TOPICS INCLUDED

1. PRINCIPLES OF CRIMINAL LAW

- Crime law and morality
- The scope and principles of criminal law
- The elements of criminal offences

2. OFFENCES

- Murder
- Manslaughter
- Assault
- Sexual offences
- Larceny
- Complicity

3. DEFENCES

- Extreme provocation (s 23)
- Self-defence and excessive self-defence
- Duress and necessity
- Substantial impairment by abnormality of mind (insanity)
- Automatism and involuntariness
- Intoxication

SAMPLE CONTENTS PAGE

CRIMINAL LAW NOTES
LAWS5004 SEMESTER TWO 2016

★Compulsory Case and Statute Readings ●Additional Case and Statute Readings

TOPIC ONE – CRIMINAL LAW PRINCIPLES
Morality and the scope, principles and elements of criminal law

TOPIC TWO – OFFENCES
Murder; manslaughter; assault; sexual assault; larceny; complicity

SAMPLE NOTES FROM EACH SECTION

(CLASS ONE) CRIME, LAW AND MORALITY

Main underlying questions of Criminal Law unit

1. How *do* we determine the limits of criminal liability?
2. How *should* we decide whether certain behaviour is criminal?

Crime, Reason and History: A Critical Introduction to Criminal Law
Alan Norrie, 2nd Edition, 2014

"Criminal Law is, at heart, a practical application of liberal political philosophy. Thus the legal theorist Hart writes that criminal liability can be founded upon:

> *The simple idea that unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him.* (Hart, 1968, 181)

There is an intrinsic connection between criminal punishment and individual justice:

> *"[T]he principal that punishment should be restricted to those who have voluntarily broken the law… incorporates the idea that each individual person is to be protected against the claim of the rest for the highest possible measure of security, happiness or welfare which could be got at his expense by condemning him for a breach of rules and punishing him. For this a moral licence is required in the form of proof that the person punished broke the law by an action which was the outcome of his free choice… it is a requirement of Justice.* (Hart, 1968, 22)

Discussion: The use of the qualification 'at heart' is important. Ideas of individual autonomy have influenced the content of the criminal law, but so too has a judicial concern to protect the community and to ensure that the existing social order is not radically undermined. The competing influences of autonomy and community protection seem to explain the criminal law's ambivalent approach to subjective mental states.

While 'general principles' of the criminal law (e.g. the temporal coincidence rule) seem liberal on their face, judges have not always felt constrained by them when the price of adherence would be what they consider to be a manifestly unjust outcome in a particular case.

Sources of criminal law

NSW is a "common law" state: There is no Criminal Code that purports comprehensively to state the criminal law. Nevertheless, much of the state's criminal law is contained in legislation and, in particular, the NSW *Crimes Act* 1900.

- Where the *Crimes Act* is **ambiguous**, the common law may resolve the ambiguity:
  - Example: *the courts* have given meaning to the phrase "act [or omission] … causing … death" in s 18(1)(a) of the *Crimes Act* (an act or omission causing death is the *actus reus* of the offences of murder and manslaughter).
- Some offences and defences are not provided for in legislation, but are creatures of the common law.
  - Example: the defences of duress, necessity and mental illness are judge-made defences; they are not defined in the *Crimes Act* (or any other NSW legislation).

(CLASS ELEVEN) LARCENY

i) Generally

Section 117 of the Crimes Act provides that the maximum penalty for larceny is five years imprisonment, but it has been left to the common law to define the offence.

The conduct and mental elements of this offence is sometimes bedevilled by tortuous reasoning in the case law. For, although the facts of larceny cases are often not complex, Lord Roskill's admonition in *R v Morris* [1983] 3 All ER 288, 295 that: '[t]he law to be applied in simple cases… should if possible be equally simple,' has not always been heeded in this branch of the law. Some of these complexities arise as a result of its historical development.

Some controversial questions arise in larceny cases include:

- In what circumstances is a transferor's apparent consent, vitiated by mistake?
- When can it be said that the accused has taken property 'dishonestly'?
    - The 'dishonesty' requirement is an exception to the rule that the accused's motive is relevant only to sentence. This raises three questions:
        1. Why has this exception emerged?
        2. How far does it go?
        3. How far should it go?

ii) The conduct and mental elements

★Illich v R (1987) 162 CLR 110, HCA

Facts: Wilson and Dawson JJ summarised the elements of larceny.

Principles:

- Defined larceny (as per below)
- Emphasised that larceny is a crime against possession of property and it can be misleading to describe the victim as the owner, because in some circumstances the owner can be the thief.

Reasoning: [123] At common law, larceny is committed by a person who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof. This is the definition, which was intended to be declaratory of the common law, given in s.1(1) of the Larceny Act 1916 (U.K.) which has, of course, now been repealed by the Theft Act 1968 (U.K.). What we wish to draw attention to is the fact that at common law larceny involves the taking of something without the consent of the owner who may, for this purpose, include the person in possession of the thing. For this reason it is said that there is no larceny if the circumstances would not sustain an action for trespass. Under the Code, on the other hand, a person who fraudulently takes anything capable of being stolen is said to steal that thing. Absence of consent on the part of the owner is not required and there is, for that reason, no necessary element of trespass. Of course, if the taking is to be fraudulent, there must be the requisite intent but, given that intent, there may be a fraudulent taking of something under the Code even if the owner intentionally delivers the thing to the person said to take it.

Actus reus/mens rea requirements of larceny (as per Ilich (1987))

Actus Reus	Mens Rea
• There is property capable of being stolen (i.e. tangible personal property) • That property is in the possession of a person other than the defendant (referred to as belonging to another) • The property is taken and carried away by the defendant (asportation) • The taking is done without the consent of the possessor	• The property is taken with an intention to permanently deprive • The property is taken without any claim of right to the property • The property is taken fraudulently (i.e. dishonestly).

iii) Conduct element: Property capable of being stolen?

Brown et al (pp 967-969, 2015) explains that not all forms of property can be stolen. In general terms larceny is restricted to chattels: i.e. tangible, movable property.

★Croton v R (1967) 117 CLR 326, HCA

Facts: The accused, being a married man, and a divorced woman formed an association. On his proposal they agreed to live on the wages of one, banking the wages of the other. They opened a joint banking account with each having authority. The woman's salary cheques and some of her maintenance cheques were paid into it. The deposits were usually made by the accused, who retained possession of the bank book. Withdrawals were made from the account, but never, according to the woman, with her knowledge or particular authority. The subject of the charges of larceny was money withdrawn from the account by the accused and deposited in bank accounts in his own name. The woman claimed that she did not authorise the transactions and was unaware they had occurred until much later. The accused appealed his larceny conviction.

Principles:

- Property must be tangible, therefore, "choses in action" cannot be stolen, i.e. if you remove money from someone's bank account, you cannot be convicted of larceny.
  - '**Chose in action'** *is essentially a right to sue. It is an intangible personal property right recognised and protected by the law, that has no existence apart from the recognition given by the law, and that confers no present possession of a tangible object.*

Reasoning: Barwick CJ: The subject matter of the instant charges was money, in each case expressed as a number of dollars, that is, paper money, or coin to the stated face value. That can be asported and be the subject of larceny. But, though in a popular sense it may be said that a depositor with a bank has "money in the bank", in law he has but a "chose in action", a right to recover from the bank the balance standing to his credit in account with the bank at the date of his demand, or the commencement of action. That recovery will be affected by an action for debt. But the money deposited becomes an asset of the bank which may use it as it pleases: see generally Nussbaum, Money in the Law: s. 8, p. 103.

Neither the balance standing to the credit of the joint account in this case, nor any part of it, as it constituted no more than a chose in action in contradistinction to a chose in possession, was susceptible of larceny, though it might be the subject of misappropriation

Exceptions to larceny

The antiquity of the origins of larceny has meant that the forms of property that can be stolen developed in a piecemeal fashion and there are complexities in some areas (including land, fixtures and animals).

Land

The doctrinal reason for excluding land is that land cannot be taken and carried away. However, the reasons for not seeing land as a form of larcenable property are more complex. Despite the expansion of the offence in other ways, misappropriation of land (other than by fraud) has remained largely outside the scope of the criminal law.

✘ Those who take land by moving boundary fences or taking up boundary marks or even completely dispossessing those with title are not guilty of larceny in NSW, no matter how dishonest they are. Nor are squatters. At most they may lay themselves open to trespass, unless they intend to commit an indictable offence.

A. **Blackstone** argued that the detaining of another's field was "a civil injury and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public, which of us is in possession of the land"

B. Much of the interior of NSW was originally occupied by graziers (squatters) who, in the 1830s, ignored the policy of Governor Darling designed to limit settlement.

C. The question of whether land "theft" should be regulated by the criminal law is particularly relevant in Australia, given the role that the **forced taking of the lands of Indigenous peoples played in the British colonisation of this continent**.

- In *Mabo v Queensland (No 2)* (1992), the High Court held that the legal fiction of terra nullius could not be used to justify the dispossession of Indigenous peoples and the appropriate of their lands.
- Deane and Gaudron JJ described this dispossession as "the darkest aspect of the history of this nation" which was to "leave a national legacy of unutterable shame".
- Notwithstanding the High Court's moral condemnation of the colonial taking of land from Indigenous peoples in Australia, the common law concept of native title recognised in *Mabo* represents a legal validation of the "theft"
- Luke McNamara and Scott Grattan describe this paradox as follows:

> ***The recognition of indigenous land rights as 'native title': Continuity and transformation***
> Luke McNamara and Scott Grattan (1993) 3 *Flinders Journal of Law Reform* 137 at 149
>
> Native title is both the product of the High Court's moral condemnation of the racism of colonial land theft across Australia's history, and a key component (along with the unshakeable bedrock of Crown sovereignty) in the legal technology for legitimating much of that very same practice.
>
> …Native title is defined by its contradictory attributes because it is the product of a judicial (and more recently, legislative) attempt to achieve two incompatible objectives: one, a 'makeover' for Australia's colonial legal history with respect to the denial of Indigenous land rights; and, two, the perpetuation of the colonial project, including the protection of the political institutions and the economic interests which the project has produced. The result of the simultaneous pursuit of these two objectives is the concept of native title.

(CLASS EIGHTEEN) AUTOMATISM AND INVOLUNTARINESS

i) Generally

To be held criminally liable, the accused must have voluntarily committed the offence. As Barwick CJ notes in Ryan: *"a person cannot be held criminally responsible for a 'deed' that occurred independently of his or her will". Ryan v R* (1967) 121 CLR 205, 214.

Two situations where accused persons have argued that they should be acquitted on the basis that the relevant conduct *was* involuntary are:

1. Where the relevant conduct was allegedly done by reflex action;
2. Where the relevant conduct was done while the accused was allegedly unconscious/in an impaired state of consciousness.

The common use of the term 'automatism' to describe claims of the latter kind should not obscure the fact that, as Barwick CJ pointed out in Ryan at p. 214, 'this description [is not]… of the essence of the discussion…' Rather, as his Honour noted (and as Toohey J noted in Falconer), it is the claimed 'absence of the will to act' that is critical.

These issues are considered in the decisions of *Ryan* and *Murray*, where the different High Court Justices use different reasoning to justify their conclusions concerning the identification of the act causing death and, if that act was done by reflex action, whether it was voluntary. Discussion points include:

- Whether the various reasoning methods were artificial;
- Disagreement over the question of whether the reflex action was truly voluntary.

Automatism and mental illness: In some cases where the accused claims to have 'acted' involuntarily, the only plea open to him or her is one of mental illness. There is criticism that this solution owes too much to community protection concerns.

Dissociative state: An important question to consider in regards to the dissociative state cases is whether an accused who successfully claims to have committed an offence while in such a state is entitled to a full acquittal, or merely to a special verdict.

ii) The reflex action cases

Brown et al (2015), pp 160-168

In satisfying the actus reus, there is an assertion that the prosecution must prove that the accused's acts were voluntary. An act is defined as a muscular contraction which causes a part of the body to move. There must be further qualification in this definition to satisfy actus reus, otherwise acts by animals and muscular contractions like heart beat would be included.

Brown argues that some definitions of a voluntary act are insufficient, namely it is unsatisfactory to say that a person simply needs to be conscious at the time of the 'muscular contraction' in question and there must also be some connection between the conscious mind and bodily movement, sometimes described as 'will to act'.

Brown points out that many people do things on "automatic pilot" without turning their minds specifically to the variety of movements required to perform these acts:

> "People do them 'without thinking', although the conscious mind may step in to stop or adjust the movement where necessary. Even where our actions are more deliberate, we simply do not think of them as the product of willed muscular contractions." *Brown et al (2015), p 161*

Some of the difficult cases considered by common law involve reflex movements: what if you are holding a gun, a sudden noise causes you to start and this causes the gun to go off. Have you performed an act that satisfies the actus reus?

General principles of involuntariness

1. An accused **cannot be held criminally responsible for involuntary conduct**.
   - ➢ *Ryan per Barwick CJ, 213; Bratty per Lord Denning, 409.*

2. There is a **presumption the actus reus was performed voluntarily**.
   - Defence must discharge an evidential burden before the jury can consider whether the accused's conduct was the involuntary product of a cause other than 'disease of the mind'.
   - Once the evidential burden has been discharged, the burden shifts to the Crown, who must prove the conduct was voluntary beyond reasonable doubt.
     - ➢ *Ryan; Bratty; Falconer; Radford; Woodbridge.*

3. If there is evidence the accused **pressed the trigger of a gun by reflex in a shooting death**, it is for the jury to identify the 'act causing death.'
   - If the jury decides that the act causing death was the reflex pressing of the trigger, it then must go on to decide whether that conduct was involuntary.
     - ➢ *Murray* per *Gaudron J* at *[16], Kirby J* at *[89]* and *Callinan J* at *[148]-[149].*

4. Defence of involuntary action is **not available if the only cause for the involuntary conduct was a 'disease of the mind'**, but defence of mental illness available.
   - An unqualified acquittal is not possible where the only cause assigned for the alleged involuntariness is a 'disease of the mind;
   - However, the mental illness defence will be available to the accused;
     - ➢ *Bratty; Radford; Falconer; Woodbridge*.
   - The accused must prove the mental illness defence on the balance of probabilities.
     - ➢ *M'Naghten; Porter.*

5. The **definition of 'disease of the mind'** is a question of law. ➢*Falconer; Woodbridge; Bratty.*
   - The law states that a 'disease of the mind' is *'an underlying pathological infirmity of the mind, be it of long or short duration and be it permanent or temporary, which can be properly termed mental illness, as distinct from the reaction of a healthy mind to extraordinary external stimuli*'. ➢*Radford*.
   - But temporary disorders can seemingly only be classified as 'diseases of the mind' if they are prone to recur ➢*Falconer*, 54 (Mason CJ, Brennan and McHugh JJ).

6. An accused might be entitled to an unqualified acquittal if a **psychological blow caused him or her to enter a dissociative state** and 'act' involuntarily.
   - The judge might be required to direct the jury to consider whether the accused is entitled to an unqualified acquittal depending upon whether there is evidence that:
     - □ The accused entered the dissociative state;
     - □ Such a response was the reaction of a sound mind to the psychological blow;
     - □ The conduct was (as a consequence of the dissociative state) involuntary.
       - ➢ *Radford; Falconer; Woodbridge.*
   - If, however, there is only evidence that the relevant conduct was involuntary due to the accused being in a dissociative state that was the reaction of an unsound mind to the psychological blow, or to its own delusions, the judge must leave only the mental illness defence with the jury. ➢ *Radford; Falconer.*

7. In a psychological blow dissociative state, there will be evidence that the accused's conduct was the **involuntary product of a *sound* mind's reaction** to extraordinary external stimuli if there is:
   - Evidence to the effect that the mind of a 'normal person' (*Gaudron J, 85; Deane and Dawson JJ, 62, Falconer*) or 'ordinary person' of the accused's age and circumstances and in his/her position (*Mason CJ, Brennan and McHugh JJ in Falconer, 58-59*) would (*Mason CJ, Brennan and McHugh JJ*) or might (see *Gaudron J at 85-6; also Woodbridge, [95]*) have reacted to the external stimuli in the way the accused's mind did.

8. Accused is entitled to an **unqualified acquittal only in the absence of 'disease of the mind'**
   - Where there is evidence the accused's conduct was involuntary (*either* due to a 'disease of the mind' **or** another cause) the jury must first decide whether the Crown has disproved beyond reasonable doubt the accused's claim that he or she 'acted' involuntarily due to a cause other than a 'disease of the mind.'
     - □ If not, the accused will be entitled to an unqualified acquittal.
     - □ If it has, the jury must then decide whether the defence of mental illness has been proved on the balance of probabilities (i.e. the relevant conduct was involuntary due to a 'disease of the mind' and the accused did not understand the nature and quality or wrongfulness of his or her 'act'). This would result in a special verdict.
       - ➢ *Falconer per Toohey J, 77; also Deane and Dawson JJ, 62-3 and Gaudron J, 86.*