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## Crime and the Mind

### Constructing Criminal Offences

*Actus non facit reum, nisi mens sit rea* (an act does not make a person guilty unless the mind is guilty)

- Offences are generally constructed with two elements in mind: *actus reus* and *mens rea*
  - *Mens rea* is “an essential element in every statutory offence unless, having regard to the language of the statute and to its subject matter, it is excluded expressly or by necessary implication”: *He Kaw Teh* (1985) 157 CLR 523 (Brennan J) (drug importation)
    - “The requirement of *mens rea* is at once a reflection of the purpose of the statute and a humane protection for persons who unwittingly engage in prohibited conduct”: *He Kaw Teh* (Brennan J)
  - The *mens rea* fault element of a criminal offence can be satisfied by showing either:
    - Intention
    - Recklessness
    - Knowledge
    - Negligence (objective fault standard)
    - Wilful blindness (evidence of deliberately refraining from making inquiries)
  - Exclusions are those offences of strict and absolute liability
    - Strict liability offences have the defence of honest and reasonable mistake of fact
      - Generally, an honest and reasonable mistake in a set of facts, which, if they had existed, would make the defendant’s act innocent, affords an excuse for doing what would otherwise be an offence: *Proudman v Dayman* (1941) 67 CLR 536, 541
      - Defendant must prove this defence on the basis of probabilities
    - Absolute liability offences have no fault element, and conviction is based on conduct
- General presumptions of the *actus reus* are as follows:
  - The *actus reus* is done voluntarily and with intent
  - At the time when the person commits the *actus reus*, they either:
    - Know the circumstances which make it an offence
    - Do not believe honestly and reasonably that the circumstances of the act are such as to make the doing of that act innocent: *He Kaw Teh* (Brennan J)
  - The *mens rea* is that which is more consonant with the fulfilment of the statute’s purpose
- In considering if new offences should be created, factors taken into account include whether:
  - the behaviour in question is sufficiently serious enough to warrant legal intervention
  - the mischief could be dealt with under existing legislation
  - the proposed offence is enforceable in practice, tightly drawn and legally sound
  - the proposed penalty is proportionate with the seriousness of the offence
- Censure and punishment are two defining features of criminal liability, and separate the criminal justice system from the civil
  - However, there is now a tendency to mix civil and criminal, punitive and compensatory responses to wrongdoing
- Ashworth (2013) argued, in reference to strict liability offences carrying a term of imprisonment, that persons shouldn’t be liable to be deprived of liberty without proof of fault:
  - “Imprisonment is the most severe penalty available in most legal systems, and to condemn an individual to prison without requiring proof of fault – or, at least, without allowing the defendant to establish lack of fault – is a negation of the respect for individual autonomy that ought to be a foundational principle of the criminal law”

## Culpability

- The centrality of the culpability requirement is part of the essence of criminal law
  - If a person is to be censured publicly by being labelled a criminal and made liable to sentence, then the court should be satisfied not merely that that person caused the consequence, but that they did so culpably
  - Anyone can cause injury, death or damage by misfortune or coincidence, but that should not be enough for criminal liability, however great the harm
- General presumption is that *mens rea* should be looked at subjectively: *He Kaw Teh*
  - Subjective looks at accused's actual mental state
  - Objective considers actions of an ordinary and reasonable person in the circumstances
- However, it is now recognised that subjectivism does not define the limits of *mens rea*, as fault elements in the modern law extend beyond descriptive (subjective) to include normative (objective) states such as negligence and some forms of culpable inadvertence: Bronitt (2008)

## What is 'Intention'?

- "A mental state is inherently hard to define, and the definition of *mens rea* is beset by problems of terminology. Voluntariness, for example, connotes a number of different mental states... It includes a conscious control of bodily movement": *He Kaw Teh* quoting *Ryan* [1967] HCA 2
- The courts have been reluctant to give direction on the meaning of intention. However, it is accepted that foresight and desire play a role
  - "Intent in one form connotes a decision to bring about a situation so far as it is possible to do so – to bring about an act of a particular kind or a particular result. Such a decision implies a desire or wish to do such an act or to bring about such a result": *He Kaw Teh*
  - "the better view is that the word, being one of ordinary acceptation should not be defined but should be left to the trier of fact without elaboration as to its meaning": *Cutter v The Queen* (1997) 143 ALR 498 at 511 (Kirby J)
- *Criminal Code Act 1995* (Cth) defines 'intention' under Part 2.2, Division 5.2:
  - A person has intention:
    - with respect to conduct if he or she means to engage in that conduct
    - with respect to a circumstance if he or she believes that it exists or will exist
    - with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events
- There are several types of 'intention' which have been debated:
  - "General or basic intent relates to the doing of the act involved in an offence; special or specific intent relates to the results caused by the act done": *He Kaw Teh* (Brennan J)
  - Hart (1968) distinguishes between 'oblique intention', which is a mere foresight of consequences, and 'direct intention', where the consequences were contemplated by the accused not merely as a foreseen outcome, but as an end which he set out to achieve
    - While both of these are 'intention' for the purposes of conviction, the distinction between them is relevant during sentencing
    - Not all legal theorists agree whether oblique intention should be considered actual intention for the purposes of criminal liability
      - Hart (1968) states that a merely foreseen, though unwanted, outcome is not usually considered as 'intended'. However, in such cases of oblique intention, where the outcome was foreseen, he also said that they were not done 'unintentionally'
      - Duff (1990) says that we must ask more carefully both whether an intentional action always involves or flows from a decision, and what the agent intended to do

## Capacity and Competence

### *Not Guilty by Reason of Mental Illness*

- Complete defence under s 38 *Mental Health (Forensic Provisions) Act 1990* (NSW) ('MHFP')

"**mental illness**" means a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:

- (a) delusions,
- (b) hallucinations,
- (c) serious disorder of thought form,
- (d) a severe disturbance of mood,
- (e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)-(d).

- The jury must return a verdict of not guilty by reason of mental illness if they believe that the person did the act or omission charged, but was mentally ill at the time when they did it
  - This defence does not apply in the Local Court
- A trial judge should put to the jury any defence available on the evidence, even if the defendant doesn't raise it or objects to it being raised: *Pembie v The Queen* (1971) 124 CLR 107; s 37 MHFP
  - The court has the power not only to raise the defence of their own motion, independent of the parties, but to call evidence in an appropriate case: *R v Damic* [1982] 2 NSWLR 750
- Prosecution cannot commence by raising the defence of mental illness
  - However, they can raise it if the defendant first puts their mental state in issue by raising substantial impairment or automatism: *R v Meddings* [1966] VR 302 (automatism); *R v Ayoub* [1984] 2 NSWLR 511 (diminished responsibility)
- Following a special verdict of not guilty by reason of mental illness, the court may order:
  - Detention: s 39(1) MHFP
  - Conditional or unconditional release: s 39(1) and (2) MHFP
  - Treatment in a mental health facility: s 32(1) MHFP
- The person usually becomes a 'forensic patient' and must be reviewed regularly: ss 42-47 MHFP

### *M'Naughten's Rules*

- "It must be clearly proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know what he was doing was wrong": *M'Naughten's Case* [1843-1860] All ER Rep 229
  - Followed by Dixon J in *Porter* (1933) 55 CLR 182:
    - "his state of mind must have been one of disease, disorder or disturbance. Mere excitability of a normal man, passion, even stupidity, obtuse-ness, lack of self-control, and impulsiveness, are quite different things from what I have attempted to describe as a state of disease or disorder or mental disturbance arising from some infirmity, temporary or of long standing. If that existed it must then have been of such a character as to prevent him from knowing the physical nature of the act he was doing or of knowing that what he was doing was wrong"
- Defect of reason caused by a 'disease of the mind'
  - Underlying pathological infirmity of the mind: *R v Radford* (1985) 42 SASR 266
    - 'Disease of the mind' is synonymous with 'mental illness': *Radford*
    - However, not all mental illnesses will be diseases of the mind

## Case Study: Arson

### *Destroying or Damaging Property*

- Base offence provided under Part 4 AD, Division 2, s 195(1) CA
- Technically a property offence, but may also be an offence against the person if it leads to injury
  - Offence is 'personal violence offence' under s 4 *Crimes (Domestic and Personal Violence) Act 2007* (NSW), and when committed against a person with whom the offender has or has had a domestic relationship, is a 'domestic violence offence' under s 11 of the Act
- Accused intentionally or recklessly
  - Recklessness is to be understood as foresight of the possibility of property destruction or damage by means of fire generally across spectrum, but acted by lighting a fire in spite of the possible risk: *CB v Director of Public Prosecutions* (NSW) (2014) 240 A Crim R 451
    - Not limited to foresight of the specific damage that occurred, just damage to property
- Destroyed or damaged property
  - The meaning of the word 'damages' in s 195 has been considered in a number of NSW cases, including *DPP v Fraser* [2008] NSWSC 244 and *Hammond v R* (2013) 85 NSWLR 313
    - In *Hammond*, the court said at [69] that it would differ from *Fraser* and conclude that interference with functionality of the property in question alone, even without physical harm or 'derangement' of the property, is sufficient to establish 'damage'
    - There must be physical harm or functional interference with the property, so as to render the property imperfect or inoperative in the context in which it exists: [77]
      - *Hammond* principles were applied in *DPP v Lucas* [2014] NSWSC 1441, where the defendant's act of deflating a tyre on the complainant's car was an interference with the functionality of the tyre, and thus constituted 'damage' under s 195(1)(a)
  - Maximum penalty increases under s 195(1A)(a) and (b) if the accused was 'in company'
    - "If two or more persons are present and share the same purpose, they will be 'in company', even if the victim is unaware of the other person": *R v KT* [2007] NSWSC 83
    - "persons are not acting "in company", with a common purpose, unless there is some express or implied arrangement or understanding between them to act together to achieve an agreed end. Proof of a nod or even a look acknowledging that they will act together may suffice, but a mere coincidence of purpose not resulting from an arrangement or understanding will not be enough": *Markou v R* [2012] NSWCCA 64
    - "test is the coercive effect of the group": *R v Button and Griffen* (2002) 54 NSWLR 455
- Which belonged to another person, or to the accused and another person
  - Merely requires proof that the property belonged to some person other than the accused: *Walton v Salmon* (NSWSC, Loveday J, 24 April 1992, unreported)
- Damage or destruction was caused by means of fire or explosives
- Other offences under Division 2 include:
  - Destroying or damaging property with intent to cause bodily injury to another: s 196
  - Dishonestly destroying or damaging property: s 197
    - Must be done with a view to making a gain for themselves or another person
    - 'Dishonest' is according to the standards of ordinary people and known by the defendant to be dishonest according to these standards: s 4B CA
  - Destroying or damaging property with intention of endangering life: s 198
  - Threatening to destroy or damage property
    - Threat may be to destroy/damage property belonging to a third person: s 199(1)(a)
    - OR to destroy/damage their own property in a way they know will, or is likely to, endanger the life of, or cause bodily injury to a third person: s 199(1)(b)
- Higher penalties apply if using fire or explosives, or if done during a public disorder