

Case Appendix

A:

AG-Reference (No 3 of 1994): **Definition** of human being; **transferred malice**

- Definition of 'human being': see Unlawful Killing Crimes
- Transferred malice: 'the intended victim and the actual victim are treated as if they were one, so that what was intended to happen to the first person (but did not happen) is added to what actually did happen to the second person (but was not intended to happen), with the result... to make a notionally intended and actually consummated crime.'

Aubertin: Reasonableness of Belief in **Consent** – Sexual Offences

- » **Facts**: D messaged V and made plans to go out and stay overnight at a hotel. Cocaine use, dirty dancing, oral sex & sexual assault alleged but V protested she had a boyfriend
 - Assessment of **reasonable belief** involves a mixed element, dependent on circumstances
 - Personal attributes/ characteristics only relevant if it affected A's capacity to appreciate/perceive the objective circumstances; and is something over which A had no control over (youth, disability, etc); values held by A are irrelevant
 - Jury considers what the community should reasonably expect of a person with the accused's relevant attributes and characteristics and in the relevant circumstances
 - *The reasonableness of the A's belief is an objective factor to be judged by the standard of a reasonable person of the same age, background and level of intellectual functioning as the accused, and familiar with all the circumstances that were known to the accused at the relevant time.'*

B:

Brady v Schatzel: **Apprehension of Violence**; immateriality of fear

- Chubb J held that 'it is not material that the person assaulted should be put in fear'; otherwise an accused's liability would vary according to whether his chosen victim was timid or courageous. Defendant was not fearful and did not move to protect himself. Contrary to general common law principle.

Bouhey v The Queen: **Recklessness**; meaning of '**probable**', approved *Crabbe*

- » **Facts**: D is a doctor. During alleged consensual S&M sex, D puts pressure on his girlfriend's carotid arteries on her neck. D's girlfriend dies due to asphyxiation.
- » **Held**: Approved the subjective recklessness test discussed in *Crabbe* - '*it is not sufficient if he knew that death was possible if he did not know that it was "likely or probable"*'. (A mathematical analysis isn't needed, just a 'substantial or real chance'.)
 - Probable: 'substantial, real and not remote';
 - 'Not sufficient if he knew that death was possible if he did not know it was likely or probable';
 - Probable: more likely than not to occur. Judges not to direct juries in terms of 'a more than 50 per cent' chance
 - Regarded by CL as 'ordinary incidents of social intercourse which do not... constitute battery'

R v Blaue: **Causation / NOVUS ACTUS INTERVENIENS—Acts of the Victim**

- » **Facts**: V, a Jehovah witness, was stabbed in the lung and died because she refused a blood transfusion even though doctors may have saved her.
- » **Held**: The fact that V refused to stop this end coming about did not break the causal connection between the act and death. Take your V = 'thin skull' principle.
 - Chain of causation not broken because the victim of a stabbing refused a blood transfusion which would have saved their life.
 - 'Those who use violence on other people must **take their victims as they find them**... The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection between the act and death.'

R v Brown (House of Lords): **Consent; Morality**

- » Appellants belong to group of sado-masochistic homosexuals
- » Tried for charges of assault occasioning actual bodily harm, and unlawful wounding
- » Trial Judge ruling that consent of the victim afforded no defence to these charges
- » Appellants pleaded guilty and sentenced to terms of imprisonment
- » Appealed against convictions, contending that a person could not be guilty of assault in respect to acts carried out in private with consent of victim.
 - Consent renders CL assault lawful, unless the act causes bodily harm
 - Consent a lawful justification to an extent, does not extend to SI
 - 'involves a degree of violence such that the infliction of bodily harm is a probable consequence'
 - Morality: decision displayed moral censure;
 - Ratio Decidendi:
 - Lord Templeman: 'society is entitled and bound to protect itself against a cult of violence'
 - Lord Lowry: defendants' actions 'satisfy a perverted and depraved sexual desire... [that] cannot be regarded as conducive... to the welfare of society'
 - Obiter Dictum:
 - Minority: what people do, consensually, in private is not the business of criminal law
 - Lord Mustill: [dissenting] of 'private morality: the standards upon which they fail to be judged are not those of the criminal law'

C:

Campbell v The Queen: Causation; **Recklessness** RE Injury

- Accused fired gun in carpark, seriously injuring one man. Judge misdirected jury in directing them that the A fired the gun knowing serious injury might occur, appropriate test to apply is that 'it is *possession of foresight* that *injury probably will result* that must be proved', per *Crabbe*.
- Burt CJ in *Campbell v The Queen*: causation is 'a question to be determined by the jury applying their common sense to the facts as they find them'
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Coke: **Intention**; Malice Aforethought

- *Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth... with malice aforethought, either expressed by the party or implied by law, so as the party wounded, or hurt, etc. die of the wound or hurt' – Sir Edward Coke (1597).*
- 'Malice aforethought' exists where A's act was accompanied by an intention to kill OR intention to cause GBH

Collins v Wilcock: **CL Assault**; Application of force

- » Facts: Police woman touching a suspected prostitute to stop her leaving scene
 - CL assault need not be violent, can be 'as slight as a mere touch'

Crabbe: **Recklessness**; Standard of 'Probable'

- » Facts: Ejected from bar, D drove a prime mover & trailer into the crowded bar of a motel near Ayers Rock (after being ejected earlier). He killed 5 and injured 16 others.
 - 'Probable' = 'more than a mere possibility', if act done knowing death/GBH is a probable consequence, he does the act expecting that death/GBH will be the likely result.
 - 'It should now be regarded as settled law in Australia... that a person who, without lawful justification or excuse, does an act knowing that it is probable that death or GBH will result, is guilty of murder if death in fact results. It is not enough that he does the act knowing that it is possible but not likely that death or grievous bodily harm will occur.'

D:

R v Doherty: **Duty of Care**; **Duty to Avoid Harming Others**

- CL imposes a general duty on all people who are doing a dangerous act, or who have charge of anything dangerous, to take ordinary precautions to **avoid harming other people**