LAWS1022 – CRIMINAL LAWS

Class 2 – Consent to Harm, Acceptable Violence and Aggravated Assaults

Readings - 601-12, 618-22, 637-38 + s 37(1A) Crimes Act 1900

Consent to Harm

- Considerable uncertainty as to the circumstances under which consent may legitimate an assault
- Used as a defence for common assault

***Brown* [1994] House of Lords UK – Operation Spanner**
Facts - Five appellants engaged in consensual, sado-masochistic, homosexual activities, intentionally inflicting violence upon each other - Trial Judge Rant QC stated the prosecution did not have to prove lack of consent, appellants pleaded guilty and were convicted - Appeal concerning judge erring at law were dismissed by Court of Appeal (Criminal Division) Issue - Whether the defence of consent should be extended to the consequences of sado-masochistic encounters could 'only be decided by consideration of policy and public interests.' Reasoning – (Lord Templeman – Majority. Dismissed appeal.) - 'Each appellant was… guilty of an offence… unless the consent of the victim was effective to prevent the commission of the offence or effective to constitute a defence to the charge' - 'There can be no conviction for the summary offence of common assault if the victim has consented to the assault… the accused is entitled to be acquitted if the injury was a foreseeable incident of a lawful activity' - **Intentional violence 'accepted as lawful**… surgery, tattooing, ear-piercing and violent sports including boxing' - ***Coney*** (Stephen J) – 'Consent of the person who sustains the injury is no defence to the person who inflicts the injury… that its **infliction is injurious to the public as well as the person injured**'. - Prize fights = injurious → against public interest of protecting life and health, disorderly. - 'Whether consent does or does not take from the application of force to another its illegal character, is a question of degree depending upon circumstances.' - ***A-G's Reference*** (Lord Lane CJ) – Two men quarrelling and fought with bare fists. '**Immaterial whether the acts occur in private or public**; it is assault if actual bodily harm is intended and caused'. o Duelling and fighting are both unlawful and consent offers no defence - 'In principle there is a **difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty. The violence of sado-masochism encounters involves the indulgence of cruelty by sadists and the degradation of victims.' Consent is not extended** - **Comes down to a public interest test** Reasoning – (Lord Mustill – Minority. Allow appeal) - Considers the spectrum of infliction of bodily harm. Killing at one end and trifling touch at the other. Identify where consent ordinarily ceases to be an answer to prosecution for inflicting harm → '**critical level**'. - 'Consensual infliction of violence are special.' 'Adopt a much narrower and empirical approach'. o *Prize fighting, sparring and boxing* – Spectrum of public tolerance of the activity. o *'Contact' sports* – Whether there comes a point where violence is too severe for law to tolerate. o *Surgery* – Proper medical treatment where actual or deemed consent is prerequisite o *Lawful correction* – Correction of child behaviour, not gratification of passion or rage. Consent irrelevant. Limit of tolerable harm. o *Dangerous pastimes; bravado; religious mortification* o *Rough horseplay* o *Prostitution* – 'Commonest occasion for the voluntary acceptance of the certainty, as distinct from the risk, of bodily harm'. o *Fighting* – (*A-G's Reference*) Depends upon public interest whether or not to annul consent defence. - Takes the view of a civil libertarian – There is no overarching standard due to inconsistencies amongst cases. Gives opportunity to create public policy - 'I prefer to address each individual category of consensual violence in the light of the situation as a whole… circumstances must alter cases.

- European Convention on Human Rights – 'clearly favour the right of appellants to conduct their private lives undisturbed by the criminal law'
- Public policy – 'whether there is good reason to impress upon s 47 of *Offences Against the Person Act* 1861 an interpretation which penalises the relevant level of harm irrespective of consent, ie, to recognise sado-masochistic activities as falling into a special category of acts… which the law says shall not be done'. Consent is extended.

Criticism

- Inconsistent with harm principle – respect for private practices
- Judicial paternalism – conservative, subjective view of judges
- Departure from previous approach – consent is good consent unless there is a good reason to vitiate it
- Discrimination/ homophobia?

***Laskey, Jaggard and Brown vs UK,* 1997 - (Appeal to European Court of Human Rights)**

Facts

- Appealed on ground that their prosecution was in breach of Art 8 of ECHR. Common ground between parties that the criminal proceedings constituted 'interference by a public authority' with the right to respect for life, carried out 'in accordance with the law'.

Issue – Whether this interference was 'necessary in a democratic society'.

Reasoning

- State is entitled to regulate through operation of criminal law, activities which involve the infliction of physical harm, including sexual conduct – The determination of harm to be tolerated where the victim consents is a matter for the state
- State was entitled to have regard not only the actual seriousness of the harm caused, but also the potential harm inherent in acts
- Rejected allegations of bias against homosexuals
- There has been no violation of Art 8.

***Stein* [2007] VSCA 300 – Handkerchief Gag**

Facts

- Bondage session between accused, prostitute and the deceased who was tied up and left gagged around head and mouth
- Deceased showed signs of distress but accused stayed in room without providing assistance, deceased died
- Accused charged with murder but convicted of unlawful and dangerous act manslaughter – unlawful act = assault, where no evidence of consent with gag.

Reasoning

- There could also not be consent to this level of risk of harm – 'There was a foreseeable risk of serious injury… restrained and gagged… no possibility of his articulating his lack of consent or… articulating distress… Issue of consent became irrelevant.'

For exam

- **When someone does something to a victim but is unable to articulate there distress, then consent is not valid**

***Wilson* [1997] QB 47**

Facts – Consensual branding with hot knife of husband's initials on wife's buttocks. Scars reported to police by wife's doctor

Reasoning

- UK Court of Appeal quashed conviction of assault occasioning actual bodily harm.
- '**In our judgement *Brown*, is not authority for the proposition that consent is no defence to a charge… where actual bodily harm is inflicted… related only to sado-masochistic encounter'**.
- 'We are firmly of the opinion that it is not in the public interest that activities such as the appellant's in this appeal should amount to criminal behaviour. Consensual activity between husband and wife, in the privacy of the matrimonial home, is not… normally a proper matter for criminal investigation, let alone criminal prosecution.'

Attitudes

- Private matters are not matters of criminal prosecution.
- However, violence does happen in marriage and domestic contexts

AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine 2004*

- Contrasted decisions of Brown and Wilson
    - Wilson had no 'aggressive intent' like Brown
    - Brown described as 'truly extreme' case involving physical torture, Wilson only required medical attention
    - The branding procedure was characterised as a form of tattooing and not sado-masochism

***Boughey* (1986) 161 CLR 10**
In *Brown,* Lord Mustill rejected the submission that there is an underlying element of hostility in the law of assault – in *Boughey,* HCA came to a similar conclusion: - (Mason, Wilson and Deane JJ): 'It has never… been the common law that actual hostility or hostile intent towards the person against the force is intentionally applied is a necessary general ingredient of unlawful battery'. Only of decisive importance when it converts what would otherwise be unobjectionable as an ordinary incident into battery at common law.

Consent to Medical Treatment

- Medical exams and surgical operations are only lawful where:
    - 1. Consented to by the patient (or some other person authorised to provide such consent)
    - 2. Emergent conditions make the procurement of consent impractical
- 'Informed consent' requires patient's consent to be freely given after an explanation of basic nature and risks of procedure. Usually the subject of civil suits for damages rather than criminal prosecution

***Richardson* (1998) 43 BMLR 21**
- Richardson continued to treat patients after being suspended from practice. Charged with assault occasioning actual bodily harm – Trial ruled her patients' consent vitiated by fraud, plead guilty - Appeal held that under criminal law only a mistake as to the nature of the act or the identity of the person doing it vitiates the consent – The court held that the concept of informed consent has no place in the criminal law and quashed the conviction

***Marion's Case* (1992) 175 CLR 218**

Facts
- Application by parents to have their child with severe intellectual disability sterilised. Required analysis of *Criminal Code* (NT) for assault and when for the Code an act is unlawful if done 'without authorisation, justification or excuse'.
Issues
- Whether a minor with an intellectual disability is or will ever be capable of giving or refusing informed consent to sterilisation on their own behalf
- Where above question is negative, whether sterilisation is in a special category which falls outside the scope of a parent to consent to treatment
Reasoning
- 'The very fact that sterilisation implies more than medical or surgical treatment that is crucial to the central issue of this appeal'
- 'Consent… has the effect of transforming what would otherwise be unlawful in accepted and therefore acceptable contact.'
- Parent power to consent to medical treatment of their child who is a minor founded on two principles:
  o 1. Subjective consent is indispensable, where authority emanates from caring relationship
  o 2. Overriding criterion applied in parental authority is the welfare of the child objectively assessed.
- Sterilisation requires invasive, irreversible and major surgery. Court authorisation is required because:
  o 1. Significant risk of wrong decision
  o 2. Consequences of a wrong decision are particularly grave
Conclusion

- The decision to sterilise a minor in circumstances such as the present falls outside the ordinary scope of parental powers and therefore outside the scope of the powers, rights and duties of a guardian under the *Family Law Act*.'
- (Following this case, amendments to the *Act* included insertion of s 67ZC addressing Family Court's powers to make orders in respect of a child's welfare)

***Crimes Act 1900* (NSW) ss 45, 45A** **Female Genital Mutilation**
- Lord Templeman in *Brown* refers to 'ritual circumcision' as lawful. Concern about female circumcision in Australia prompted legislation prohibiting 'female genital mutilation'. - **s 45** – made it an offence punishable originally by 7 years imprisonment (now 21 years) for an person who 'excises, infibulates or otherwise mutilates the whole or any part of the labia majora, minora or clitoris of another person', or who is complicit in this act. Consent is expressly not a defence (s 45(5)). Surgical operations for medical welfare of person are exempt when performed by medical practitioners or authorised professionals - **s 45A –** Removing a person from the State or arranging for a person to be taken from NSW with the intention of having FGM performed is an offence. Also 21 years maximum punishment.

Aggravated Assaults

- 'Aggravated' (rendered more serious) by the presence of one or more factors such as:
  - Harm caused
  - Where the person intends to cause a level of harm
  - Method used (gun, poison, intoxicating substance)
  - Status of the victim (child, police officer)
  - Setting (school, or during a 'public disorder')
- Seriousness of crime reflected in the fact that a number have standard non-parole periods attached (SNPP) (*Crimes (Sentencing Procedure) Act 1999* s 54A and Table)

Assaults with Further Specific Intent

- Presence of a further specific intent
  - ***Crimes Act* ss 27 and 29** – contains offences which amount to assault with intent to commit murder
  - **S 33-33B**: offences which amount to assault with intent to do GBH or resist lawful arrest
  - **S 37(2), 38, 58**: contain offences of assault with intent to commit an indictable offence
- Prosecution must prove the further relevant specific intent
  - **S 33** – Wounding or Grievous Bodily Harm
    - **S 33(1)** – Prosecution must prove that the accused wounded or caused GBH to the victim and at the time had a specific intent to cause GBH
    - **S 33(2)** – specific intent is to resist or prevent lawful arrest or detention-
- Standard non-parole period of 7 years

Assaults causing particular injuries

- Where an assault causes or 'occasions' actual injury to the victim, it may be prosecuted as an aggravated assault
- Common law divides injuries:
  - Actual bodily harm
  - Wounding
  - Grievous bodily harm
- Such 'harm categories' have been used in the *Crimes Act* for statutory definitions/ offences
  - S 35: reckless wounding or causing GBH
  - S 59: assault occasioning actual bodily harm

Actual Bodily Harm

- Set out in **s 59 *Crimes Act 1900***
- Case law suggests expression to be interpreted according to ordinary meaning of the words

Class 5 – Sexual Assault II

Readings – 680 – 693 + Lazurus v R 2016, Lazurus v R 2017 + Law Reform Commission Paper

Sexual Assault: The Mental Element

Overview of Mental Element

- **S 61HE(3) – Knowledge about consent**
- **S 61HE(4) – Steps taken and intoxication**
- **S 61HE(7) – Knowledge about consent under mistaken belief**
- **S 61HE(3) – Knowledge about consent**
    - **Knowledge** about consent (circumstances):
    - (3) A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:
        - (a) the person **knows** that the other person does not consent to the sexual intercourse, or
        - (b) the person is **reckless** as to whether the other person consents to the sexual intercourse, or
        - (c) the person has **no reasonable grounds for believing** that the other person consents to the sexual intercourse.
- **Two mens rea requirements**
    - **Intend** to engage in the conduct
    - **Knowledge** of the circumstances of non-consent – Knowledge usually subjective mens rea state involving the accused's actual knowledge of the relevant circumstance
- Recklessness
    - 'Inadvertent reckless' (***Kitchener****)*
    - ***Tolmie*** – 'where the accused has not considered the question of consent and a risk that the complainant was not consenting to sex would have been obvious to someone with the accused's mental capacity if they had turned their mind to it'
    - 1981 and 1989 legislative amendments in NSW preserved 'honest mistake of fact' doctrine from ***DPP v Morgan***
- 'Deeming' provision in **s 61HE(3)**
    - *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007*
    - Expressly deems that where a person has 'no reasonable grounds for believing' that the other person consents to the sex the person is deemed to know that the other person is not consenting.
    - NSW only legislature in Aus. to expressly overturn the 'honest mistake of fact' doctrine
    - Introduces objective dimension into mens rea for sexual assault
        - Section 61HA(3) deems that the following states amount to knowledge for sexual assault, the aggravated forms and the attempts
        - Accused had actual knowledge that the victim was not consenting
        - Accused was aware off the possibility that the victim was not consenting, but went ahead regardless (advertent recklessness: *Banditt*)
        - Accused failed to consider whether the victim was consenting, and went ahead with the act of sex, even though the risk that the victim was not consenting would have been obvious to someone with the accused's mental capacity if they had turn their mind to it (inadvertent recklessness: *Tolmie*)
    - Accused had an honest belief that the victim was consenting but no reasonable grounds for that belief (s 61HE(3)(c))
    - Mental states in 1, 2, 4 all require a belief or knowledge.
    - Third form (judicial creation) remains independent because it does not require a belief or awareness on the part of the accused. Based on failure to consider.
    - Mental element in s 61HA(3) does not apply to indecent assault or an act of indecency which are covered by common law.

Mental Element Where Mistake Relied on to Negate Consent - **S 61HE(7)**

***Gillard* [2014] HCA**
Facts - In ACT, complainants were sisters, and the appellant was a friend of their father. Appellant was convicted on numerous grounds, including 3 counts of sexual intercourse without consent and 1 count of indecency when complainants were over 16 and staying in appellant's care. Crown relied on s 67(1)(h) which provides that the consent is negated where there is an abuse of a position of trust – equivalent to NSW s 61HA(5) Issue - Where s 67(1)(h) is engaged to negate consent, is the mental element of the offence established by: o proof of knowledge that the consent was given because of the abuse of the position of authority o would recklessness as to that circumstances suffice as the mens rea is in relation to the substantive offences in ss 54(1) and 60(1)? Reasoning - Recklessness as to s 67(1) circumstances does not establish the mental element of liability for the offence to which it applies - Mental element must be established by knowledge o 's 67(1) negates consent where a specified circumstance is the cause of the complainant's consent, knowledge of the causal relation between the circumstance and the complainant's consent is knowledge that the sexual intercourse or act of indecency was without consent' - Material misdirection to leave open that the jury might reason to guilt on the issue of consent that the appellant was reckless as tot the risk that complainant's consent was occasioned by the abuse of his position of authority over her.

Knowledge of Consent

- **In s 61E(3)**
  - (a) Actual knowledge – 'the person knows that the other person does not consent to the sexual intercourse'
  - (b) Recklessness – both advertent and inadvertent
  - (c) Deemed knowledge – accused has 'no reasonable grounds for believing that the other person consents'

Recklessness as to Consent

- Both **advertent (turns their mind to the fact that the other person is not consenting)** and **inadvertent (does not turn their mind to the fact that the other person is not consenting)**

***Kitchener* (1993) 29 NSWLR 696 (inadvertent recklessness)**
Facts - 16-year-old complainant with boyfriend after club at 1am. Couple approached Kitchener, president of a the life and death motorcycle club, to ask if complainant could ride one of the motorbikes, to which Kitchener acceded. o Complainant was driven by Kitchener to a dirt track 20km out of town, where the alleged sexual assault took place. o Crying complainant told her boyfriend that Kitchener forced her to have sex. o Kitchener's defence was that sex occurred, but was consensual, and that the complainant fabricated the story about being forced to explain time she spent away and avoid trouble with her boyfriend Issue - Whether recklessness for the purpose of what is not s 61HA(3)(b) meant o only actual advertence to the possibility of non-consent o it extended to a failure to advert at all to the possibility of non-consent Reasoning - (Trial Judge Kirby J) Foreseeing that leads to a possibility that she was not consenting, but going ahead regardless, or failing to even advert to the question in the situation in which he was and which he wanted

- Failure to advert at all the possibility that the complainant is not consenting means accused is 'reckless as to whether the other person consents' within the meaning of s 61HA(3)(b)
- Appeal upheld

***Tolmie* (1995) 37 NSWLR 660 (inadvertent recklessness)**
Facts - The complainant and the appellant were among a group of people who had been drinking, as they walked down a path the appellant asked the complainant to come to him at the back of the group and propositioned her. She repeatedly told him to stop and they ended up on the ground where he sexually assaulted her. Issue- Argument was that *Kitchener* (incorporating inadvertent recklessness) would be inconsistent with central tenet of criminal law – that a person should not be subject to serious criminal sanction for actions which they aren't proved to have intended. - Whether *Kitchener* decision is to be interpreted as encompassing inadvertent recklessness - If so, whether *Kitchener* is consequently bad in law - Whether reckless in the situation of consent withdrawn during a continuing act of consent can be distinguished from recklessness as to consent at the commencement of intercourse Reasoning (Kirby P): - To allow accused persons to escape conviction merely because they do not realise the significance of what they have done, where they have completely ignored the requirement of consent as a perquisite for sexual interaction, is completely antithetical to the attainment of the goals which the criminal law properly sets for itself in this area - Where the accused has not considered the question of consent a risk that the complainant was not consenting to sex would have been obvious to someone with the accused's mental capacity if they had turned their mind to it, the accused is to be taken to have satisfied the requisite mens rea referred to by the word reckless in s 61HE(3)(b) - **Recklessness can be shown where the accused adverts to the possibility of consent but ignores it and also where the accused is so bent on gratification and indifferent to the rights of the victim as to completely ignore consent**

***Banditt* [2005] HCA 80 (Advertant Recklessness)**
Facts – Accused broke into the victim's house and commenced intercourse with her while she was asleep Issue – Whether the trial judge erred in not giving additional direction that the appellant had to be indifferent about the risk or determined to have sex whether consent was present or not, and that recklessness cannot be satisfied by an awareness of a risk Reasoning/Held - Court held that "he was reckless in the sense that he did not even consider whether she was going to consent or not, or at least he recognised that there was a possibility that she may not consent but he went ahead anyway

<u>No Reasonable Grounds for Believing the Other Person was Consenting</u>

- **Under s 61HE(3)(c) overturned *Morgan* honest belief doctrine**
- **Requires accused's belief to be honest and reasonable**

Law Reform Commission of Vic, *Rape: Reform of Law and Procedure* (Against "reasonableness')

- Decided that existing mental element of offences should be retained
    - Requirement that the accused's belief in consent must be 'reasonable' would involve a significant departure from established principles of criminal law
    - Policy reasons for treating rape differently from other serious criminal offences are not persuasive
    - Meaning of 'reasonableness' is difficult to interpret in the context of sexual assault
- The general principle and its application to rape

Courts have stressed the need to base culpability on the actual state of the defendant's mind (the subjective test) as opposed to attributing a mental state to the defendant by

Class 7 – Murder II and Manslaughter

Readings – 760-773, 778-786

Constructive Murder

- ***** along as that base offence is punishable by 25 years to life – the offence may amount as murder**
- ***** with constructive murder – liability is absolute**

Ryan [1976] HCA – Leading Authority

Facts

- Ryan was in the process of doing an armed robbery and tied up attendant – attendant startles Ryan by jumping and Ryan pulled the trigger – said it was involuntary
- An unintended killing in the course of or in connexion with a felony is murder if, but only if, the felonious conduct involved violence or danger to some person

Reasoning:

Barwick CJ

- Question is merely one of statutory construction and the application of the statute so construed to the facts of the case
- If the act of the accused causing the death charged was done by him before, during or immediately after the commission of a felony punishable under the *Crimes Act* by penal servitude for life, that act is murder according to the statute
- Voluntary use of an offensive weapon which wounds the victim of the robbery satisfies s 98, without any need for proof of an intend to wound by that use
- Act of walking into the service station with a gun cocked and pointed and safety off, plus the involuntary discharge is the act causing death
- Support a conviction of murder, given the voluntary nature of the discharge of the gun

Menzies J

- If Taylor's death was caused by a bullet fired by the accused, albeit accidentally, while he was robbing Taylor, the accused was guilty of murder
- A person who commits robbery under arms does so at the peril of committing murder if, by his act, he happens through wounding to ill the person robbed either during or immediately after the robbery (*R v Jarmain*)

Windeyer J

- Could the act of the applicant, assuming it to be in a relevant sense his voluntary act, be said to have been 'done during or immediately after the commission of a crime punishable by death or penal servitude for life?'
- The felony created by s 98 is constituted by combination of two offences: (**AUTHORITY FOR s 98 ELEMENTS**)
    - Armed robbery (or armed assault with intent to rob)
    - Wounding (or inflicting GBH)
- Taylor and Owen JJ – joint judgement dismissing appeal in which they also held that s 98 could form the basis of constructive murder and did not require proof of an intent to wound

**** with constructive murder – liability is absolute**

Death act must have occurred before the base offence – trigger pulled before the wounding

Munro (1981) 4 A Crim R 76

Facts

- Appellant entered flat of old man with intention to rob money, and being told the victim had no money, the appellant punched the victim in the face – injuries resulted in victim contracting pneumonia which led to his death – **wounding was on his eye**

Issue – Whether, if the jury accepted the statement of the applicant that his actual intent was to shoot near the deceased, understanding those words to mean that the applicant intended the bullet should not hit the body of the deceased, and to scare him

- Munro argued that pneumonia was caused by the striking to the ribs, not the wounds to the eye

Statute Examined (Base offences s 95 & s 96)

- s 95 Crimes Act (at time): "whosever robs … any person … and immediately before or at the time, or immediately after such robbery … strikes … any person, shall be liable to penal servitude for 20 years."

- s 96 Crimes Act (at time): "whosoever commits any offence under s 95, and thereby wounds any person, shall be liable to imprisonment for 25 years".

Reasoning Street CJ (discussing challenges advanced by appellant)

- Ground 2 – involving a contention that there must be a causal connection between the felonious wounding and the subsequent death
    - No relevant requirement of a causal link
    - ***Mraz*** – The very fact that they were so associated or so done established beyond reasonable question that they were done 'of malice'
- Ground 3 – trial judge erred in failing to direct the jury that it was necessary for the Crown to establish that a reasonable person in the position of the accused would have foreseen that his acts would cause death and that the wounding would cause death
    - In face of clear statutory definition and in the absence of anything in the authorities pointing to the contrary, I am of the view that the challenge advanced in ground 3 is no good
- Ground 4 – Trial judge erred in that he should simply have directed the jury that the Crown must prove that the act of the accused directly caused the death
    - The supervening pneumonia was the immediate cause of death

Common Base Offences

***Crimes Act 1900* (NSW)**		
33	Wounding etc with intent to do bodily harm or resist arrest	25 years
66A	Sexual intercourse – child under 10	25 years
96	Robbery with wounding	25 years
98	Robbery with arms etc and wounding	25 years
***Drug Misuse and Trafficking Act 1985* (NSW)**		
24(2); 33	Manufacture/production large commercial quantity of prohibited drugs (except cannabis)	Life
25(2), (2A); 33	Supply large commercial quantity of prohibited drugs (except cannabis)	Life

IL v The Queen [2017] HCA 27 (9 August 2017)

- Joint criminal enterprise manufacturing methamphetamines (base offence 25 years) – Husband in turning on a burner kills himself as room was filled with gas
- Wife who was part of the joint enterprise convicted on constructive murder as the actions of one attribute to the actions of the other – CCA
- **However HCA changed the outcome to this**

Constructive Murder, Mens Rea and Voluntary Act

- A conviction could be secured even if the consequence was accidental.
- In arguing for a conviction of murder based on constructive malice, the prosecution does not have to prove that
    - the defendant realised that death or any other consequence was possible result of their actions, or;
    - that a reasonable person would have appreciated any such risk (*Munro; Bowden* (1981))
- Under the doctrine of constructive murder, the act causing the death must still be voluntary
- It will only be in cases where accident is no basis for an acquittal (Constructive homicide, absolute liability offences) that those accused will need to raise the voluntariness issue

The Base Offence

- There is no mens rea requirement extending to this aspect of the actus reus – an accidental wounding is sufficient provided that it is voluntary. Consequently, the mens rea on which constructive murder is based is the mens rea for the offence under s 97
- Other offences that could constitute the base offence for constructive murder:
    - S 61JA – aggravated sexual assault in company
    - S 33(2) – wounding with intent to resist arrest
    - S 33A(2) – discharging a firearm with intent to resist arrest
    - S 97(2) – armed robbery with a dangerous weapon
- ***Bowden* (1981)** – constructive murder was built on the offence of breaking and entering a dwelling-house and while therein inflicting GBH. Held that this offence did not require proof of an intent to cause GBH.

Intoxication

- **Burden is beared by prosecution to prove the mens rea that the defendant caused the specific intent**
- **Evidentiary burden on the defence**

Current Legislation – The legislation: Part 11A *Crimes Act*

- Section 428A definitions
  - "intoxication" means intoxication because of the influence of alcohol, a drug or any other substance
  - "offence of specific intent" is defined in section 428B.
  - "self-induced intoxication" means any intoxication except intoxication that:
    - (a) is involuntary, or (b) results from fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force, or (c) results from the administration of a drug for which a prescription is required
- Section 428B
  - An offence of specific intent is an offence of which an intention to cause a specific result is an element.
    - Mens rea beyond the actus reus, to achieve a result
    - Sexual assault isn't a specific intent crime
- Section 428C
  - (1) Evidence that a person was intoxicated (whether by reason of self-induced intoxication or otherwise) at the time of the relevant conduct may be taken into account in determining whether the person had the intention to cause the specific result necessary for an offence of specific intent.
  - (2) However, such evidence cannot be taken into account if the person:
    - (a) had resolved before becoming intoxicated to do the relevant conduct, or (formed mens rea beforehand)
    - (b) became intoxicated in order to strengthen his or her resolve to do the relevant conduct (use intoxication to propel action)
- Section 428D
  - In determining whether a person had **the mens rea** for an offence **other than an offence of specific intent**, evidence that a person was intoxicated at the time of the relevant conduct:
    - (a) if the intoxication **was self-induced cannot** be taken into account, or
    - (b) if the intoxication was **not self-induced may** be taken into account

MENS REA	Self-Induced	Non Self-Induced
Specific	Yes	Yes
Basic	No consideration	Yes may be considered

- Section 428E – Intoxication in relation to murder and manslaughter
  - If evidence of intoxication at the time of the relevant conduct results in a person **being acquitted of murder**:
    - in the case of intoxication that was self-induced evidence of that intoxication cannot be taken into account in determining whether the person had the requisite mens rea for manslaughter, or
    - in the case of intoxication that was **not self-induced** evidence of that intoxication **may be taken into** account in determining whether the person had the requisite mens rea for manslaughter.
- Section 428F – Intoxication in relation to the reasonable person test
  - If, for the purposes of determining whether a person is guilty of an offence, it is necessary to **compare the state of mind of the person with that of a reasonable person**, the comparison is to be made between the conduct or state of mind of the person and that of a **reasonable person who is not intoxicated**
- Section 428G – Intoxication and the actus reus of an offence.
  - (does not discriminate between specific and basic intent)

- (1) In determining whether a person has committed an offence, evidence **of self-induced intoxication** cannot be taken into account in determining whether the relevant conduct was **voluntary**.
- (2) However, a person is **not criminally responsible** for an offence if the relevant conduct resulted from intoxication that was **not self-induced**.

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	Self- Induced	Non-Self-Induced
Actus Reus	No	Yes

Self-Induced Intoxication in NSW

- ***O'Connor* (1980)** – defence of intoxication
  - Controversial
  - 'Drunk's charter' – protected drunk people from their actions
    - Mental element is necessary, if something interferes with this, hence mens rea isn't proven
    - 'So intoxicated' that you are incapable of forming mens rea, hence not culpable of offence
- ***Ainsworth* (1994) Gleeson CJ** – it is rate for juries to regard the consumption of alcohol by the person responsibility for the killing as a matter of excuse
- Part 11A *Crimes Act*, overrode the common law relating to the effect of self-induced intoxication on criminal liability (s 428H)
  - Resurrects the distinction drawn in *Majewski* [1977] between offences of specific and basic intent
  - This does not neatly distinguish between less and more serious crimes
  - No meaningful definition of intoxication.
    - S 428A – 'intoxication means intoxication because of the influence of alcohol, a drug or any other substance'
  - No attempt to provide an indication of the magnitude of intoxication that is likely to be required
- **Prior fault approach – mens rea is established when one starts drinking alcohol, then an actus reus is created later during an offence and we have coincidence – NSW follows this**

***Sullivan* [2012] NSWCCA 41**
Facts - S convicted of murder after stabbing victim - On appeal S argued that the trial judge erred by refusing leave an intoxication defence to the jury   - Murder is an offence of specific intent and so there was no statutory barrier to the judge doing so, by TJ concluded that there was insufficient evidence to warrant a direction on intoxication Issue - Whether the evidence of the applicant that he was 'out of it' and 'whacked' by the drugs he had taken should have been left to the jury to consider on the basis that it was relevant in determining if the prosecution had proved beyond reasonable doubt the applicant had the requisite intent Reasoning (Blanch J): - Authorities establish need to alert the jury to all relevant legal considerations even if they are not relied on by defence because sometimes there may be tactical reasons to explain the omission - On the other hand, if the evidence is not capable of raising doubt it is permissible for the judge to decline to put the issue before jury even when asked by counsel to do so - Imprecise evidence of applicant's state and detailed evidence of his actions contracts the fact that he did not have the relevant intent - Held – Dismissed

Intoxication and Murder

- Specific intent as mentioned in the Pt 11A of the *Crimes Act* includes murder
  - Questionable whether murder based on allegations of reckless indifference to human life requires proof of an intention to cause a specific result

- Relevance of self-induced intoxication to **murder by reckless indifference** was considered in ***Grant*** **[2002]**
    - Trial judge directed jury that intoxication could be taken into account in relation to the appellant's state of mind for murder dependent on intent to kill or GBH, but not in relation to murder dependent on reckless indifference
    - Wood CJ, Spigelman CJ and Kirby J said this was a misdirection
        - In relation to reckless indifference, there is a significant element of intent involved in a state of mind which requires
            - An awareness or foresight that the probable consequence of one's act is death
            - A conscious decision to proceed regardless
        - **<u>For manslaughter, self-induced intoxication provides no defence (*Doherty*)</u>**
        - Murder in all of its forms should come within the operation of s 428C

The Direction to the Jury for Offences of Specific Intent

Makisi **[2004] NSWCCA 333**

Reasoning (Barr J):
- Noted that he distinction has long been drawn between the effect of intoxication on the capacity to
  o form the requisite specific intent and
  o the formation of that intent
- Reference to the effect of alcohol on the accused's capacity to form the requisite intent is unnecessary and confusing
- the evidence of intoxication was important because it had the potential to raise a reasonable doubt whether the appellant had formed the intent to rob
- to leave the question as one about capacity would be to disadvantage the accused because it would be more difficult to raise a reasonable doubt about capacity than about the actual formation of the requisite intent
Held – Dismissed

Availability of Lesser Offence

- Offence causing GBH with intent to cause GBH, self-induced intoxication would be relevant to the question of whether the defendant intended to cause GBH
- ***Brady*** **[2012]** – if prosecution failed to prove the specific intent because of the defendant's self-induced intoxication, there might nevertheless be a conviction of recklessly inflicting GBH, which is not an offence of specific intent

Relationship Between Intoxication and Other Offences

- S 428F
- Where the mens rea standard is objective rather than subjective, the criterion to be used is the conduct or state of mind of the reasonable person who is not intoxicated
- Applies:
    - Reasonableness inquiry forms part of the fault element (e.g. manslaughter)
    - Where it forms part of the defence (e.g. self-defence)

<u>Intoxication Which Is Not Self Induced</u>

- Resulting from 'fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force, and intoxication resulting from drugs taken for medicinal purposes, in accordance with instructions (s 428A)
- The criterion to be used is the conduct or state of mind of the reasonable person who is not intoxicated
    - If a person who has had their drinks laced and commits an offence where the mens reas is defined objectively, the jury is supposed to ask whether a reasonable sober person would have appreciated a particular consequence or realised the existence of particular circumstances

Class 18 – Sentencing Modules – FOR MIDSEM EXAM

MODULE 1 – INTRODUCTION

Theories of Punishment

Retribution
- Often framed as a theory of 'Just Deserts'
- Offenders should receive punishment that is proportionate to the harm caused by their conduct, and their blameworthiness or guilt
- Backwards looking – focuses on the act committed and the offender's criminal responsibility for the act

Deterrence
- Forward looking – punishment is a means to induce individuals to comply with the law
- Punishment is designed to prevent recidivism of the offender and prevent other members of society from breaking the law
- Belief that tougher punishment (particularly imprisonment) rather than the likelihood of detection prevents crime

Rehabilitation
- Seeks to prevent crim through changing or reshaping the moral outlook of offenders
- Uses a medical or pathological model for determining the motivations and proper treatment of offenders
- An essential aim of punishment according to article 10(3) of the ICCPR

Incapacitation
- Arguable punishes individuals for crimes that they might do, rather than what they have done
- The key am is to protect the community from dangerous of risky individuals
- Removes the means and opportunity for individuals to criminally offend in the future

Restorative Justice
- In practice, in AUS, offenders' victims and other stakeholders convene at a 'conference' to discuss the impact of the crime and ways to repair harm
- A move towards community-based initiatives that promote reintegration and restoration for offenders, victims and the community
- Involves inclusive participation by all stakeholders, reparation and resolution

Purposes of Punishment

The role of the purposes of sentencing
- Theories of punishment are important intellectual methods for understanding or reforming punishment in criminal law. Courts historically have not acknowledged these sources and instead have articulated their own justifications. That being said, there is a strong similarity between the 'courts' formulations and that of philosophers.
- While academics can argue for a single theory of punishment, courts have generally recognised competing interests. This leads to complexity in coming to decisions on the appropriate level of punishment. In the next page we'll explore the statutory framework of the purposes of sentencing.
- First, though we start with the common law's approach - which underlies the statutory framework.
- ***Veen v The Queen (No 2)*** (Mason CJ, Brennan, Dawson and Toohey JJ):

    - '… sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. **The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case**. They are guideposts to the appropriate sentence but sometimes they point in different directions.'
- These comments were made in the context of the purposes of sentencing at common law.
- However, **as the legislated purposes do not depart from the common law, these comments remain relevant –** This passage from *Veen (No 2)* is regularly quoted by courts.

The Legislated Purpose

- All NSW Sentences governed by Crimes (Sentencing Procedure) Act 1999 – **purposes of punishment in s 3A**
- **3A PURPOSES OF SENTENCING**
- The purposes for which a court may impose a sentence on an offender are as follows:
    - (a) to ensure that the offender is adequately punished for the offence,
    - (b) to prevent crime by deterring the offender and other persons from committing similar offences,
    - (c) to protect the community from the offender,
    - (d) to promote the rehabilitation of the offender,
    - (e) to make the offender accountable for his or her actions,
    - (f) to denounce the conduct of the offender,
    - (g) to recognise the harm done to the victim of the crime and the community.
- No Set priority order
    - There is nothing in the Act that provides guidance as to how to rank or interpret the purposes in s 3A.
    - In ***Muldrock v The Queen*** **(2011**) 244 CLR 120, [20] – High Court ruled that the common law approach to multiple purposes still applies:
        - 'The purposes there stated [in s 3A] are the familiar, overlapping and, at times, conflicting, purposes of criminal punishment under the common law [Veen v The Queen (No 2) at 476–477].
        - There is no attempt to rank them in order of priority and nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in Veen v The Queen (No 2) [at 476] in applying them. '

Understanding and Authority for Each Purpose

- (a) to ensure that the offender is adequately punished for the offence,
    - ***R v Dodd*** **(1991)**
        - There ought to be a reasonable proportionality between a sentence and the circumstances of the crime, and we consider that it is always important in seeking to determine the sentence appropriate to a particular crime to have regard to the gravity of the offence viewed objectively, for without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place. Each crime … has its own objective gravity meriting at the most a sentence proportionate to that gravity, the maximum sentence fixed by the legislature defining the limits of sentence for cases in the most grave category. The relative importance of the objective facts and subjective features of a case will vary …'.
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,
    - **Specific Deterrence - C*omptroller-General of Customs v Parker*** (Simpson J):

        - 'It is not in dispute that general deterrence is a factor in this penalty decision. However, it was also argued that specific deterrence is not an issue. This, it was said, was because the defendant's conduct was committed as a result of his holding a licence issued under the Customs Act, something he is unlikely ever to be granted again. Thus, he will not have the opportunity to engage in this particular conduct, and so specific deterrence can be put to one side. In my opinion that approach takes too narrow a view of specific deterrence as one of the considerations relevant to sentence. Specific deterrence goes further than deterring the offender from repeating precisely the conduct the subject of the offence or conviction. It has a broader purpose. It is also to deter the particular offender from engaging in any other form of dishonesty; in this case, particularly, dishonesty relevant to the revenue.'
    - **General Deterrence – R v Harrison (1997)** (Hunt CJ at CL):
        - 'Except in well-defined circumstances such as youth or the mental incapacity of the offender . . . public deterrence is generally regarded as the main purpose of punishment, and the subjective considerations relating to the particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those who may otherwise be tempted by the prospect that only light punishment will be imposed'.
- (c) to protect the community from the offender,
    - ***Veen v The Queen* (No 2) 473**:
        - 'It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible'.
- (d) to promote the rehabilitation of the offender,
    - ***Vartzokas v Zanker* (1989) 51 SASR 277, 279 (King CJ):**
        - 'Rehabilitation as an object of sentencing is aimed at the renunciation by the offender of his wrongdoing and his establishment or re-establishment as an honourable law-abiding citizen. It is not confined to those who fall into wrongdoing by reason of physical or mental infirmity or a disadvantaged background. It applies equally to those who, while not suffering such disadvantages, nevertheless lapse into wrongdoing. The object of the courts is to fashion sentencing measures designed to reclaim such individuals wherever such measures are consistent with the primary object of the criminal law which is the protection of the community'.
- (e) to make the offender accountable for his or her actions,
    - NSWLaw Reform Commission, *Sentencing* (2013):
        - 'It is not entirely clear what is intended by this purpose of sentencing. It has been suggested that making the offender accountable for his or her actions may introduce "a new element into the sentencing task". For example, it has been argued that making the offender accountable amounts to a statutory recognition of restorative justice as a purpose of sentencing, … The alternative view is that this purpose does not necessarily reflect restorative principles, but rather a "justice model" of sentencing which has "long advocated aiming to make young offenders in particular accountable and responsible for their offending long before restorative justice ideals became popular". Viewed in this way, the purpose is more appropriately understood as directed at retribution, a purpose that has traditionally been identified at common law. Retribution has

been described as involving "retaliation or revenge against the offender for committing a wrong and is concerned with the community's expectation that offenders will be punished". A question accordingly arises as to whether this purpose adds anything to that of ensuring that the offender is adequately (or justly) punished for the offence.'

- (f) to denounce the conduct of the offender,
    - ***Ryan v The Queen* (2001)** (Kirby J)
        - 'A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also communicate society's condemnation of the particular offender's conduct. The sentence represents "a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law"'.
- (g) to recognise the harm done to the victim of the crime and the community.
    - ***R v Berg* [2004]** (Spigelman CJ):
        - 'It appears to me strongly arguable that the recognition of this purpose of sentencing would encompass the kind of matters which are incorporated in a victim impact statement. It may in some cases, be appropriate to consider the contents of such statements in the sentencing exercise'.

Forms of Punishment

Introduction

- A sentencing judge or magistrate has a range of sentencing options available to him or her as set out in the *Crimes (Sentencing Procedure) Act 1999* - The options that are available can vary depending on the type of offence and whether or not the person has been formally convicted.

Forms of Punishment

- Dismissal without Conviction – s 10(1)(a)
    - For some minor crimes, the court may choose to not record a conviction or proceed to a conviction but not impose any further penalties.
- Conditional Release Order s 9(2)
    - Alternatives to sentences of imprisonment or fines that effectively discharge offenders, subject to the mandatory conditions that the offender must not commit any offence and must appear before the court if called on to do so at any time during the term of the CRO
    - There are also a range of optional additional conditions that may be imposed.
    - CROs can be imposed by the court whether or not it decides to proceed to conviction.
- Conviction without penalty s 10A
    - For some minor crimes, the court may choose to not record a conviction or proceed to a conviction but not impose any further penalties.
- Deferral for Rehabilitation s11
    - The court can adjourn proceedings against an offender to a specified date for the purposes of rehabilitation, participation in an intervention program or other purposes
- Fine
    - A fine is a monetary penalty for a range of minor offences (e.g. speeding, littering or parking). A fine is sometimes also called a penalty notice, infringement notice, on the spot fine, ticket, Criminal Infringement Notice (CIN)
    - A person can go the Court to plead not guilty and defend the case against you. A person can also provide a good reason as to why they broke the law, plead guilty and ask the court for a smaller or no fine
- Community Corrections Order