

LARCENY

117. Punishment for Larceny

Whoever commits larceny, or any felony by this act made punishable like larceny, shall, except in the cases hereinafter otherwise provided for, be liable to penal servitude for five years.

DEFINITION:

- “Larceny is committed by a person who, **without the consent** of the owner, **fraudulently and without 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**” – *Illich v R* (1987) 162 CLR 110

Actus Reus:

1. Property is ‘**taken and carried away**’
2. Taking is done **without consent** of the owner
3. The property was in **possession of another (belonging to another)**
4. The property was **capable of being stolen**

Mens Rea:

1. Taken with the **intention** to ‘**permanently deprive**’
2. Taken without **claim of right**
3. Taken **fraudulently (dishonestly)**

Actus Reus 1: “Asportation” (Taken and Carried Away):

Definition:

- “[I]t would appear that **any movement of goods with intent to steal** them is sufficient to constitute an asportation...it is sufficient asportation if there is a **removal of the property from the spot where it was originally placed with intent to steal**” – *Wallis v Lane* [1964] VR 293, 295.

Some Action, However Minimal, is Necessary:

- “The **mere formation of mental resolve** to appropriate the thing, **not manifested in any overt act, could not change an original innocent possession into a larcenous one**” – *Potisk v R* (1973) 6 SASR 389.

Actus Reus 2: Absent Consent

- To constitute larceny, there must be removal of an item without consent of the owner
- It need only be **invito domino** (without owners consent), not contrary to the express will of the owner.
 - “That does not mean contrary to or against the will, but without it...this accounts for how it is that a finder of a chattel may be guilty of larceny” – *Middleton v R* (1873) LR 2 CCR 38, affirmed by *Kennison v Daire* (1986) 60 ALJR 249

Implied Licence:

- Property may be **passed into the possession** of another **by consent, but with implied licence**. E.g. Shoppers can look, try on, carry around clothing.

- When this implied licence is **breached, it may become larceny.**
 - “The licence granted by an owner to remove goods is broken if there is any action inconsistent with that licence” – *Kolosque v Miyazaki* NSWCCA 17 Feb 1995
- Where you **find property**, there **exists an implied license** to take possession of the item in order to **return it to the proper owner**. Larceny is committed **where you act contrary to this license.**

Actus Reus 3: Property in Possession (belonging to) Another Person:

Property Unlawfully Possessed:

- It is **still larceny** even where the **possessor had no legal right to have the property**. E.g. Drugs.
 - “I do not think that the cry “he has no right to have had them” amounts to an exculpatory answer for the culprit” – *Anic, Stylianou and Suleyman* (1993) 61 SASR 223

Employees or Servants:

- Property that is held by the employee or servant within the terms of their employment is considered to be **‘constructively in the possession’ of the employer.**
 - *Williams v Phillips* (1957) 41 Cr App R 5
- Larceny by employees is contained as a separate offence:
 - Larceny by clerks or servants – s 156

Actus Reus 4: Property Capable of Being Stolen:

Land:

- Land **cannot be stolen** as it cannot be ‘taken and carried away’

Fixtures:

- Those things attached to, growing from or associated with the land such as houses, letterboxes, tress and crops.
- These things **cannot be stolen where they are intended, or appear to be, attached permanently to the land** as they are considered to have lost all ‘independence of the land’
- In **determining if the intention for permanent attachment exists**, the court takes into account the factual issues, method of attachment and the damage that would be caused by its removal
 - *Billing v Pill* [1954] 1 QB 70.
- The Crimes Act contains **separate offences** for things affixed to land:
 - Stealing wood, glass etc attached to houses – s 139
 - Stealing trees etc in pleasure-grounds – s 140

Animals:

- **Wild animals cannot be stolen** if they are *ferae naturae* (in their natural state) **unless possession of them has been assumed** through capture or killing.
 - *Blade v Higgs* (1865) 11 HLC 621.
- **Domesticated animals can be stolen** from their possessor. Separate offences exist that cover these:
 - Stealing cattle – s 126
 - Stealing dogs – s 503

- Stealing animals normally held in confinement – s 505

Mens Rea 1: Intention to Permanently Deprive

Intention to Return Property- No Defence:

- Where **property was taken**, and **used as if it were the accused**, it is **larceny**- irrespective of **whether they intended to return it** later.
 - *“If the intention is to exercise ownership of the goods, to deal with them as his own, an intention later to restore the property in the goods will not prevent the original taking being larcenous” – Foster v R (1967) 118 CLR 117*
- Where property is taken, but from the **outset the accused had the intention** only of **depriving the owner temporarily**, it is **not larceny**
 - *“Thus, if the intention is to deprive the true owner of possession for a limited time, larceny is not made out” - Foster v R (1967) 118 CLR 117*

Mens Rea 2: Absent a Claim of Right:

- **Where a person believes** he or she **has a legal right** to that property, and **acts upon it**, there is **no larceny**.
 - *“To render a person liable to punishment for an offence relating to property, when, under a mistake of law, he acts **honestly claiming a right** to do what he does and **when he has no intention to defraud** would make the criminal law **unjustly oppressive**” – Walden v Hensler (1987) 163 CLR 561*
- The claim must **relate to property** in **possession of another**
 - *Lanham v R (1984) 36 SASR 48*
- The **means by which the accused acts** to retrieve the property **does not need to be legal**
 - *Fuge v R (2001) 123 A Crim R 310*
- Claim **must be genuine** (honestly held) but not **necessarily reasonable**
 - *Nundah v R (1916) 16 SR (NSW)*
- The claim must be **founded in law**, **not** merely a **moral claim**.
 - *Harris v Harrison [1963] Crim LR 497*
- The claim does **not apply to specific notes and coins**, but **includes the equivalent amount**
 - *Langham v R (1984) 36 SASR 48*
- The claim **does not excuse deliberately going beyond what the individual believes they are entitled to**
 - *Astor v Hayes (1988) 38 A Crim R 219, 222*
- If charged as an **accessory**, it is **sufficient that the principal has a claim**
 - *Richards v R [1974] QB 776*
- It is for the **crown to disprove the claim** if the accused has raised it on the evidence to the satisfaction of the jury
 - *Astor v Hayes (1988) 38 A Crim R 219*

Mens Rea 3: Fraudulently (Dishonesty):

- In most cases, dishonesty can be inferred from the facts.
- *“Jurors, when deciding whether an appropriation was dishonest can be reasonably expected to, and should, **apply the current standards of ordinary decent people**. In their own lives, they have to decide what is and what is not dishonest” – Feely v R [1973] 1 QB 530.*
- *“it is sufficient that the jury be instructed that that is to be decided by the **standards of ordinary decent people**” – Peters v R (1998) 192 CLR 493.*

STATUTORY EXPANSIONS TO LARCENY

LARCENY BY BAILEE

- A bailee is a person, neither a servant or employee, who is given temporary possession of property by the bailor for either the bailee's benefit (loaning of a car etc) or for the bailors benefit (handing over a watch for repair)

125. Larceny by a Bailee

Whoever, being a bailee of any property, fraudulently takes, or converts, the same, or any part thereof, or any property into or for which it has been converted, or exchanged, to his or her own use, or the use of another person other than the owner thereof, although he or she does not break bulk, or otherwise determine the bailment, shall be deemed to be guilty of larceny and liable to be indicted for that offence.

LARCENY BY SERVANT/EMPLOYEE - EMBEZZLEMENT

- Where there is a constructive trust over the property then it will be considered larceny, not embezzlement.
- Property is reduced to the **constructive possession** of the employee by **some act of the employee** such as placing the money in the till or placing the property in the employer's vehicle.

157. Embezzlement

Whosoever, being a clerk, or servant, fraudulently embezzles, either the whole or any part of, any property delivered to, or received, or taken into possession by him or her, for, or in the name, or on the account of, his or her master, or employer, shall be deemed to have stolen the same, although such property was not received into the possession of such master, or employer, otherwise than by the actual possession of such clerk, or servant, and shall be liable to imprisonment for ten years.

JOYRIDING

- As joyriding doesn't have the requisite intent to permanently deprive the owner, it is not strictly considered larcenous. Parliament responded with **section 154A**.

154A Taking a Conveyance Without the Consent of the Owner

(1) Any person who:

- (a) without having the consent of the owner or person in lawful possession of a conveyance, takes and drives it, or takes it for the purpose of driving it, or secreting it, or obtaining a reward for its restoration or pretended restoration, or for any other fraudulent purpose, or
- (b) knowing that any conveyance has been taken without such consent, drives it or allows himself or herself to be carried in or on it,

shall be deemed to be guilty of larceny and liable to be indicted for that offence.

CAR-JACKING:

- **Commandeering**, rather than taking away, a vehicle with the owner or passengers in it.

154C Taking a Conveyance with a Passenger on-board

(1) A person who:

- (a) assaults another person with intent to take a motor vehicle or vessel and, without having the consent of the owner or person in lawful possession of it, takes and drives it, or takes it for the purpose of driving it, or
- (b) Without having the consent of the owner or person in lawful possession of a motor vehicle or vessel, takes and drives it, or takes it for the purpose of driving it, when a person is in or on it,

is liable to imprisonment for 10 years.

- (2) A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in circumstances of aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 14 years.

FRAUDULENT APPROPRIATION

- Dishonest retention of property innocently obtained.

124 Fraudulent Appropriation

Where, upon the trial of a person for larceny, it appears:

- (a) that the person had fraudulently appropriated to his or her own use or that of another, the property in respect of which the person is indicted, although the person had not originally taken the property with any fraudulent intent, or
- (b) that the person had fraudulently retained the property in order to secure a reward for its restoration,

the jury may return a verdict accordingly, and thereupon the person shall be liable to imprisonment for two years, or to a fine of 20 penalty units, or both.

ROBBERY

- Robbery includes any instance where **violence, or threat of violence, is used to steal an item.**
- Where the **violence is not enough** to constitute robbery, it is merely "steal from person"

94 Robbery

Whosoever,

Robbs or assaults with intent to rob any person, or
Steals any chattel, money, or valuable security

Shall, except where a greater punishment is provided by this Act, be liable to imprisonment for fourteen years.

- The violence used must be more than merely the violence associated with the taking of the thing,
 - *“the mere act of taking being forcible will not make this offence highway robbery: to constitute the crime of highway robbery the force used must be either before or at the time of the taking and must be of such a nature as to show that it was intended to overpower the party robbed, and prevent his resisting, and not merely to get possession of the property stolen” – Gnosil (1824) 1 C&P 304, 304.*
- Other offences:
 - Aggravated Robbery – s 95
 - If the robbery under s 95 results in wounding – s 96
 - Robbery in company – s 97
 - Robbery with arms – s 97
 - Robbery with arms and wounding – s 98
 - Demanding Money with Menaces - s 99

FRAUD

192E Fraud

- (1) A person who, by any **deception, dishonestly;**
- a. **Obtains property belonging to another, or**
 - b. **Obtains any financial advantage or causes any financial disadvantage,**
- is guilty of the offence of fraud
 Maximum Penalty: Imprisonment for 10 years

Fraud: Structure of Prosecution

- In order to prosecute fraud, the prosecution must demonstrate:

ACTUS REUS	MENS REA
(Conduct) "Deception" (1) False statements, or (2) Deceptive conduct inc. silence	Intent or Recklessness
Consequence Element: * 1. Obtain Property of another 2. Obtain Financial benefit 3. Cause financial disadvantage	1. Intention to permanently deprive 2. No MR specified- assumed to be intent to permanently deprive 3. No MR specified. Assumed to be intent to deprive. (need not be permanent per <i>Murphy</i>)
Dishonesty (in bringing about those consequences) - defined in Section 4B	Per the <i>standards of ordinary, decent people</i> applied to the subjective mental state of the accused.

* Note- Causation test also applies

There are, essentially, three requirements to satisfy:

- 1) Were the actions of the accused **intentionally or recklessly deceptive?**
- 2) Did the actions **cause an obtaining of property, a financial advantage or a financial disadvantage?**
- 3) Was it **dishonest** to cause that consequence?

ACTUS REUS: (DECPTIVE ACTS)

False Statements:

- False statements may be **either outright lies, or partially true** where it creates a **false impression.**
 - *"It is well established that falsity of a statement may arise, not only because a fact therein is falsely alleged, but because the statement, by omitting material facts, creates a false impression."* – *M v R* [1980] 2 NSWLR 195, 204.
- A false statement **does not** include instances of **'puff' or exaggerated claims** which are clearly unreasonable.
 - *Bryan* (1857) Dears B 265

Deceptive Conduct, including Silence:

- **Conduct, without words** can amount to false pretences or deceptive acts.
 - *Barnard* (1837) 7 C&P 784.
- **Note:** A person who makes an **honest claim** has **no legal obligation to inform the other party that circumstances have changed** which make the representation false.

MENS REA: DECEPTIVE ACTS

- The *Crimes Act 1900* (NSW) stipulates the MR to be **intent** or **recklessness**
 - **192B(2)** A person does not commit an offence under this Part by a deception unless the deception was intentional or reckless.

Intent:

- This requires proof that the accused had **knowledge of the falsity of the statement** and that they had **intent to defraud**.
 - *Greene v R* (1949) 79 CLR 353, 357

Recklessness:

- No precise direction.
- Assumed that it relates to **an awareness of the possibility that the behaviour is deceptive**.

CONSEQUENCE ELEMENTS (3 POSSIBILITIES)

- The consequence element of fraud requires the accused to:
 - **Obtain property from another**
 - **Obtain financial benefits**
 - **Cause financial disadvantage**

Obtaining Property From Another:

- Defined in statute: *Crimes Act 1900* (NSW) s 192C

192C Obtaining Property Belonging to Another

- (1) For the purposes of this part, a **person obtains property** if:
 - a. The person obtains ownership, possession or control of the property for himself or herself or for another person, or
 - b. The person enables ownership, possession or control of the property to be retained by himself or herself or another person, or
 - c. The person induces a third person to do something that results in the person or another person obtaining or retaining ownership, possession or control of the property.
- This includes situations where the victim is tricked into **temporarily handing over the property**
 - *Justelius* [1973] 1 NSWLR 471

Mens Rea for Obtaining Property:

- **192B (2)** A person does not commit an offence under this Part by obtaining or intending to obtain property belonging to another **unless the person intends to permanently deprive** the other of the property.

Obtaining Financial Advantage or Causing Disadvantage:

- **192D Obtaining Financial Advantage or Causing Financial Disadvantage**
 - (1) In this Part, *obtain* a financial advantage includes:
 - a. Obtain a financial advantage for oneself or for another person, and

- b. Induce a third person to do something that results in oneself or another person obtaining a financial advantage, and
 - c. Keep a financial advantage that one has
- Whether the financial advantage is permanent or temporary.

- The “**financial advantage**” is limited:
 - *“essence of the concept of financial advantage that the person alleged to have obtained such has obtained a benefit which can be valued in terms of money and a benefit which can be seen to be financial as distinct from a benefits of another kind”* – *Coelho v Durbin* [1993] NSWSC (29 March 1993)

- **192D Obtaining Financial Advantage or Causing Financial Disadvantage**

(2) In this part, **cause a financial disadvantage means:**

- a. Cause a financial disadvantage to another person, or
- b. Induce a third person to do something that results in another person suffering a financial disadvantage,

Whether the financial disadvantage is permanent or temporary

Mens Rea: Obtaining Financial Advantage/Causing Financial Disadvantage:

- There is **no statutory enactment** of a Mens Rea requirement.
- There is a suggestion that there must be an **intention to deprive but this need not be permanent.**
 - *Murphy* [1987] Tas R 178.

CAUSATION:

- As fraud is a **consequence-based offence**, it is necessary to **demonstrate causation.**
 - *“it is an essential ingredient of the offence created by that section that the cause of the payment of the money (or the handing over of the valuable thing or the giving of the financial advantage) was the deception used by the accused”* – *Ho and Szeto v R* (1989) 39 A Crim R 145
- If the **activity doesn’t have the desired effect**, because the **other person realises** that a **deception** is being practised, the **offence is not committed**, even if property is handed over.
 - *Clemesha* [1978] WAR 193

DISHONESTY: (IN BRINGING ABOUT CONSEQUENCE ELEMENTS)

- Defined in **section 4B** as:
 - *“dishonest according to the standards of ordinary people and known to the defendant to be dishonest according to the standards of ordinary people.”* - s 4B
- The test remains **subjective**- the standards of ordinary people as applied to the mental state of the accused.
- There is **NO dishonesty** where the accused had a **genuine claim of right.**
 - *“the question to be considered was whether the appellant believed he had a legal right to obtain [the benefit], not whether the appellant believed he had a legal right to practise the particular deception”* – *Love v R* (1989) 17 NSWLR 608, 614

OTHER FRAUD OFFENCES

FORGERY AND FALSE INSTRUMENTS:

253 Forgery – making false document

A person who make a false document with the intention that the person or another will use it:

- (a) To induce some person to accept it as genuine, and
- (b) Because of its being accepted as genuine
 - i. To obtain any property belonging to another, or
 - ii. To obtain any financial advantage or cause any financial disadvantage, or
 - iii. To influence the exercise of a public duty

Is guilty of the offence of forgery.

Maximum Penalty: Imprisonment for 10 years.

IDENTITY THEFT OFFENCES:

- 192J Dealing with Identification Information
- 192K Possession of Identification Information
- 192L Possession of Equipment etc to Make Identification Documents of Things
- 192M Miscellaneous Provisions

DEFENCE: MENTAL ILLNESS

Concept of 'Defence'

- A defence is not a complete denial of the core factors of the offence itself
- Often misapplied
- There are defences that involve a **negation of the positive elements** of the offence. That is, admitting the core elements are made out, but offering an excuse for them
 - Intoxication, automatism
- **Bars to Conviction** are procedural matters that preclude a conviction
 - Sovereign immunity, statutory limitations etc
- **Justification and Excuses** are defences raised that 'excuse' (to a degree) the offender. The term 'excuse', however, is contentious and not consistent in its application.

INSANITY: Defence of Mental Illness

- Renamed pursuant to *Mental Health (Forensic Provisions) Act 1900* (NSW) Pt 4
- **Accused bears the burden of proof** of proving, on the **balance of probabilities**, that the accused was mentally ill at the time of committing the offence.

The M'Naughten Rules

The Rules:

1. Labouring under defect of reason
2. That defect was from a disease of the mind
3. He did not know of the nature of the act
4. If he did know, he did not know what he was doing was wrong

"Defect of Reason"

- It does **not** refer to **loss of self control or emotional outbursts**
 - *"mere excitability of a normal man, passion, even stupidity...are quite different things"* - *Porter v R* (1933) 55 CLR 182
- **mere difficulty in reasoning** what is wrong is **insufficient**. It must be that the accused was 'incapable' in an "absolute sense" of reasoning that the act was wrong.
Cheatham v R [2000] NSWCCA 282

"Disease of Mind"

- Not defined in statute. It is not expressly a medical term.
- Examples may include psychosis, epilepsy, hyperglycemia, paranoia, schizophrenia, manic states of depression and dementia
- Not personality disorders

"Nature of the Act"

- The accused must **not be able to understand** what he or she was doing at the time
 - *"namely that his disease or disorder...was of such a character that he was unable to appreciate that the act he was doing was wrong"* - *Porter v R* (1933) 55 CLR 182

"Wrongness of Act"

- This is judged *"having regard to the everyday standards of reasonable people"*
 - *Porter v R* (1933) 55 CLR 182

Other Qualifications to *M'Naughten*:

- The **time** at which the accused mind is judged is only at the **time of the commission** of the offence, not before or after.
 - *Porter v R* (1933) 55 CLR 182
- The **defence has an evidential burden** to raise the issue of mental illness on **the balance of probabilities**. If this **satisfies the judge**, the issue is given to the jury. The **prosecution then bears the onus to disprove it beyond reasonable doubt**.
 - *Porter v R* (1933) 55 CLR 182

Jury Direction: Possible Jury Findings

- The **court must explain** to the jury **the findings they may make** in regards to the accused. This includes an **explanation of the processes and consequences** of each verdict
 - *Mental Health (Forensic Provisions) Act 1990* (NSW) s 37
- These **directions must include** the possibility of a **finding of guilty**.
 - *Hilder v R* (1997) A Crim R 70
- **Available Findings:**
 1. Guilty
 2. Not guilty
 3. Not guilty by reason of mental illness.

“Special Verdict” Available to Jury

- The **jury** may find the accused **“not guilty by reason of mental illness”**
 - *Mental Health (Forensic Provisions) Act 1990* (NSW) s 38
- Where this is the case, the **court can order** the **“person be detained in such place and in such manner as the Court thinks fit until released by due process of law”** s 39

FITNESS TO PLEAD

MINIMUM STANDARD REQUIRED TO PLEA: "Presser Rules"

- “He needs...to be able to **understand what he is charged with**. He needs to be able to **plead to the charge** and to **exercise his right of challenge**. He needs to understand, generally, the **nature of the proceedings**...he needs to be able to follow the **course of proceedings**...he needs to be able to understand, I think, the **substantial effect of any evidence that may be given against him**...he must have sufficient capacity to be able to **decide what defence** he will rely upon and to **make his defence** and his **version of the facts known** to the **court** and to his **counsel**.”
 - *Presser v R* [1958] VR 45
- This can **include** instances of **intellectual disability**.
 - *Mailes v R* [2001] NSWCCA 155
- This **DOES NOT include** instances where the person **may have had a better understanding** if **medical attention** were rendered:
 - “so long as the accused can understand...The fact that the accused may have done so in a better way, had suitable medical treatment or medication been provided...does not seem to us to be relevant” – *Rivkin v R* [2004] NSWCCA 7

INVOLUNTARY COMMITTAL PROCEDURES:

“Mentally Ill Persons”

14 Mentally ill persons

(1) A person is a mentally ill person if the person is suffering from mental illness and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary:

- (a) for the person’s own protection from serious harm, or
- (b) for the protection of others from serious harm.

4 Definitions

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).

Committing a ‘Mental Ill Person’

- There must be **no other appropriate care facility or arrangement** available – s 12
- Can be done at the **request of a doctor, friend, police officer or by the court** – ss 19-26
- **Doctors may certify** if **police assistance** is necessary – s 21
- The person **must be assessed** by the facility **within 24 hours**. If the **facility’s medical personnel are not satisfied** the person is mentally ill or mentally disordered, the **person is released** – ss 27-28
- The person so committed **must be assessed by the Mental Health Review Tribunal as soon as practical** – s 27
 - Matters for the tribunal to assess – s 35
- Involuntary patients must be assessed **every 3 months** for a year and every **12 months** thereafter – s 38

Committing a ‘Mentally Disordered Person’

15 Mentally disordered persons

A person (whether or not the person is suffering from mental illness) is a mentally disordered person if the person’s behaviour for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary:

- (a) for the person’s own protection from serious physical harm, or
- (b) for the protection of others from serious physical harm.

- Can only be committed due to the threat of physical harm
- Limited to three days (not including weekends or public holidays) – s 31(1)-(2)
- Must be assessed every 24 hours – s 31(3)
- Cannot be detained more than 3 times in a month – 31(5)

DEFENCE: AUTOMATISM

Insane Automatism

- Insane Automatism must be raised according to the M’Naughten rules (as a mental illness defence)
 - “If the involuntary act proceeds from a disease of the mind, it **gives rise to a defence of insanity, but not to a defence of automatism**” – *Bratty v Attorney-General for Northern Ireland* [1963] AC 386
- Often found because:
 - The mental **disorder is recurring** – *Batty* (citation above)
 - Is a reaction to delusion or stimuli – *Falconer v R* (1990) 171 CLR 50
 - **Sound/unsound** mind test - *Falconer v R* (1990) 171 CLR 50

Sane Automatism:

- “means an act which is **done by the muscles without any control of the mind**, such as a spasm, a reflex action or a convulsion; **or an act done by a person who is not conscious of what he is doing**” – *Bratty v Attorney-General for Northern Ireland* [1963] AC 386
- If the **cause of the automatism was some mental state**, it **must be shown** that it was:
 1. **Transient**
 2. **Caused by trauma** (physical or psychological), which the **mind of an ordinary person would likely not have withstood** and;
 3. **Not prone to recur**

Falconer v R (1990) 171 CLR 30

Psychiatric Evidence:

- **Unless the insanity is raised, psychiatric evidence is inadmissible.**
 - *Hawkins v R* (1994) 179 CLR 500
- Where the **offence was one of specific intent**, **psychiatric evidence is admissible** to canvass if the accused had specific intent
 - *Hawkins v R* (1994) 179 CLR 500

DEFENCE: SUBSTANTIAL IMPAIRMENT

23A Substantial impairment by abnormality of mind

- (1) A person who would otherwise be guilty of murder is not to be convicted of murder if:
- (a) at the time of the acts or omissions causing the death concerned, the person's capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition, and
 - (b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.
- (2) For the purposes of subsection (1) (b), evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible.
- (3) If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was self-induced intoxication (within the meaning of section 428A), the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section.
- (4) The onus is on the person accused to prove that he or she is not liable to be convicted of murder by virtue of this section.
- (5) A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder is to be convicted of manslaughter instead.
- (6) The fact that a person is not liable to be convicted of murder in respect of a death by virtue of this section does not affect the question of whether any other person is liable to be convicted of murder in respect of that death.
- (7) If, on the trial of a person for murder, the person contends:
- (a) that the person is entitled to be acquitted on the ground that the person was mentally ill at the time of the acts or omissions causing the death concerned, or
 - (b) that the person is not liable to be convicted of murder by virtue of this section, evidence may be offered by the prosecution tending to prove the other of those contentions, and the Court may give directions as to the stage of the proceedings at which that evidence may be offered.
- (8) In this section:
- underlying condition** means a pre-existing mental or physiological condition, other than a condition of a transitory kind.

"Abnormality of Mind"

- *"a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal"* – *Bryne v R* [1960] 2 QB 396

DEFENCE: INTOXICATION

428C Intoxication in relation to offences of **specific intent**

(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
- (b) became intoxicated in order to strengthen his or her resolve to do the relevant conduct.

- The appropriate **jury direction** regarding specific intent:
 - *“you will have to consider the evidence...and work out, beyond reasonable doubt, whether the accused had...the necessary capacity to act intentionally” – Makisi v R [2004] NSWCCA 333*

428D Intoxication in relation to **other offences**

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.

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:

- (a) 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
- (b) 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.

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.

428G Intoxication and the **actus reus of an offence**

(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.

DEFENCE- PROVOCATION

23 Trial for murder—provocation

- (1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.
- (2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:
 - (a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused, and
 - (b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased,whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.
- (3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negated if:
 - (a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission,
 - (b) the act or omission causing death was not an act done or omitted suddenly, or
 - (c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.
- (4) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.
- (5) This section does not exclude or limit any defence to a charge of murder.

The Elements of Provocation:

1. **Provoking circumstances**
2. Accused must **have lost self-control** as a result of the provoking circumstances
3. The circumstances could have **induced an ordinary person** in the **position of the accused to have so far lost control** as to have formed the intent to kill or inflict GBH

Element 1: “Provoking Circumstances”

Within Hearing/Sight of the Accused

- In order to constitute provoking **words or conduct**, it must be **within hearing or sight of the accused**
 - “provocation becomes a factor...when the killing can be sensibly related to a reaction by an accused person to some conduct...of the deceased of which he **personally has experienced**, that is, which **occurs within his sight or hearing**” – *Davis v R* (1998) 100 A Crim R 573

Nature of Words used:

- The words can provoke in different ways but must, however, be sufficiently serious to ‘provoke’
 - “other kinds of words may qualify as provocative conduct such as...threatened violence, blackmail... and so on. They are equally capable of provoking strong feelings...They do, however, need to be of sufficient violent, offensive or otherwise aggravating character...Mere words of abuse or insult would not normally qualify” – *Lees v R* [1999] NSWCCA 301.

Self-Induced Provocation:

- I.e- where the accused **invited or induced** the **acts or words** which **then provoked them**.
- There are three main **common law limitations**:
 - “(1) A blackmailer cannot **rely on the predictable results of his own conduct** as constituting provocation...(2) If the **hostile reaction** by the person to be blackmailed **goes to extreme lengths it might constitute** sufficient provocation...(3)...to be **decided by the jury**” – *Edwards v R* [1973] AC 648

Lawful Provocation:

- Acts or words which are, in themselves legal, can still amount to provocation
 - “unlawfulness as a separate requirement has become obsolete” – *R v R* (1981) 28 SASR 321

Other Qualifications

- The **acts or words need not** be **directed at the accused**
 - “it need not necessarily be directed toward him” – *Davis v R* (1998) 100 A Crim R 573
- **Acts or words** can be **viewed cumulatively** and be **held to amount to provocation**.
 - “acts or words which, if viewed in isolation, are insignificant or colourless, may nevertheless constitute provocation when viewed cumulatively with other words...or conduct” – *Lees v R* [1999] NSWCCA 301

Element 2: Subjective Element – “Loss of Self- Control”

- **Subjectively**, the question is whether the accused **lost self-control**.
- **Characteristics** of the accused **may be used** including history of the relationship.
 - *Chhay v R* (1992) 72 A Crim R 1
- There is **no requirement** that the provocation be ‘**sudden**’. *Crimes Act 1900* (NSW) **s 23(3)(b)**

Element 3: Objective Tests – “Ordinary Person”

- Section 23(2)(b) of the *Crimes Act 1900* (NSW) requires that the provocative conduct to be:
 - “such as **could** have induced an ordinary person in the position of the accused to have so far lost self control as to have formed the intent to kill” – s 23(2)(b)

The Two Steps:

1. Assessing the *gravity* of the provocative conduct
 2. Applying “ordinary” standards of self-control to them
- In **assessing the gravity of the provocative circumstances, subjective characteristics** of the accused **may be admitted**:
 - *“the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused” – Stingel v R (1990) 171 CLR 312*
 - In applying the “ordinary” standard to the **issue of Self-Control, NO characteristics** (apart from age) **may be used**.
 - *“the objective test will, nonetheless, require that the provocative effect of the wrongful act or insult, with its content and gravity so identified, be assessed by reference to the powers of self-control of a hypothetical “ordinary person” who is unaffected by that...characteristic” – Stingel v R (1981) 171 CLR 312*
 - The jury does not have to find that they would have done the same thing.
 - *Green v R*
 - For this test: **NOT INTOXICATION.**

DEFENCE- SELF-DEFENCE

- and the conduct is a reasonable response in the circumstances as he or she perceives them
- 418 Self-defence—when available**
- (1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.
 - (2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:
 - (a) to defend himself or herself or another person, or
 - (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
 - (c) to protect property from unlawful taking, destruction, damage or interference, or
 - (d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,
- 421 Self-defence—excessive force that inflicts death**
- (1) This section applies if:
 - (a) the person uses force that involves the infliction of death, and
 - (b) the conduct is not a reasonable response in the circumstances as he or she perceives them,but the person believes the conduct is necessary:
 - (c) to defend himself or herself or another person, or
 - (d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.
 - (2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.
- 422 Self-defence—response to lawful conduct**
- This Division is not excluded merely because:
- (a) the conduct to which the person responds is lawful, or
 - (b) the other person carrying out the conduct to which the person responds is not criminally responsible for it.

Issues - Self-Defence

- Where **death is caused**, protection relating to property does **not apply** (s 420)
- Where the **response was unreasonable** (excessive), and **causes death**, the result is a **partial defence**. – s 421(2)

Nexus between Offence and Threat:

- There **must be a nexus** between any **threatening words or conduct** and the **act of self-defence**:

- *“there was nothing before a generalised apprehension...I do not think the matters upon which he relied...could have supported a reasonable belief that what he did was defending himself and others. The appellant was not being attacked or anything like it...the critical element of imminence of a threat was lacking” – Burgess & Saunders v R [2005] NSWCCA 52*

Self-Defence and “Battered Women Syndrome”

- **Evidence of Battered Women Syndrome** is relevant in order to determine if her actions were in response to the risk of her husband attacking her:
 - *Osland v R* (1998) 159 ALR 170

CRIMINAL ACTIVITIES BY GROUPS

Context:

- The concept of Joint Criminal Enterprise exists within a framework that recognises differing levels of participation within the commission of criminal offences:
 - **Joint Criminal Enterprise:** Where two or more persons agree to commit a crime and, in its commission, one or more carry out the necessary steps- all will be held liable.
 - **Extended Joint Criminal Enterprise:** Where, in the commission of an offence of *common purpose*, one person commits an 'incidental offence'. All will be held liable if this incident was in the contemplation of the parties involved
 - **Accessory Liability:** Where individuals provide assistance ("Aid, abet, counsel or procures") they will be held liable, depending upon the principles of accessory liability.
- **Note** – this is an entirely different concept to that of the offence of 'conspiracy'.

Innocent Agency:

- The law recognises that **some people, though involved** in the commission of an offence, **may be doing so "innocently"**. That is, are **being utilised as an 'agent'**.
 - E.g. A child, encouraged to assist in an offence may be an '**Innocent Agent**' of the operation.
- This has also been described as '**non-responsible agent**'
 - *Osland v The Queen* (1998) 159 ALR 170

JOINT CRIMINAL ENTERPRISE

DEFINITION:

- **"The law says that if two or more persons reach and understanding or arrangement that together they will commit a crime and then, while that understanding or arrangement is still on foot...are both present at the scene and one or other of them does...in accordance with their arrangement, all the things that are necessary to constitute the crime, they are equally guilty regardless of what part each played"** – *Osland v R* (1998) 159 ALR 170
- Liability is **PRIMARY** (not derivative). That is, the accused is guilty regardless of what happens to the other participants
 - *Osland v R* (1998) 159 ALR 170

Elements:

1. **Understanding Or Arrangement ("Common Purpose")**
2. **Arrangement is 'still on foot' and "not been called off"**
3. **Present at the scene**
4. **Defendant's had the Mens Rea for the Offence**

1. "Understanding or Arrangement"

- **Need not be express.**
 - *"a joint enterprise does not have to be reduced to writing or any formality. A joint enterprise simply means that people are acting together, that is, of a common mind"*

and with a common aim shared between them...an enterprise can be put together or it can be longstanding” – Kanaan [2006] NSWCCA 109, [226].

- **Existence of a Joint Criminal Enterprise** may be **inferred** from **all the circumstances**:
 - *“Its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating...may themselves establish an unspoken understanding or arrangement amounting to an arrangement formed between them” – Tangye v R (1997) 92 A Crim R 545, 556-7*
- **“Mutuality of Assistance”** must be demonstrated
 - *“not only that each [accused] had decided...and that each was aware that the others would [do] also...but that each would assist the others in doings so”- Taufahema [2006] NSWCCA 152*

2. Arrangement is still “On Foot” (Not Called Off)

- It is **possible** to **withdraw** from a **Joint Criminal Enterprise** by –
 - *“to withdraw from a common enterprise upon which he has embarked he must withdraw completely. It must be timely. He must make it known to the others that he was withdrawing and he must, by such act and words as may be appropriate do what he reasonably can to dissuade the others from continuing” – Tetie v R (1988) 34 A Crim R 438*
- The **Crown** maintains the **onus to disprove withdrawal**
 - *“by timely withdrawal...cease to bear criminal responsibility...The onus remains with the Crown to negate effective withdrawal and countermanding of his involvement” – Tetie v R (1988) 34 A Crim R 438*
- **Withdrawal**, however, is **not based** upon **stringent criteria**
 - *“that must depend upon the circumstances of each case” – White v Ridley (1978) 140 CLR 342*
- Where the accused **honestly believes**, after withdrawing, the **plans will not go ahead, no further preventative steps will be required**
 - *“If there was a reasonable possibility that the appellant honestly held that belief, he was required to do no more. In such a case, there was no present threat of the offence taking place in the immediate future, to the belief of the appellant, and there was no further obligation on the appellant” – Truong v R [1998] [Unreported] NSWCCA (22.06.98)*

3. Presence at the Scene:

- It remains a **requirement that the accused must be present** at the scene.
 - *Osland v R (1998) 159 ALR 170*
- If the accused is not present, **accessorial liability is relevant**
 - *Kanaan v R [2006] NSWCCA 109*

4. Mens Rea Requirement:

- The **accused must have had the Mens Rea for the offence**. It is only the Actus Reus that is transferred to all defendants. Mens Rea, therefore, must be shown for all.
 - *Osland v R (1998) 159*

EXTENDED JOINT CRIMINAL ENTERPRISE

DEFINITION:

- Where, in commission of a joint criminal enterprise, one or more of the participants commit an *'incidental offence'*, all may be held liable where the incidental offence was either intended to occur, or within the contemplation of the parties.
 - *McAuliffe and McAuliffe v R* (1995) 130 ALR 26
- Liability for Extended Joint Criminal Enterprise is **DERIVATIVE** (not primary). It rests upon the guilt of the individual who committed the AR.

Elements:

1. **Joint Criminal Enterprise (Foundation Offence)**
2. **Foresight/Intention of the possibility of the offence occurring**
 - a. **Foresight of Actus Reus**
 - b. **Foresight of Mens Rea**

1. Joint Criminal Enterprise

- Extension of a 'Joint Criminal Enterprise' necessarily involves the existence of a Joint Criminal Enterprise
- As a part of this Joint Criminal Enterprise', there must have been a **foundation offence** pursuant to the J.C.E.
 - *Taufahema v R* [2007] HCA 11

2.A. Foresight – Actus Reus

- The **participants** must have **shared the intention** of the incidental offence, or else, have **contemplated the possibility that it may occur**
 - *McAuliffe & McAuliffe v R* (1995) 130 ALR 26
- The **test remains subjective** – did the parties contemplate the event?
 - *McAuliffe & McAuliffe v R* (1995) 130 ALR 26
- It is sufficient to show that the **accused foresaw the event**. It is not necessary to show the whole group foresaw it.
 - *"Whether the foresight is that of an individual party or is shared by all parties"* - *McAuliffe & McAuliffe v R* (1995) 130 ALR 26

2.B Foresight: Mens Rea

- The accused **must also foresee** the **Mens Rea** requirement of that offence.
 - *"either that the common intention...or contemplated the intentional infliction..."* – *McAuliffe & McAuliffe v R* (1995) 130 ALR 26
 - *Gillard v R* [2003] HCA 64

Murder Cases:

- Where the prosecution seeks to convict the accused of murder, it must be shown that he or she **foresaw BOTH the infliction of injury causing death and the intention to inflict such injury**
 - *Gillard v R* [2003] HCA 64
- Where **no such foresight of intention can be proven, manslaughter is still available** for prosecution

CRIMINAL ATTEMPTS

Principles:

- Generally, **Criminal Attempts** cover:
 - Where the accused performs certain acts in pursuance of a planned crime but is interrupted and prevented from completing it
 - Where the accused performs all the acts considered necessary but fails due to flaws in the execution
- Criminal Attempt carries the same penalty as the corresponding completed offence
 - *Crimes Act 1900* (NSW) s 344A
- **Intention alone** will **not** expose a person to **criminal liability**
- **Acts of preparation** are **not sufficient** to constitute attempt
 - *McMillian v Reeves* (1945) 62 WN (NSW) 126, 127

The “Ingredients” of Criminal Attempt:

- “The elements (1) of **intention**, (2) of the **necessity for the overt acts charged** to be
- **part of a series** which **would constitute the full offence if uninterrupted**, and (3) of **proximity**”
 - *DPP v Stonehouse* [1977] 2 All ER 909

Preparation vs. Perpetration:

- Acts of preparation are insufficient- only **acts of perpetration** will allow for criminal liability
- It must be shown that the acts, purporting to be a Criminal Attempt must go beyond preparation to ‘perpetration’.

Tests for Perpetration (vs. Preparation)

- **Unequivocality test** (where the defendant performs an act which unequivocally shows they had an intention to commit the completed offence)
 - *Mai v R* (1992) 26 NSWLR 371
- **Substantial Step Test** (where the accused performs an act that forms a substantial part of the completed offence)
- **Last Act Rule** (Now largely discounted)

Proximity

- The notion of “proximity” applies, regardless of which test is applied.
- It must be demonstrated.
- **“Proximity”** refers to the need for an **immediate connection** between **the acts and the offence**
 - “the wrongdoer may not have progressed a sufficient distance along the intended path...his actions may still amount to no more than mere ‘preparation’” – *DPP v Stonehouse* [1977] 2 All ER 909

Desisting:

- Desisting from the offence is no excuse where the actus reus has been performed, or substantially performed.
 - *R v Page* (1933) VR
- For attempted murder, the mens rea requirement is intent to kill. (the other Mens Rea requirements are insufficient).

ACCESORIAL LIABILITY

General Principles:

- liability of those who **assist** in the commission of a crime, although are **not part of a joint criminal enterprise**.
- A secondary participant may be indicted and sentenced as if he or she were the principal
 - *Crimes Act 1900* (NSW) aa 345-351
- Often, the prosecution will advance Joint Criminal Enterprise, whilst keeping **accessorial liability as an alternative**. The Court has endorsed this practice
 - *R v Hore & Fyffe* [2005] NSWCCA 3
- Generally, there are **three main avenues** for prosecution:
 - An Accessory BEFORE the fact
 - An Accessory
 - An Accessory AFTER the fact

Elements:

1. **Physical Element** (Aiding, Abetting, Counselling or Procuring)
2. **Presence** (either physically or constructively)
 - a. Required for 'aiders and abettors'
 - b. **Not Required** for 'counsellors and procurers'
3. **Mental Element** (intent + knowledge)

1. AIDING, ABETTING, COUNSELLING OR PROCURING:

Aiding and Abetting:

- *"Inevitably involves a situation in which the secondary participant and the main offender are together, discussing the plans which they may be making in respect of the alleged offence"*
 - *Attorney-General's Reference* [1975] QB 773
- *"linked in purpose"*
 - *Phan v R* [2001] NSWCCA 29

Counselling or Procuring:

- *"a person who counsels the commission of a crime by another...comes to a moment when he is in contact with that other, when he is discussing the offence with the other and....he counsels the other to commit the offence"*
 - *Attorney-General's Reference* [1975] QB 773
- *"We do not see why a similar principle should apply to procuring"*
 - *Attorney-General's Reference* [1975] QB 773

Level of Participation:

- Mere presence is **insufficient**:
 - *"non accidental presence...would not be enough...the Crown had to establish that such assent or acquiescence amounted to that degree of encouragement or assistance that would constitute him a [participant]."* - *R v Phan* [2001] NSWCCA 29
- A **qualification**, however, does exist:
 - *"the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition...might under some circumstances, afford cogent evidence upon which a jury would be justified in finding he wilfully encouraged and so aided and abetted."* - *R v Phan* [2001] NSWCCA 29

- There must be **positive steps to encourage etc.**
 - *“some active steps must be taken by word, or action, aiding and abetting with the intent to instigate the principal” – R v Phan [2001] NSWCCA 29*
- **Positive steps** can be almost **anything that contributes**
 - *“arises from the contribution that he or she intentionally makes to the commission...can take different forms...encompassed by the broad descriptive notions” – Lam v R [2008] VSCA 109*
 - *“intentional encouragement may come from expressions, gestures or actions intended to signify approval” – Beck v R (1989) 43 A Crim R 135*

Aiding and Abetting an Aider and Abettor:

- It is possible for liability to extend to a party that aids, abets, counsels or procures in relation to another aider, abettor.
- The standard of participation and proof is the same
 - *“It would still be necessary for the prosecution to establish that the person...possessed the requisite knowledge...with respect to the principal offence and offender” – Beck v R (1989) 43 A Crim R 135*

Necessary Effects of Aiding, Abetting, Counselling or Procuring:

- It is **not necessary that the principal be aware** of the **assistance** rendered.
- The assistance need **not be effective, or be an assistance at all**

2a. PRESENCE AT THE SCENE: “FOR AIDING AND ABETTING”

- This **requirement is not strict.**
- **Presence** can be **physical or constructive**
 - *“The concept of being ‘present’ is somewhat elastic; an accessory may be **actually present** (in the sense of being within sight and sound of the crime) or **constructively present** (in the sense of being sufficiently near as to be able readily to go to assistance of the principal offender, should the occasion arise).” – McCarthy & Ryan v R (1993) 71 A Crim R 395*

2.b NON-PRESENCE FOR “COUNSELLING OR PROCURING”

- Where an accessory is being charged as an **accessory BEFORE the fact**, due to **“counselling and procuring”**, there is **NO need** for presence.
 - *“‘Counsel’ or ‘procure’ are generally used in relation to the conduct of an accessory before the fact, or one who is absent at the time of the commission of the offence” – Giorgianni v R (1985) 156 CLR 473*

3. MENTAL ELEMENT (MENS REA)

- An accused must have **intent to assist**, and **must have actual knowledge** of the **essential elements** of the offence to which he or she is contributing.
- The requisite **Mens Rea** requirement is that of an **intention** to aid, abet, counsel or procure.
 - *“a person cannot aid, abet, counsel or procure...without intent based on knowledge of the essential facts which constitute the offence” – Giorgianni v R (1985) 156 CLR 473*
- **Knowledge** of the **essential elements** is **necessary** and **cannot be inferred**
 - *“knowledge of the essential facts of the principal offence is necessary before there can be intent. It is actual knowledge which is required and the law does not presume knowledge or impute it” – Giorgianni v R (1985) 156 CLR 473*

- **Wilful Blindness** where it is **blatantly obvious** may be sufficient:
 - *“The fact of exposure to the obvious may warrant the inference of knowledge. The shutting of one’s eyes to the obvious, is not, however, an alternative to the actual knowledge which is required” – Giorgianni v R (1985) 156 CLR 473*
- Actual Knowledge of the **“KIND”** of offence committed may be sufficient:
 - *Anacuta v R (1990) 49 A Crim R 307 (QCCA)*

Where the Principal Commits a More Serious Offence:

- Where the principal commits a more serious offence than that for which assistance was given, the accessory is nevertheless liable for the lesser offence
 - *Chai v R [2002] HCA 12*

ACCESSORIES AFTER THE FACT

- **NOTE:** The general requirements of accessorial liability apply (and must be proven).
- A **person may be guilty** of aiding, abetting, counselling or procuring **where:**
 - *“any assistance whatever given to one known to be a felon, in order to hinder his being apprehended or tried or suffering the punishment to which he is condemned” – Barlow v R (1962) 79 WN (NSW) 756, 757*
- The **prosecution must prove** a knowledge of all the relevant acts of the **PRECISE** offence (not the ‘kind’ as in general accessorial liability):
 - *“[the accused] had knowledge of all the relevant facts, or acts, that establish the precise...[crime] with respect to which the Crown alleges the accused was an accessory” – Stone v R [1981] VR 737*

Statutory Offences:

316 Concealing a Serious Indictable Offence

- (1) If a person has committed a serious indictable offence and another person, who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.
- (2) A person who solicits, accepts or agrees to accept any benefit for himself or herself or any other person in consideration for doing anything that would be an offence under subsection (1) is liable to imprisonment for 5 years.

INNOCENT INSTRUMENT (INNOCENT AGENCY) AND ACCESSORIAL LIABILITY

- Liability may be **extended to encompass those who use an ‘innocent agent’** to perform the offence.
 - *“the doctrine of innocent agency is a means by which the common law attaches criminal liability to a person who does not physically undertake some or all of the elements of the offence” – Pinkstone v R [2004] HCA 23*
- The party used as an **innocent agent** is not liable. Described as a **‘vehicle’**.
 - *“a person who is himself innocent of the offence charged by reason of lack of a required fault element” – Pinkstone v R [2004] HCA 23*

Innocence Requirement:

- The **party used as an instrument** to commit the offence **must be innocent** in order for the doctrine of innocent agency to be deployed. That is, the **doctrine does not extend to ‘guilty agents’** as seen in *Franklin v R [2001] 3 VR 9*

CONSPIRACY

Elements of Conspiracy:

1. **Agreement** between two or more people
2. **Intention to form such agreement** with the other
3. For the **purpose of committing unlawful acts**
4. **Intention to commit the unlawful act + Knowledge of what that entails.**

1. AGREEMENT

- The prosecution must establish the existence of an agreement
- It is **not necessary** for the prosecution to establish an agreement for the **precise criminal acts**. Instead, an **agreement to perform unlawful acts will suffice**
 - *Douglas v R* (1991) 63 CCC (3d) 29 (SCC)
- There is **no requirement** that the **agreement and substantive offence correspond** (they are separate offences)
 - *“what is agreed to be done and not what was in fact done which is all important”* – *Bolton v R* (1992) 94 Cr App R 74, 80.
- **Evidence of overt acts** can be **admitted to show an agreement was reached**:
 - *“Evidence, particularly of subsequent overt acts, is admissible to demonstrate that such agreement has been reached between the conspirators”* – *Bijerk v R* (2000) 111 A Crim R 443, 449
- The Court can **admit primary facts** and allow the **jury to draw an inference** of agreement from these:
 - *“a jury can draw inferences from established primary facts...they could only draw the inference that there was a conspiracy, that is to say an agreement between these men”* – *O’Brien v R* (1974) 59 Cr App R 222
- **Joint intention is NOT sufficient**- there **must** be a **commitment (agreement)** to do the unlawful acts:
 - *“persons do not commit a criminal offence merely by talking about the possibility of committing some wrongful or unlawful act unless they reach the stage when they have agreed to commit that act”* – *O’Brien v R* (1974) 59 Cr App R 222
- The Crown must establish a **single agreement, not a number of separate conspiracies**.
 - *“that there is one comprehensive conspiracy, rather than a number of separate conspiracies.”* – *Lee v R* (1994) 76 A Crim R 271

Scope of the Agreement:

- It is **insufficient** for the **Crown to establish only an agreement**- details of the nature of the agreement are also required.
- The Crown must establish the **nature or ‘scope’ of the agreement**.
 - *“said to require a consideration of what was within the scope of the agreement”* – *LK and RK v R* (2010) 266 ALR 399, 435.
- This includes the subject matter
 - *“it is the subject matter and purpose of the agreement which determines whether it is criminally unlawful”* – *Gerakiteys v R* (1984) 58 ALJR 182

Impossible Conspiracy:

- Where the parties agree to something, which is ‘impossible’. (E.g. the substance they agree to import is not the prohibited substance they thought it was)
- The **parties can still be found guilty** of Conspiracy

- *Onuorah v R* (2009) 260 ALR 126, [25].
- **So long as the parties agree to something criminal, it is irrelevant that there may be no possibility of success.**
 - *Onuorah v R* (2009) 260 ALR 126, [25]

2. COMMITTING UNLAWFUL ACTS

- Conspiracy is **not limited to criminal acts**.
- “Unlawful Acts” include:
 - defrauding
 - Committing torts
 - Corrupting public morals
 - *DPP v Shaw* [1962] AC 220
 - Effecting a public mischief
 - Defeating or perverting the course of justice
 - Preventing or defeating the execution or enforcement of the law of the Commonwealth
- The **Court**, however, has **recognised that its role is NOT to expand the heads** of conspiracy
 - *“The House of Lords made it clear that, although there is only one offence of conspiracy which for convenience is categorised into separate heads, the Courts cannot develop the law of conspiracy by adding new heads to those already recognised by the law. It is for Parliament to expand the offence” – Peters v R* (1998) 192 CLR 493, 515

3. INTENTION TO ENTER INTO THE AGREEMENT:

- The Crown must **prove the accused had the intention of conspiring** with the other party
 - *“At the trial of a person charged with conspiracy it is incumbent on the prosecution to prove that he or she meant to conspire with another person to commit the...offence particularised as being the object of the conspiracy” – LK and RK v R* (2010) 266 ALR 446.
- **Recklessness is insufficient**
 - *“Such recklessness would be inconsistent with the very intention that is necessary at common law” – LK and RK v R* (2010) 266 ALR 446.

4. INTENTION TO COMMIT THE OFFENCE:

- The Crown must establish **intent to commit the offence agreed to**.
- This requires **Actual Knowledge of the elements of the offence**
- This is the case, even where the M.R. for the offence is of a lower standard.
 - *“The mens rea sufficient to support the commission of a substantive offence will not necessarily be sufficient to support a charge of conspiracy to commit that offence” – Soracusa v R* (1990) 90 Cr App R 340, 350.

Procedural Matters Regarding Conspiracy:

Merger Doctrine: No Application

- The **Merger Doctrine does not apply**.
- It is, therefore, **possible** to be charged with both conspiracy and the substantive offence to which the conspiracy relates.

- The court has reiterated, however, that **where the substantive offence charge is available, it is inappropriate to advance both**
 - *“substantive charges must always be laid in preference to a charge of conspiracy...where a sufficient and effective charge relating to a substantive offence was available, it was considered to be inappropriate to lay a charge of conspiracy” – El-Kotob v R (2002) 4 VR 546*

Evidence from Co-Conspirators:

- **Evidence from a co-conspirator** regarding the **actions or words of the accused** is **admissible** as an exception to the hearsay rule.
 - *“when two or more persons are bound together in the pursuit of an unlawful object, anything said, done or written by one in furtherance of the common purpose is admissible in evidence against the others” – Ahern v R (1988) 62 ALJR 440*
- It must be that the **witness is a co-conspirator** (cannot be an outsider of the agreement)
 - *“The implied authority on the part of one conspirator to act or speak on behalf of the another will only arise if the latter is part of the combination” – Ahern v R (1988) 62 ALJR 440*

Sentencing:

- The **punishment for general conspiracy is ‘at large’**. That is, there is no limitations to the general offence
- **Some limitations** are placed on the offence by **statute**. E.g. *Crimes Act 1900 (NSW) s 26*-conspiracy to commit murder (25yrs)
- A person may be **convicted individually** for ‘conspiring with persons unknown’
 - *“whether two or more defendants are included within the same indictment or not, may be charged separately...it shall be sufficient to name one only as having conspired” – Crimes Act 1900 (NSW) s 393*
- Equally, a **charge of conspiracy will stand despite the acquittal of the other party**
 - *“the conviction of a conspirator....may stand notwithstanding that the [other party] is or may be acquitted” – Darby v R (1982) 56 ALJR 688*

Indicting Multiple Defendants:

- It is **possible to have joint defendants**.
- The **direction to the jury may require an “all-acquitted or all-guilty” approach**
 - *“In cases where there is no material distinction in the evidence admissible against both alleged conspirators, the trial judge’s advice to the jury that they will either convict or acquit both accused will continue to be appropriate not because of any technical rule but because of the circumstances of the case” – Darby v R (1982) 56 ALJR 688*
- It is **necessary to prove that each member’s agreement included the participation of the other members**.
 - *“be shown to have a common purpose which involved the activities of the entire network” – Lee v R (1994) 76 A Crim R 271.*

CRIMINAL ASSOCIATION

Consorting:

546A Consorting with convicted persons

- (1) Any person who habitually consorts with persons who have been convicted of indictable offences, if he or she knows that the persons have been convicted of indictable offences, shall be liable on conviction before the Local Court to imprisonment for 6 months, or to a fine of 4 penalty units.
- (2) Proceedings for an offence against this section may be commenced at any time within 12 months after the date of commission of the offence.

Association with terrorist Groups:

Anti-Terrorism Act (No 2) 2004 (Cth) s102.8 Associating with terrorist organisations

- (1) A person commits an offence if:
 - (a) on 2 or more occasions:
 - (i) the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organisation; and
 - (ii) the person knows that the organisation is a terrorist organisation; and
 - (iii) the association provides support to the organisation; and
 - (iv) the person intends that the support assist the organisation to expand or to continue to exist; and
 - (v) the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation; and
 - (b) the organisation is a terrorist organisation because of paragraph (b), (c), (d) or (e) of the definition of *terrorist organisation* in this Division (whether or not the organisation is a terrorist organisation because of paragraph (a) of that definition also).
- Penalty: Imprisonment for 3 years.

Associating with Criminal Groups:

Crimes Act 1900 (NSW) s 93T

93T Participation in criminal groups

- (1) A person who participates in a criminal group:
 - (a) knowing that it is a criminal group, and
 - (b) knowing, or being reckless as to whether, his or her participation in that group contributes to the occurrence of any criminal activity,is guilty of an offence. Maximum penalty: Imprisonment for 5 years.

93S Definitions

(1) In this Division:
criminal group means a group of 3 or more people who have as their objective or one of their objectives:

- (a) obtaining material benefits from conduct that constitutes a serious indictable offence, or
- (b) obtaining material benefits from conduct engaged in outside New South Wales that, if it occurred, would constitute a serious indictable offence, or
- (c) committing serious violence offences, or
- (d) engaging in conduct outside New South Wales (including outside Australia) that, if it occurred in New South Wales, would constitute a serious violence offence.