggests that the effect is quite important - there must be actual assistance.
    - But in the Canadian Code equivalent, the secondary party's acts do not need to actually help, so long as they were intended to do so.
    - But later, the person analysing this text says tat there does need to be some real assistance given.
- The aider must try to allow the principal to proceed more effectively with his criminal plan.

- The assumed lack of knowledge in the present case renders it unexplainable that there was any actual assistance provided.
- *R v Baker:* D sent a letter containing instructions of how to use a bomb to enter a safe and sent it to some people, who then used the info to try to break into the safe. But the instructions were not specific to any safe/any specific plan.
    - Found guilty of aiding - Judge thinks that this decision is a bit stupid and extends liability too much.
    - BUT bound by the decision.
- English case law supports the view that assistance is necessary, presence, even if presence was intended to encourage, does not mean anything if there was no common design.
    - *R v Young and Webber*
- Adopted in Canada.
- *A-G v Able:* the party must be shown to have in fact encouraged the principal to perform the deed.
    - Aiding requires actual assistance but neither consensus nor causation.
- Where the encouragement lies in presence at the scene of the crime there is generally no clear dividing line between assistance and encouragement, the latter being capable of being regarded as one instance of the former. In principle there seems to be no valid reason why, if actual encouragement is a requirement before a secondary party can be convicted as an abettor, actual assistance should not be a prerequisite in the case of aiding.
- Consistent thread in authorities that at common law actual assistance or encouragement is required as a prerequisite for conviction of secondary party for aiding or encouragement.
    - S 66(1)(b) might have been intended to enlarge culpability.
    - But unlikely - there must be AR.
- There needs to be actual assistance for "aid" and the word "purpose" is a reference to the state of mind required by the secondary party.
- THEREFORE: while it is unnecessary that the principal should be aware of being assisted, there must be proof of actual assistance. The mere commission of an act intended to have that effect is insufficient.
    - Absence of any knowledge of being assisted removes a common ground for finding actual assistance - that is the confidence gained by the principal knowing that they have help. Easier to find actual assistance where the principal knows the parties' presence.
- BUT in this case the extra pair of eyes was enough to be found to be actual assistance, regardless of the principals not having knowledge of it.
    - Overall quashed because of the contemporaneity thing.
        - Should've been s 71 accessory after the fact.
    - No change in penalty tho.

RATIO DECIDENDI

- While it is unnecessary that the principal should be aware of being assisted, there must be proof of actual assistance. The mere commission of an act intended to have that effect is insufficient.
- Where the allegation of a D's involvement as a party is founded upon aiding and abetting it is elementary that the act relied upon must occur prior or contemporaneous to the commission of the offence.

POLICIES

- Secondary acts MUST be done before or during the criminal offence that has been aided
- Principal doesn't need to know about the help but there must be actual assistance provided
- Purpose refers to the state of mind of the secondary party.

Richards

COURT AND DATE

CA - 1992

Fisher J

FACTS

- Wentworth was a pharmacist who in 1990 supplied methadone to three of the accused.
- Initially did this as part of an authorised programme for heroin addict but he gave more than the authorised levels.
- He said that he supplied the excess methadone in order to keep the group away from heroine.
- Later admitted that he knew that large quantities of the drug could be used to make heroine, and that he thought that the other D's were probably procuring such a large amount in order to do so.
- By supplying the Panedeine tablets to Moroney knowing they would be used for the manufacture of heroin, the case is that D became a party to the subsequent manufacturing of it.
- Had intention and knowledge of essential matters.
- There was actual assistance.

RELIEF SOUGHT

- Overturning conviction or at least separating his trial from the co-defendants.

PRIOR PROCEEDINGS

- Convicted at the high court.

RESULT

- Charge upheld - convicted under s66(1) as a party to the production of heroine.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

- Not enough evidence of a common purpose.
- Mere foreknowledge of the incidental criminal consequences is not enough. Accused should want that particular criminal outcome.

ISSUE(S)

- "Is it incumbent on the Crown to go on to prove that Wentworth *wanted* heroin to be manufactured or is it enough to show that he knew that such a manufacture would be consequence of his actions?"
    - i.e whether there was actual intention to assist.

- Whether forgoing is sufficient to satisfy the MR requirement for aiding a principal offender to manufacture heroin.

JUDGE'S REASONING

- There are at least four ingredients which the Crown must establish.
    a. That D (Wentworth) knew that someone contemplated the manufacture of heroin.
    b. That he intended to help that person to manufacture heroin in the sense that he knew that such manufacture would be a direct or indirect consequence of his own action;
    c. That with that intention he performed some act; and
    d. That his act in fact assisted the other person to manufacture heroin.
- The available evidence makes the following findings possible:
    - D knew that someone intended to illegally manufacture heroin.
    - Knew that if he supplied a large amount of Panadeine it would be used for that purpose.
    - With that knowledge he deliberately supplied Moroney with Panadeine.
    - This enabled Richards to manufacture Heroin.
- The answer to the issue turns on the meaning of the phrase "for the purpose" in s 66(1)(b)."

- Defence Counsel noted Glanville Williams:
  - Purpose means wanting something to exist or occur - would be frustrated if the result in question did not occur.
  - A person cannot be indifferent to whether he wants the result to occur to be considered to have the required "purpose," less so if he does not want the result to follow.
- D counsel also raised minority judgment in *National Coal Board v Gamble:* Slade J -
  - 'assist' or 'encourage' import motive.
  - "The act was made with a view of assisting or encouraging the principle offender to commit the offence... *with the motive of endorsing the commission of the offence*."
- D counsel also used *Pene:* the conduct must actually be intended to encourage the crime, if there is some other motive then there is no liability.
- These passages may seem to focus on the motive for foreseen encouragement rather than foreknowledge of its consequences, this would not be easy to reconcile with other passages of *Pene* which state that it is fine to sustain a conviction if D conducted himself in such a way which was intended to be interpreted by the principal offender as encouragement.
- The real point of *Pene* may have been that merely to know that one's actions would be "likely" to encourage the commission of a crime would not import the necessary degree of certainty on the accused's part if he did not desire that outcome as an end in itself.
- But these can all be answered by the majority in *National Coal Board* - Devlin J:
  - There must be proof of intent to aid.
  - Prima facie, a man is presumed to intend the natural and probable consequences of his acts (**nb we don't have this anymore in nz**).
  - Always open for D to give evidence as to his real intention.
  - The prima facie presumption is enough to satisfy the intent element in the absence of another additional requirement.
  - Indifference to the result of the crime does not negate abetting.
  - MR is not about motive - it is about intention.
- Lots of other authorities support the idea of looking at intention in the more limited sense that foreseen consequences are deliberately pursued whether wanted for their own sake or not.
  - Disregarding motive
- "Intention" is taken to mean both ultimate and desired consequences and incidental (undesired but foreseen) consequences so long as the latter can be seen with a reasonable amount of certainty when the act is begun.
  - Room for argument as to the degree of certainty with which the accused must predict the incidental consequence.
  - Both oblique and direct intention qualify.
- Williams wants to separate intention and purpose, this means that incidental outcomes would not come under the meaning of purpose. Intention includes foreseen but unwanted consequences when part of a larger plan, but purpose does not.
- But this is an issue for the following reasons;
- **Semantics**: in some contexts a distinction between purpose and intention can be made. But there is usually a chain of purposes (or intentions), each leading to an ulterior one.
  - There is no distinction between purpose and intent for s 66(1)(b).
- **Authority:** Intention and purpose are usually interchangeable. Intention has both oblique and direct intention.
  - All of the cases used by Williams could have actually been about the accused lacking the requisite knowledge or foresight of the criminal consequences which followed.
    - This might include some kind of value judgement or public policy consideration.
- **Policy:** people should not be able to pick and choose between the consequences of their actions. The result is still the same to the victim.

- Treat an accused as acting "purposely" as to any consequence if he acted in order to effect either that consequence or another consequence which he knew would involve that consequence. This is the same for secondary parties.
    - Foreseen outcomes are not divisible in this context.
    - To hold anything else would be to confuse purpose with motive.
- There is public interest and people are still morally responsible for the crime.
- If you know that the things you are supplied are going to be used illegally, foreseen consequences are not divisible from your actions.

RATIO DECIDENDI

- Treat an accused as acting purposely as to any consequence if he acted in order to effect either that consequence or another consequence which he knew would involve that consequence. This is the same for secondary parties.

POLICIES

- There is the same amount of moral culpability
- D cannot choose the consequences of his action
- Purpose/intention and motive are different - motive not so relevant here.
- Purpose does not add anything to how we look at intention for s 66(1).

Ahsin v R

COURT AND DATE

Supreme Court of NZ - March 2014

McGrath, Glazebrook and Tipping JJ.

FACTS

- D's were convicted by the High Court murder.
- Parties under ss 66(1) or alternatively 66(2) for having formed a common intention to intimidate and assault members of the Mongrel Mob, with murder being known as a probable consequence.

- Appellants were associated of Black Power.
- Sequence of events that culminated in the murder:
    - Countdown supermarket: altercation with a member of the Mongrel Mob
    - Victoria Ave: Police search the car
    - The "North Mole:" the D's threaten people in their car.
    - Gibbons cres: Mr McCallum throws a spanner at another vehicle
    - Gibbons cres and cross street: The group leaves the party and sees V in a red hoodie, jump him and he dies.
        - Ms Rameka and Ms Ahsin tell the perpetrator to get back into the car whilst he is assaulting V.

RELIEF SOUGHT

PRIOR PROCEEDINGS

- CA dismissed the appeal against convictions.

- In the summing up - Dobson J discussed the relevant law.
    - Second part: he described the question tail
    - Third part: reviewed the Crown and defence cases in relation to each defendant in the following order.
    - Fourth section: they should take the evidence including identification evidence.
    - Final par: decision-making process to be followed by the jury.
- All four D's were convicted of Murder.

RESULT

- Appeals allows, retrials ordered, convictions quashed.

PLAINTIFF'S THEORY

Crown Case re 66(2):

- the first incident at the supermarket had led to the four defendants forming a common intention with the purpose of intimidating and assaulting people who they believed to be Mongrel Mob members of their associates.
    - Evidenced by their driving to the North Mole, the altercation at the party.
- Aware that the 2 male D's had weapons and that killing of a person was a probable consequence of the prosecution of the common purpose.

Crown case re 66(1) - Ahsin:

- Ms Ahsin had provided assistance and encouragement to Mr McCallum as the driver throughout the day.
    - Tried to facilitate the perpetrators getting away.

Crown case re 66(1) - Rameka:

- Provided encouragement and assistance by yelling and as a lookout.
- Pushed V out of his car.

Re defences:

- Shouted words were not enough to be a withdrawal - were still helping as lookouts.

DEFENDANT'S THEORY

Rameka:

- Not being present lol.
- Spanner incident was not a common manifestation of a common person.

Ahsin:

- Events were not gang related.
- She had no knowledge of the weapons in the car.
- She told ppl to get back in the car, showing that she wanted to leave.
- Words indicated withdrawal from a common purpose.

ISSUE(S)

1. The legal elements of party liability under s 66(1) and (2) and the trial judge's discussion of those elements in directing the jury;
2. The adequacy and sufficiency of the trial judge's directions on withdrawal;
3. The particularity with which the judge's directions identified the case against each appellant and differentiated between s 66(1) and (2); and
4. The requirement of jury unanimity.

JUDGE'S REASONING

Section 66(2) of the Crime Act

- Proof is first required that the defendant formed a common intention with one or more others to prosecute an unlawful purpose and to assist the other(s) in doing that.
- Each participant will become liable as a party if one of the other commits an offence while prosecuting the common purpose, whether or not that offence was an intended outcome, as long as that offence was known by the participant to be a probable consequence of the prosecution of that purpose.

Section 66(2) applies to intended offences

- Applies where the offence that occurs is an intended offence and to offences that were not intended by the party but that were known to be a probable consequences. It section can apply in either context.
- Considered *Bouavong v R.*
    - The CA found support in the Privy Council decision of *Chan Wing-Siu v The Queen* - Robin Cooke:
        - S 66(2) was explained as: the case must depend rather on the *wider principle* whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not *necessarily* intend.
- In *Bouavong* the Court of Appeal said that it did not see any suggestion in the case law that the "extended form of liability" discussed in *Chan Wing-Siu* "could apply to the very crime intended to be committed."
- The court did not recognise the meaning of the word 'necessarily.'
- Common purpose liability is a "wider principle" that is not confined to cases where the intended offence is committed. Nor are intended offences to be excluded from its ambit.
- Where the crown pitches the common intention can determine how easy it is to show whether the parties had the knowledge of probable consequences.
    - Easier to show the common intention if it is pitched lower but harder to show the appreciation probable consequences
    - Or higher common unlawful purpose but is much easier to connect to appreciation to probable consequences.
    - Here the common intention was trying to sacre Mongrel Mob members, this was shown in the driving around and culminated in the attack on V.
- The offence by the participants falls naturally within the scope of s 66(2).
    - Parliament cannot have contemplated that s 66(2) was confined to offences other than those intended at the time of entry into the common purpose.[94].
- The *Bouavong* position goes against the longstanding position in *The Queen v Currie.*
    - North P:
        - "reject the argument of counsel that the words "to every offence committed by one of them" exclude the offence which was the immediate object of the formation of the common intention."
- *Bouavong* does not correctly state the law in NZ for 66(2) and prefer the approach in Currie.

"Known to be a probable consequence" in s 66(2)

- The judge said that this meant 'could well happen.'
- D submitted it would be better for the words to be "probable consequence."
- But the judge's summing up was the established law in *Gush.*
    - Doesn't have to mean an even that is more probable than not, just one that could well happen.
- Same with *Piri.*
    - Foresight required to be proved may be referred to as "a real risk, a substantial risk, or something that might well happen."
- These decisions have been consistently followed in NZ so the judge's direction was correct.

The elements of s 66(2)

a. The offence to which the defendant is alleged to be a party was committed by a principal offender; and
b. There was a shared understanding or agreement to carry out something that was unlawful; and
c. The person(s) accused or being parties to that agreement had all agreed to help each other and participate to achieve their common unlawful goal; and
d. The offence was committed by the principal in the course of pursuing the common purpose; and
e. The defendant intended that the offence that eventuated be committed, or knew that the offence was a probable consequence of carrying out the common purpose.
    a. Foresight of both the physical and mental elements of the essential facts of the offence.

The trial Judge's explanation of s 66(2)

- Judge's summing up was alg for (b)-(d).
- But there was deficiency for (e): did not refer to the need for *knowledge* that the offence was a probable consequence - made it more objective.
    - Did not specifically identify that what needed to be foreseen (or intended) included both the physical and mental essential facts of the offence, including murderous intent.
    - We therefore conclude that, in relation to s 66(2) too, the jury was not given adequate assistance as to the meaning and necessity of the legal elements of party liability.

RATIO DECIDENDI

- The elements as set out above.

POLICIES

- S 66(2) can be used for the intended offence
- The idea of "probable" means the same as gush - real and substantial risk, something that might well happen.

Ahsin v R

COURT AND DATE

Supreme Court of NZ - March 2014

McGrath, Glazebrook and Tipping JJ.

FACTS

- D's were convicted by the High Court murder.
- Parties under ss 66(1) or alternatively 66(2) for having formed a common intention to intimidate and assault members of the Mongrel Mob, with murder being known as a probable consequence.

- Appellants were associated of Black Power.
- Sequence of events that culminated in the murder:
    - Countdown supermarket: altercation with a member of the Mongrel Mob
    - Victoria Ave: Police search the car
    - The "North Mole:" the D's threaten people in their car.
    - Gibbons cres: Mr McCallum throws a spanner at another vehicle
    - Gibbons cres and cross street: The group leaves the party and sees V in a red hoodie, jump him and he dies.
        - Ms Rameka and Ms Ahsin tell the perpetrator to get back into the car whilst he is assaulting V.

RELIEF SOUGHT

PRIOR PROCEEDINGS

- CA dismissed the appeal against convictions.

- In the summing up - Dobson J discussed the relevant law.
    - Second part: he described the question tail
    - Third part: reviewed the Crown and defence cases in relation to each defendant in the following order.
    - Fourth section: they should take the evidence including identification evidence.
    - Final par: decision-making process to be followed by the jury.
- All four D's were convicted of Murder.

RESULT

- Appeals allows, retrials ordered, convictions quashed.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

- Withdrawal demonstrates a lack of entrenched criminal purpose or future dangerousness, so not blameworthiness.

ISSUE(S)

Whether verbal actions are enough to constitute withdrawal as a party, and what the burden of proof on D is.

JUDGE'S REASONING

- Party liability unconditionally attaches only when the principal offender attempts or commits the crime to which the secondary offender becomes a party.
- This means D may have a window of opportunity before the offence is perpetrated during which it is conceptually possible to withdraw from involvement before any criminal liability attaches.

Withdrawal within the elements of party liability?

- The common law says that there is withdrawal as an excuse. Unsure ab whether it is a defence or whether it just means the AR has not been proved.
- Sometimes people say that withdrawal speaks straight to the elements of the offence.
    - E.g s 66(1) requires proof that the D's conduct has in fact actually aided or encouraged the principal offender. This cannot be established where a withdrawing party takes steps that effect complete neutralization of earlier involvement. In such cases the alleged party has not provided any assistance.
- On the other hand, s 66(1) does not stipulate a requirement that the assistance or encouragement needs to remain operative.
    - For s 66(1)(b), (c) and (d) the AR is complete when the initial assistance etc. occurs (provided that principal offender then goes on to commit the offence).
    - This means that the AR is not negated by acts of withdrawal.
- Recognition of withdrawal must accordingly be as a true defence.
- In relation to 66(2) the elements of liability require some consideration of withdrawal is that the party remained party to the common purpose.
    - But under the subsection the AR is complete when the common purpose is formed.
    - Recognition of withdrawal thus must be as a full defence.
- Therefore the approach in NZ towards s 66 is to recognise withdrawal as a true defence under the common law - preserved in NZ under s 20.
    - Not inconsistent with the Crimes Act.
- This is good because it avoids complexity of jury directions.
- The defence of withdrawal has an evidentiary burden on D to raise evidence that indicates the reasonable possibility of the defence before it will be put to the jury.
    - There would need to be clear evidence before the jury considers it even if the lack of withdrawal were seen as an offence element of party liability???

Rationales underlying the withdrawal defence.

- Potential beneficial effect.
- Dissuade or frustrate the principal from committing the offence.
- The law should encourage people who participate in criminal arrangements to change their mind.
    - Providing an incentive if there is not liability.
- Where the full defence cannot be met, it will remain open for the Court to recognise actions by a party who withdrew as a mitigating factor in sentencing. But limited in murder.

The scope of the withdrawal defence

- Referred to in *R v Pink,* Hammond J - four conditions to be met before a withdrawal defence will be available to the defendant. (essentially the same as what is outlined later).
- Judgement is a contextual one.

- English CA - *O'Flaherty,* Mantell LJ:
    - "mere repentance does not suffice... person must do enough to demonstrate that he or she is withdrawing from the joint enterprise... this is ultimately a question of fact and degree,,, the nature of assistance and encouragement already given and how imminent the infliction of the fatal injury or injuries is as well as the nature of the action said to constitute withdrawal... reasonable steps must have been taken to prevent the crime. It is clear, that this is not necessary."
- Sloan J - *Rex v Whitehouse* (Canada)
    - "where practicable and reasonable there must be timely communication of the intention to abandon the common purpose... what is timely communication must be determined from the facts of each case."
- Wilson J - *R v Kirkness* (Canada)
    - Standard of withdrawal may depend on the party's involvement
    - "defendant will be held liable to a different standard depending on the degree of participation in the crime."
    - Court shouldn't advise exactly what is required. Jury should be directed to consider the quality of the withdrawal in relation to both the offence and the type of participation.
- Same as below 4 steps was outlined in Canada in *Gauthier.* Majority judgment also said:
    - "there will be times when the timely and unequivocal communication... will be considered sufficient to neutralise the effects of participation."
    - In other times something more may be required for it to be considered reasonable.
- Two requirements of the common law defence of withdrawal in NZ.
    - There must be conduct, whether words or actions, that demonstrates clearly to others withdrawal from the offending.
    - The withdrawing party must take reasonable and sufficient steps to undo the effect of his or her previous participation or to prevent the crime.
    - Some actions will be relevant to both the first and the second requirements of the defence.
- Application of the second requirement of the defence involves a careful factual inquiry, particular consideration must be given to the nature and degree of assistance or encouragement that has been given and the timing of the attempted withdrawal.
- What is done to withdraw must be proportionate to the impact of the assistance earlier given.
    - Communicating discouragement may be enough the influence of previous conduct.
    - If previous participation consists of actions of assistance, further reasonable steps to undo that previous assistance or to otherwise prevent the crime will be required for there to be a valid withdrawal.
- Timelines of the acts said to be a withdrawal will be significant. They must be done before the crime is committed. The withdrawal must occur at a time when it is possible for the party either to undo his or her previous assistance or to prevent the crime.
- The sufficiency of the conduct must be judged by reference to the potential of what was done to be effective in the circumstances.
- If attempted withdrawal is left too late, there may be circumstances in which withdrawal is extremely difficult if not impossible. If in all the circumstances the withdrawing conduct has insufficient potential to be effective, it will not be enough to be a withdrawal.
- Withdrawal will sometimes be unachievable because no action will be capable of undoing what has been done as the matters have gone too far.

Summary of the withdrawal defence:

- The common law defence of withdrawal must be put to a jury in relation to s 66(1) and (2) where there is evidence that indicates the reasonable possibility of the availability of the defence. It is for the trial judge to decide if an evidential basis for both requirements of the defence exists.
- The D will be liable as a party only if it is proved beyond reasonable doubt that he or she had not withdrawn from involvement. If there is a reasonable possibility that the defendant has withdrawn from the offending, he or she has a defence to criminal liability.
- Helpful to direct the jury to consider:

a. The D demonstrated clearly to the principal that she was withdrawing from the offending before the offence was committed?
b. D took steps to undo the effect of his or her previous involvement or to prevent the crime?
c. Steps taken amounted to everything that was reasonable and proportionate, having regard to the nature and extent of the defendant's previous involvement?
d. The steps taken by the D were timely, D acted at a time when it was reasonably possible that he or she may be able either to under the effect of his or her prior involvement or to prevent the crime?

- If all of these questions are answered yes on the basis of reasonable possibility, the Crown will not have disproved the defence.
- Jury should be directed in relation to the facts of the case.

Ms Ahsins appeal on withdrawal:

- Judge directed the jury for s 66(2) that withdrawal was a defence.
- Did not do so for s 66(2).
- But all she did was shout out to him, she could have been acting as a lookout.
- There is no tenable case for withdrawal.
- What she did was too little too late and did not meet the evidential onus for withdrawal.

Ms Rameka's appeal on withdrawal:

- The shouting was enough to discharge an evidential basis because she was not as involved as Ms Ahsin in the crime.
- Therefore there was a defence that should have been put to the jury.
- Judge also did not point to withdrawal under s 66(2) for her. Didn't direct on law either. Jury was therefore not adequately informed when looking at the question trail.
    - Judge did not assist the jury sufficiently.

RATIO DECIDENDI

- Withdrawal exists as a common law defence preserved under s 20, where timely communication of withdrawal, as well as reasonable and proportionate steps to withdraw or reverse previous involvement, may be enough to exculpate.
- The onus is on D to raise evidence, the crown must then disprove it beyond reasonable doubt.

POLICIES

- Operates as a common law defence.
- Sometimes communication is enough, sometimes there has to be other steps taken.
- Cannot be done at a time where it is not possible to reverse previous involvement.

Tomkins

167 and 66(2)

COURT AND DATE

CA - 1985

Cooke P

FACTS

- D and 2 others were associated in an episode resulting in the death of a taxi-driver.
- They planned to rob a taxi-driver.
- After doing so, they made him drive out to a deserted spot and get out of the car.
- They then pushed him into some bushed.
- Tompkins snatched the glasses off his face with his knife in hand, whilst his friend murdered the taxi-driver.
- Tomkins maintained that the weapons were not intended to be used to kill but were supposed to be used to scare the driver.

- This was an exculpatory statement kinda.

RELIEF SOUGHT

PRIOR PROCEEDINGS
- First trial murder verdict quashed because of misdirection, ordering a new trial.
- Then on second trial, he was found guilty of manslaughter.
- Then applied for leave of appeal out of time.

RESULT
Appeal dismissed

PLAINTIFF'S THEORY

DEFENDANT'S THEORY
- Relied on the decision in *Reid:*
  - Having started out with weapons on an enterprise which envisaged some degree of violence, albeit nothing more than causing a fright, each participant could be convicted of manslaughter even if acquitted of murder.

ISSUE(S)
- Whether, having found a principal guilty of s 167 murder, a s 66(2) party could be guilty of manslaughter?

JUDGE'S REASONING
- Manslaughter verdict was open and it was not a case of murder or nothing.
- No lack of previous cases recognising or consistent with the view that if a defendant joins a criminal enterprise intending that the knives will be used (even if only to scare) he may be guilty of manslaughter if another party uses a knife to kill with murderous intent.
  - *Reid* and *Markby.*
- Shouldn't just be str8 up murder; gives effect to the community idea that a man who joins and enterprise knowing that knives are being carried should carry some blame if death ensures, but not as much if he never thought the weapons would be used to kill.
- A number of ways to approach it:
  - Although not contemplated by the accused charged as a party, the intentional killing was in the scope of the concerted action (*Smith* and *Betty*).
  - If there had been a departure from the common purpose, the death would have only rendered the participants guilty of manslaughter. (*Markby*)
  - Guilt of manslaughter should be based on criminal negligence (Howard's *Criminal Law*)
  - Can be seen as a case of aiding and abetting with causation partially attributable to the accused, and thus falling within s 66(1).
    - This might be hard re MR
- Prefers the justification in *Reid:*
  - "always the likelihood that, in the excitement and tensions of the occasion, one of them will use his weapon in some way which will cause death or serious injury. If such injury was not intended by the others, they must be acquitted of murder; but having started out on an enterprise which envisaged some degree of violence, albeit nothing more than causing fright, they will be guilty of manslaughter."
- Murder has to be read subject to its contemplation of risk.
- Also must be considered in light of s 66(2).
- The 'offence' in s 66 in this case can be seen to be 'culpable homicide.'
- If he meant to encourage the murder, D is guilty as a party under s 66(1)
- If the jury is satisfied that D knew there was a substantial or real risk that his party would kill with murderous intent in such circumstances, murder can be found.

- But the circumstances may have been too remote for D to consider that he never thought it was a real a risk, OR although there was a known possibility of murder in the event murder is committed in circumstances totally outside of the accused's contemplation there may be regard for not just murder.
- Guilty of manslaughter if the Jury were satisfied that a killing might eventuate, even if the circumstances were totally unexpected.
- Guilty of murder if helped or encouraged it.
    - Also if he saw murder by someone else to be a real risk.
- But if he thought that a death just might occur, it will be manslaughter.
    - Also if saw risk of murder but it was committed in a way that was in circumstances never contemplated (so that the jury thinks murder was not part of the contemplated plan).
        - But can still convict of manslaughter if he thought there would be death in a real risk way.

RATIO DECIDENDI

- You can be charged as a party to murder but under manslaughter, if you saw a real risk of death but not of one with murderous intent by yourself or another party. Or you foresaw murder, but it was in such a way that would have never been contemplated or not part of the plan.

POLICIES

- Very blurry and confused - gonna be hard to apply :333

R v Rapira

SECTION 66(2) PARTIES LIABILITY (COMMON INTENTION) AND S 168 MURDER (FELONY MURDER)

COURT AND DATE

Court of Appeal, 2003

FACTS

- Group implemented a plan to rob a delivery driver of food and money.
- The group planned to conceal themselves, 2 would engage with the delivery driver, another was to be armed with a club. All members were to assist with the robbery.
- Earlier on the day of the offending, the positions to be taken up by each group member was organised.
    - Baseball bat hidden in a nearby section.
- V was speaking to two of them when some other 2 (incl. appellant) went to steal the pizzas.
- One of the group struck V with the baseball bat with considerable force.
- The group robbed him and left.
- V died as a result of his injuries.

- Peihopa (who struck V) was charged under s 168, but denied intention to cause GBH.
- All other appellants were charged as secondary parties under s 66(2).

RELIEF SOUGHT

PRIOR PROCEEDINGS

- Trial judge in the summing up indicated that a party under s 66(2) must have known that the infliction of grievous bodily injury was a probable consequence of the prosecution of robbery before he or she could be guilty of murder.
    - Jury concluded that the appellant did not have that knowledge.

- Direction to the jury was in the form of a questionnaire.
    - Emphasised that the crown has the burden of proof.

- Directed that jury that if there was a common intention to rob and the parties knew that a probable consequence of carrying out the robbery would be that someone would intentionally hit the driver, they were guilty of manslaughter.
    - Could find murder but could ONLY occur if the principal was charged with murder.
- The scheme of the summing-up treat a secondary party as guilty of murder if the principal commits murder as defined by s 168 in the course of a robbery and the secondary party knows that the infliction of GB injury is a probable, even if undesired consequence. It treats the second party guilty of manslaughter if he knows that it is a probable consequence that the principal will strike someone and death in fact results from that unlawful act.

RESULT

- Appeal dismissed

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

- Trial judge should have directed that where a principal is convicted of murder, a secondary party under s 66(2) must contemplate that the principal may kill in the prosecution of the common purpose before a manslaughter verdict can be reached.
- Party should not be guilty of murder unless they knew that killing with murderous intent was a real risk.
- Should only be guilty of manslaughter if he knew that there was a real risk of a killing short of murder.

ISSUE(S)

What is the knowledge required of a secondary party to murder under s 66(2) where a principal is convicted of murder under s 168?
What is the knowledge required of a secondary party to manslaughter under s 66(2) where a principal is convicted of murder under s 168?

JUDGE'S REASONING

The knowledge required of a secondary party to murder under s 66(2) where a principal is convicted of murder under s 168

- S 168 is the only kind of murder that does not require murderous intent:
    - *R v Tuhoro* [1998] 3 NZLR 568: "once a series of acts involving violence commenced the performer had to accept the consequences and could not plead at some stage that they had become inadvertent."
- When in conjunction of s 66(2): Party is liable for "every offence" committed by another party to a common intention to prosecute any unlawful purpose if that offence was known to be a probable consequence of the prosecution of the common purpose.
    - If the offence committed by the principal is murder on the basis of s 168, a secondary party will be guilty of murder if he knows that the principal intends to cause GBH for the facilitation of the specified offence.
    - Just as intention to kill or knowledge that death is likely to ensure is not necessary for the principal under s 168 it is not necessary for the party.
        - *R v Morrison, R v Hardiman*

      i.e the infliction of GBH must be committed as part of the common purpose, and must be known by the parties to be a probable consequence of prosecuting that unlawful purpose. The secondary party will be guilty of murder if he knows that the principal used GBH to facilitate the offence/common purpose. Does not have to know or want death to ensue.
- The P relied on *Hamilton* and *Tomkins:* both were to do with s 167 murder where intention is required.
    - A secondary party under s 66(2) must therefore know that the offence, including intentional killing or GBH likely to cause death, is a probably consequence of the common purpose.

- S 168 and s 66(2) were considered in *R v Tuhoro:*
  - Requiring that the secondary party contemplate a real risk of killing would render s 168 (a) ineffective where s 66(2) was relied on.
  - Legislature wanted the parties to be liable even if they didn't foresee the death.
- The correct direction was that: each of the parties had joined with the principal in a common intention to rob the driver, question for murder was whether each accused had knowledge that intentional infliction of GB injury by another party to the common intention was probable.

The knowledge required of a secondary party to manslaughter under s 66(2) where a principal is convicted of murder under s 168.

- Where murder is committed by a principal, it entails culpable homicide with one of the intents in s 167 or s 168. Culpable homicide without intention is not murder but s 160 manslaughter.
- It is not necessary for the principal to foresee a risk of death to be guilty of manslaughter.
  - If the party needs to have foresight of risk of death (not just risk of harm of assault) this is really weird because it would mean that the party needed a different state of mind to the principal.
- Under s 66(2), the party is guilty of every offence which is foreseeable as a probable consequence.
- In the present case, the act for which the principal is liable to conviction of manslaughter if death ensued was intentionally causing bodily harm by an unlawful assault.
  - If the secondary party under s 66(2) knows that the infliction of physical harm which is more than trivial or transitory is a probable consequence of the protection of the common purpose, then he is guilty of the offence of manslaughter.
  - It is not necessary for the offence of manslaughter that death be intended or foreseen by the secondary party.
- This is made clear in *Hardiman* and reaffirmed in *Tuhoro.*
  - Judge's summing up in this case correct.
  - Jury was instructed that the parties were guilty of manslaughter only if they knew that the striking was a probable outcome of the prosecution of the purpose.

Departure from the common purpose

- It is clear that a secondary party may be convicted of manslaughter when the principal offender is convicted of murder.
  - It may in many cases be a misdirection not to leave manslaughter to the jury.
  - Different foresight or intent as to consequences within the prosecution of the same common purpose is reflected in the hierarchy of culpability provided by the legislation, following a continuum of foreseeable harm.
- It is only when the principal steps out of the common design in a way totally unforeseen that issues as to the application of s 66(2) arise.
  - But in this case if the striking was known to be a probable consequence of the robbery, it cannot have been a departure from the plan.
  - Lack of knowledge of the intent to cause GBH from the principal effects liability to murder not manslaughter.

R v Hartley

KNOWLEDGE OF ESSENTIAL MATTERS AND THE USE OF WEAPONS IN PARTY LIABILITY: S 66(1) PARTY LIABILITY (MANSLAUGHTER)

COURT AND DATE

Court of Appeal - 2007

Ellen France J

FACTS

- Group of four men set upon and assaulted a number of other men multiple times in a 3-4 hr period.

- In the course of the second of the assaults, one of the other men in the group stabbed V who later died.
- Appellant found guilty as a party under s66(1) of the manslaughter of V.

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)

a. Was the judge correct to instruct the jury that the Crown need not show that the appellant knew of the presence of a weapon?
b. Did the refusal to grant severance and/or to edit references to the appellant out of the co-offenders' statements give rise to a miscarriage of justice?
    a. (we're not really concerned with this issue).

JUDGE'S REASONING

Knowledge of the weapon:

- The Crown case here is that manslaughter is killing by an unlawful act. Assault is the unlawful act and therefore the appellant is guilty of manslaughter.
    - Crown's position is too broad - assuming A does not know that B has a knife, it cannot be the case that in any situation where A is party to an assault in the course of which B produces a knife and kills someone that liability for manslaughter as a s 66(1) party will follow.
- Hard to differentiate extreme cases of manslaughter from those like the present - hard to do so under s 66(1) where the Crown is arguing on a case where the appellant had no knowledge of the weapon or appreciation that it could be used and only helped in the fisticuffs.
- Trial judge instructed the jury that the Crown did not need to show that the appellant knew about the weapon, only that he had been part of and assisted in the principal's assault.
    - Didn't need to prove appellant's foresight of death or that he knew how the assault would be done, just that it would be.
- But the Crown case doesn't really state the authorities correctly. Instead these are the principles you can get from the authorities:

1. A D who is a party under s 66(1) to an assault of the type which resulted in death is guilty of manslaughter - ***R v Renata***
    a. Unlikelihood of the death is only relevant to sentencing.
    b. Guilty doesn't turn on the death itself but on the agreement to commit or participate in a particular criminal act.
    - Different with *Renata* and the present case is that the death that resulted in *Renata* was the result of an act within the contemplation of the parties. The parties here didn't know that someone was going to stab someone else - they thought it was just gonna be punching.
    - This could be considered an essential matter if following ***R v Kimura.***

    In a case under s 66(2) where the D knew that a weapon (or weapons) were on hand and might be used and that is the weapon that causes death, a verdict of manslaughter will be open - even if the weapons were only supposed to be used to threaten.
    a. *R v Tomkins* - Tomkins knew of the weapons so even though he didn't think they would be used to kill, manslaughter was still open.
    b. *R v Rapira:* D may be guilty of manslaughter under s 66(2) if he or she knows that "the infliction of physical harm which is more trivial or transitory is a probably consequence of a prosecution of the common purpose."

        - But this was not one of the cases where the actions of the principal were so totally unforeseen so as to effect the parties' liability to manslaughter.
3. D who is a party to an assault under s 66(1) which was *not of the type which resulted in death* is not guilty of manslaughter unless aware (for the purposes of s 66(2)) that the death of the victim was a probable outcome.
    - This is what is determinative here.
    - *R v Hamilton.*
- In terms of *Kopelani:* successful in appeal against conviction for murder and attempted murder.
    - Said manslaugther should have been left to the jury.
    - Said he didn't know there was a weapon.
    - Williams J: "possibility of murder was so remote that it was never a real risk in Mr Kopelani's mind. A second possibility is that he thought they were going to Appelby Place to do a 'hit' but never knew of the possibility of murder since he did not know that the beating would go as far as killing. A third possibility is that, even if.. Mr Kopelani was aware... that Mr Tumahai was armed with a knife, he may not have contemplated any real risk of killing or a killing in the circumstances amounting to murder."
- In order to found a conviction for manslaugther in this class of case, it was necessary for the Crown to prove that the appellant was aiding, abetting etc in terms of s 66(1) in respect of offending of the type which actually occurred.
    - Broadly consistent with the UK.
- In terms of policy, there are ways in which individuals in a group could be held responsible in a manner that is consistent with their individual culpability e.g by charging under s 66(2).
- "Type" is from *Chan Wing-Siu*
    - "Case must depend rather on the wider principle whereby a secondary party is criminally liable for acts to the primary offender of a type which the former foresees but oes not necessarily intend."
- *R v English:* allows appeal to be heard on the basis that D didn't know that the principal had a weapon.
- *R v Uddin:* No evidence that the majority of the group knew that one had a knife. Three of the D's were acquitted of murder but charged with manslaughter.
    - Appellant appealed successfully.
    - Bedlam LJ: "if the character of the weapon... is different from any weapon used or contemplated by the others and if it is used with a specific intent to kill, the others are not responsible for the death unless it is proved that the knew or foresaw the likelihood of the use of such a weapon."
        - "if the jury conclude that the death of the victim was caused by the actions of one participant which can be said to be of a completely different type to those contemplated by the others, they are not to be regarded as parties with the death where it amounts to murder or manslaughter."
        - If P pulls a weapon that the others knew that he had and knew that he might use it, they will be guilty of murder.
        - If the same thing occurs but we don't know who the principal is then they will be guilty of manslaughter.
        - "The mere fact that by attacking the victim together each of them had the intention to inflict serious harm on the victim caused by the use of a lethal weapon used by one of the participants with the same or shared intention."
- Some disctinctions are pretty fine.
    - There will be questions of fact and degree requiring a factual determination by the jury.
- Should not impose manslaughter in this case.
    - No foundation for manslaughter, the assault which occurred whas completely different from that which the appellant was assisting.
- If the Crown choses s 66(1) not (2) then they must establish that what the secondary party was aiding, abetting etc. caused death and not "some quite different act or omission." (e.g what specifically they participated in).
    - Can look at the stabbing here as a supervening act.

    - No direct causal link between the act causing death and what the appellant did.
    - Where s 66(2) is not used, s 66(1) looks at individual culpability.
- To require knowledge of the weapon "better reconclied the conflicting principles of culpability and criminalisation that underpin the criminal law."

RATIO DECIDENDI

In order to found a conviction for manslaugther in this class of case, it was necessary for the Crown to prove that the appellant was aiding, abetting etc in terms of s 66(1) in respect of offending of the type which actually occurred.

- i.e that he used any kind of weapon.

POLICIES

- If a different kind of act caused death, and they didn't know that that would occur, they are not guilty of anything.
- Knowledge of a weapon may sometimes be needed but sometimes not.
- Case by case analysis.
- Liability may vary pretty greatly and the elements needed may vary depending on if using subs (1) or (2).

R v Edmonds

66(2) AND KNOWLEDGE OF WEAPON

COURT AND DATE

Supreme Court

William Young J

FACTS

- V as working with people who had connections to the Mongrel Mob, although he himself did not.
- The group went to a party.
- Appellant, learning of their presence their, summoned the group to meet at his house. They then drove off to find V's group. Appellant was riving.
- There was a gun in the car that they knew of.
- Stopped the car at the top of a driveway on their second drive-by V's residence.
- Got out and chased them. The appellant stood beside the car with the gun telling the others to 'go.'
- V's group fled up the driveway. V was the last of his group. Pahau caught him and stabbed him. The other Black Power members had abandoned the chase at this stage.
- Pahau fatally stabbed V. As a result, himself and three other men (incl. the appellant) were charged with murder.
- Appellant was found guilty of manslaughter.
- Appealed to CA unsuccessfully.
- Appellant's conviction to this course is confined to the conviction for manslaughter - under s 66(2).

RELIEF SOUGHT

PRIOR PROCEEDINGS

- Judge thought that appellant could only be found guilty of manslaughter only if the jury were satisfied that he appreciated the killing of somebody was a probable consequence of the prosecution of the common purpose. (It was arguable that this was unnecessary.)

CA:

- Liability did not depend on the knowledge of the weapon's used (*R v Hartley*).

- Wanted to say that it was not necessary to show that appellant had appreciated that the killing was a probable consequence of the common purpose.
- May be times under s 66(2) where knowledge of weapon directions are required.
- Judgement as to where to pitch the common purpose.
- Lack of control is not relevant.
- Also Pahau's killing not fundamentally different from anything contemplated by the group.

RESULT
- Appeal dismissed.

PLAINTIFF'S THEORY
- Crown contended that the common purpose was inflicting serious violence on a group of people of whom V was one and that Pahau killed whilst prosecuting that common purpose.
    - (Closely associated with the charge of participation in an organised criminal group to which the appellant pleaded guilty)

DEFENDANT'S THEORY
- Trial judge should have directed that jury that they could only find the appellant guilty of manslaughter if sure that the appellant had known that Pahau was carrying the specific weapon used (a knife).

ISSUE(S)
- Whether the judge should have gone any further and outlined that the jury could only find the appellant guilty if he knew that Pahau had a knife.

JUDGE'S REASONING
Judgment:
- The appellant's plea of guilty to the organised criminal group charge acknowledge that he and two more of his co-D's had the objective of killing or putting at serious risk of death, or seriously injuring or putting at risk of serious injury.
    - Jury was always going to accept this.
- Addressing the appeal on the basis that the judge's direction re appreciating that killing somebody was a probable consequence was correct.
- Not much practical difference between direction suggested by D and that given by the trial judge.
- *R v Vaihu:* CA concluded that there had been no requirement for the jury to be directed that they could convict only if satisfied that he had been aware at the start of the group fight that one or more members of the group was armed.
- Asher J at trial: no need of a knowledge-for-weapon direction based off *Vaihu*. But he wanted to take a more 'conservative' approach because:
    - Appellant was more different from the primary offending, couldn't exert control.
    - Manlaughter charge was more serious than in *Vaihu*
    - Otherwise the jury might find D guilty of offending of a fundamentally different type from what he envisaged was likely.
- BUT didn't direct re a knife specifically.
    - Sometimes you don’t need a weapons direction.
    - Also person shouldn’t escape liability just because a different weapon was used even if they intended the outcome.
- Common purpose alleged was very specific in time and pitched pretty high.
    - Judge left out of consideration that the appellant was armed with a gun.
    - The direction was conservative.
- Also the judge didn’t need to point out that jury had to be satisfied that Pahau killed the deseased in the prosecution of the common purpose:
    - Pretty obvious
    - Wasn't brought up on appeal.

Setting the legal scene

Party liability under s 66(2) England and Wales

- Out s 66(1) is pretty identical to s 8 of the Accessories and Abettors Act in UK - but there is a difference in MR
    - In NZ, must intend to assist and have knowledge of essential matters, in UK recklessness or foresight is sometimes the only thing required.
- Common law principle of joint enterprise lines up with s 66(2).
- A party to offending may be liable under both aiding and abbetting and common purpose principles.
    - Group violence usually common purpose.
        - Because MR is higher for aiding and abetting than common purpose liability.
            - Party liable for aiding and abetting only if he or she had knowledge of the essential matters constituting the offence.
            - If the charge is murder, secondary party will only be liable if the assisted the principal with the knowledge that the principal would act with murderous intent.
    - Under s 6692), the Crown only need to establish that the party recognised that an assault with murderous intent was a probable consequence of the implementation of the common purpose.

MR requirements of murder and manslaughter in NZ, England and Wales;

- In NZ murderous intent it not limited to an intent to kill.
    - S 168.
- Under both the Crimes Act and at Common law, very limited MR (no appreciation that death is likely) is required to be established against a principal to justify conviction of manslaughter.
- Same is true of aider and abettor.
- Unsure if this is true for common purpose liability (yes for s 168)
    - Practice has been to require the Crown to show that the secondary party subjectively appreciated that death was a probable consequence of the implementation of the common purpose.
        - William thinks this is arguable.

Concerns about over-criminalisation

- Rigorous application of secondary party common purpose principles could over criminalise the conduct of secondary parties.
    - Esp when they don't foresee death.
- Not so bad in NZ
    - S 168: party needs foresight for murder
    - S 167: party needs to recognised that death is probable
- Requirement that the secondary party must have appreciated that the principal might act with either an intention to kill or an appreciation that death was likely to ensue.
    - Where the Crown relied on aiding and abetting principles, a party will be guilty of murder only if he or she appreciated that the principal would act with murderous intent.

Knowledge-of-weapons cases

Factual context:

- All arise in situations where the members deny that anyone was armed (either generally or with the fatal weapon).

English cases:

- *R v Powell:* The use of a knife (instead of posts as agreed upon) takes the killing outside of the scope of the joint venture and thus the party should not be convicted of manslaughter.
- Approved in *R v Anderson* - Lord Parker CJ: you're not guilty if the principal does something that is so outside of the common design that you don't contemplate it.

    - Lord Hutton: "if the weapon used by the primary party is different to, but as dangerous as, the weapon which the secondary party contemplated he might use, the secondary party should not escape liability for murder because of the difference in weapons."
- All judges in *Powell* were reserved about convicting of manslaughter when D did not appreciate a risk of death.
- The House of Lords decisions suggest that you need to know about the presence of the weapon used or an equally dangerous weapon.
    - Served as proxy to the rule that party liability for murder depends on actual foresight of the likelihood of death
- *Powell* was difficult to apply and was revisited in *R v Rahman.*
    - Not possible to identify the principal offender there.
        - Issue was that the judge didn't direct the jury that they should only convict of murder is satisfied that he had forseen that another person would attack v with murderous intent.
    - Lord Bingham: "a radical departure" from the foreseen purpose might relieve secondary liability.
        - Crown had to show foresight not of intention but what the principle might do.
    - Lord Scott: where parties set out to inflict serious harm and where the V's death was a possible and foreseeable consequence this amounts to murder.
        - Beside the point what weapon was used.
        - As long as the act was within the joint enterprise and the likelihood of death was foreseeable.
- Basis of this approach is that common purpose liability depends on whether the actions of the principal were "fundamentally different" from those foreseen by the alleged party, an issue which will be heavily influenced, but not necessarily controlled by, knowledge of a weapon that was the one used or of equivalent dangerousness.
    - Courts focus on the dangerousness of the situation as recognised by the alleged party and that party will not be responsible for consequences which result from risk which was greater than and different from that identified by the party.

Australian cases:
- Do not support the appellant.

Canadian cases
- Liability only where the party has subjectively recognised that the offence committed was a probably consequence of carrying out the common purpose.
- Common purpose liability is dependent on the alleged party having recognised that a death was a probable consequence of the implementation of the common purpose.
    - No knowledge-of-weapons jurisprudence in Canada.

NZ Law:
- Very limited s 66(2) liability where the party has not recognised the probability of death.
- Magnitude of the risk of death recognised by the alleged party cannot be accurately assessed by only looking at whether they know about a fatal weapon or one that is similarly lethal.
    - Likelihood of serious injuries depends on who's involved.
    - Far more important themselves is the intention of using them.
- Treating party liability as dependent on awareness that one or more of the participants were armed with the weapon used by the principal (or an equally dangerous weapon) cannot produce anything like a precise correlation of common purpose liability with the accuracy of the alleged party's foresight of the extent of the risk of death or serious injury.
- "fundamentally different" test is indeterminate both legally and factually.
- Each case ends on a value judgement by the jury.
    - Rooted in the facts of the case.
- The approach to common purpose liability must be true to s 66(2) wording.
    - Only one relevant level of risk: probability of the offence in issue being committed.

        - If the level of risk recognised bby the party is not of that standard, it cannot matter that the actual level of risk was greater than recognised.
    - No stand alone legal requirement that common purpose liability depends on the party's knowledge that one or more members of the group were armed or with what weapons.
    - All that is necessary is that the level of appreciated risk meets the s 66(2) standard.
- But there may be circumstances when knowledge of weapon direction is required:
    - Establishing common purpose
    - Deciding whether the party recognised that the commission of the offence was a probable consequence.
    - Determining whether the offence committed by the principal was in the course of the implementing of the common purpose.
- Common purpose is for the prosecutor to define.
- The lower the criminality of the alleged common purpose, the easier it will be to establish, but perhaps the harder it will be to show that the ultimate offence was recognised as a probable consequence.
- Where the alleged party can be shown to have known of the presence of weapons when the fracas started, it will usually be easy to infer that he or she was party to a common purpose which extended to the use of those weapons.
    - Evidence that the alleged party was either carrying a weapon or knew that other members of the group were armed may be the only evidence that the alleged party a) shared the common purpose or b) appreciated the ultimate offence as probable
    - The common purpose may be best assessed by reference to the result everyone wanted to bring about.
- There might be cases where the use of an unknown weapon may constitute a departure from the common purpose.
    - Hard to think of a time when the nature of a weapon itself will be determinative of whether the offence occurred in the course of implementing the common purpose.
- No legal requirement for knowledge of weapon directions in a s 66(2) case.
    - Whether it is practically required might differ.

In this case:

- Judge's question trail showed that there needed to be knowledge of the weapon.
- No difference between death caused by a blunt weapon or a knife.
    - What was material was the appreciation of whether the ultimate result was probable.
- No need to show about the stabbing specifically.
- Open to the jury to decide that the appellant and the other members of his group envisaged sufficiently serious violence to justify the inference that they appreciated that there was a substantial risk of death.
- No practical requirement.

RATIO DECIDENDI

- Knowledge-of-weapon direction not legally required for s 66(2), but may be pratically favourable based on the level of common purpose alleged and the nature of the charge.

POLICIES