IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B69 of 2015

BETWEEN:

Godfrey ZABURONI
Appellant

and

The Queen
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Issues raised

2. This appeal raises the following issues for consideration:
   i. What is the scope of the test for intent under the *Criminal Code 1899* (Qld) and, in particular, for the offences in s317 of the *Criminal Code 1899* (Qld)?
   ii. Can foresight of potential consequences establish intention to achieve a specific result (that result being an element of the offence in question) and if so, by what process of reasoning and according to what criteria?
   iii. Can the requisite coincidence between mental and physical elements of an offence be established where intent is to be inferred from frequent engagement in conduct over a period of time but the particular time at which that intent is formed cannot be determined in circumstances where the result cannot be said to have occurred at any particular time during the period identified in the indictment.

Part III: Notices

3. The appellant has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903* (Cth) and has concluded that no such notice is necessary.

Part IV: Citation

4. The citation of the reasons for judgment of the Queensland Court of Appeal court is: *Zaburoni v R* [2014] QCA 77.

Part V: Facts

5. The appellant stood trial before Dick DCJ and a jury in the District Court of Queensland charged with transmit a serious disease with intent, contrary to s317(b)

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and (e) of the *Criminal Code 1899* (Qld) ("the *Criminal Code*"). The offence carries a maximum penalty of life imprisonment. Upon arraignment the appellant pleaded guilty to an alternative count of unlawfully causing grievous bodily harm contrary to s320 of the *Criminal Code* before the jury at the commencement of the trial. The plea was not accepted. The trial proceeded and on 18 April 2013 he was found guilty of the offence under s317(b) and (e) of the *Criminal Code*. He was sentenced to 9 years and 6 months imprisonment. He appealed against his conviction to the Queensland Court of Appeal on the ground that the verdict was unreasonable or could not be supported by the evidence. By majority the appeal was dismissed (Gotterson and Morrison JJA; Applegarth J dissenting, [2014] QCA 77 ("QCA")).

6. At trial the appellant made a number of admissions. These were read and given to the jury (Exhibit 2). The appellant was diagnosed as HIV positive in April 1998 (QCA at [5], Ex 2 [7]). When he was diagnosed as HIV positive he was told by a general practitioner to wear a condom during sexual intercourse and the general practitioner was of the opinion that the appellant was aware that HIV could be transmitted through sexual conduct (QCA at [5], Ex 2 [9]). In 1998 he was told by the infectious diseases consultant physician at the Royal Adelaide Hospital to use condoms, inform any sexual partner of the disease, start antiretroviral medication and that HIV was transmitted by blood or sexual intercourse (QCA at [6], Ex 2 [11]). The medical registrar at the Royal Perth Hospital advised the appellant in 1998 that HIV was a sexually transmissible disease and prescribed him antiretroviral medication (QCA at [6], Ex 2 [6]). The medical registrar arranged for a further review but the appellant did not attend (QCA at [6], Ex 2 [15]).

7. The appellant and the complainant met on 31 December 2006 (QCA at [7]). Several weeks later they commenced a sexual relationship (QCA at [7]). The complainant gave evidence that before they commenced a sexual relationship she asked him whether he had been checked for HIV (QCA at [7], T1-37.15-.22). She said he told her that he had been tested and did not have HIV (QCA at [7], T1-37.30-.33). The occurrence of this conversation was challenged in cross-examination but the complainant did not resile from her evidence in chief on the subject (T1-45-1-47).

8. The complainant gave evidence that at first the appellant wore a condom during intercourse (QCA at [8]). After about 6 weeks they had unprotected sexual intercourse and he ejaculated inside her (QCA at [8]). The complainant agreed, in cross-examination, that the first few occasions of unprotected sexual intercourse occurred when they were "caught up in the moment" (T1-44.42-.44). The complainant gave evidence that the appellant said he found sexual intercourse more pleasurable without a condom and they continued to have unprotected sexual intercourse (QCA at [8], T1-

38.46-.57). The appellant would usually ejaculate inside the complainant (QCA at [8]).

9. In mid to late 2007, the complainant fell ill with various symptoms such as light headedness, tiredness, easily caught colds, vomiting and diarrhoea (QCA at [9]-[10]). At the time the complainant received medical treatment and was diagnosed with glandular fever (QCA at [9]). There was evidence at trial that these symptoms may have been sero conversion illness due to HIV infection but this was not certain (Ex 2 at [21]). The relationship ended in September 2008 (QCA at [10]).

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10. The complainant gave evidence that during the relationship the appellant told her that his brother had died of HIV AIDS (T1-42.46-.57). The complainant again asked him whether he had HIV and he said he did not (T1-42.51-.52). The occurrence of this conversation was challenged in cross-examination but again the complainant did not resile from her evidence in chief (T1-45).

11. In late August 2009 the complainant requested a sexually transmitted infections test and a blood test from a general practitioner on the Gold Coast (QCA at [10], T1-40.39-.41, Ex 2 [16]-[17]). On 27 August 2009 she was advised that there was a 60%
20 chance she was HIV positive (QCA at [10], T1-40.43-.48, Ex 2 [17]). She said that she called the appellant and told him of her possible diagnosis (QCA at [11], T1-41.5-.8). The appellant told her he definitely did not have HIV (QCA at [11], T1-41.12-.13). On 1 September 2009 she saw him and told him she needed to know the truth (T1-41.39-.40). The appellant told her that he had HIV and he had known for 6 months (QCA at [11], T1-41.42-.45). She agreed that the appellant had also told her the doctor told him he had had HIV for 2 years (T1-49.4-.5). He said that he had not told her because he did not want to make her unhappy and that he thought she was having a good time (T1-41.47-.48).

30 12. A friend of the complainant gave evidence that she asked the appellant how long he had known of his diagnosis and he told her he had known for 6 months but the doctor told him he had had it for 2 years (T1-53.25-.32). She asked him why he did not tell the complainant and he said "*I didn't want to ruin her life.*" (T1-53.38-.40). The complainant's diagnosis of HIV positive was confirmed on 2 September 2009 (QCA at [11]).

13. In November 2009, during a telephone conversation recorded by the police, the appellant told her that he had found out that he had HIV 6 months after they broke up (QCA at [12], Ex 1, MFI D p.5). This and the conversation recounted above (at [11])

were relied upon by the prosecution as lies indicating a consciousness of guilt for the offence charged.

14. On 24 and 26 May 2010, the appellant was interviewed by the police. He told the police that he and the complainant were careful and had protected sex. He told the police that on possibly two occasions they had unprotected sex (QCA at [13]). He told the police that when he was diagnosed with HIV in 1998 he was given little information and was not told that he had to tell people about it before he had sexual intercourse with them (QCA at [13]). These lies were also relied upon by the prosecution as lies indicating a consciousness of guilt for the offence charged.

15. There was expert evidence that the risk of HIV transmission from unprotected penile vaginal intercourse is approximately 0.1% and that the risk of transmission during a 21 month relationship is approximately 14% (QCA at [14]). There was no evidence that the appellant knew of these statistical probabilities of transmitting the disease at the relevant times (QCA at [17]).

16. The prosecution case on intention was conducted at trial essentially circumstantial. The prosecutor submitted to the jury that "*having multiple acts of unprotected sexual intercourse without informing [the complainant] of his own... HIV status, together with some other conduct clearly proves that intention.*" (Closing Addresses T5.22-.24). The "other conduct" relied upon by the prosecution included: the appellant's failure to disclose his disease to the complainant before they commenced unprotected sexual intercourse and throughout their relationship even after being asked by her if he had HIV; his desire to have unprotected sexual intercourse with her because he preferred sex without a condom; his failure to disclose his disease to her when she fell ill in mid 2007; lies told to the complainant following her diagnosis and lies to police regarding his awareness of the sexual transmissibility and nature of HIV and the number of times he and the complainant had unprotected sexual intercourse.

Part VI: The argument

17. The indictment alleged that between 1 January 2007 and 30 September 2008 the appellant, with intent to transmit a serious disease to the complainant, did unlawfully transmit a serious disease to her contrary to s317 of the *Criminal Code*. The element of "intent" in s317 of the *Criminal Code* is intent to bring about a specific result, namely the transmission of the disease. The issue at trial, and on appeal, was whether there was evidence from which it could be inferred (beyond reasonable doubt) that the appellant intended to transmit the disease at the time disease was transmitted.

Intention/Recklessness (Ground 1(i))

18. Gotterson JA rejected the submission that the jury could not exclude beyond reasonable doubt the possibility that the transmission of the disease was reckless rather than intentional (QCA at [48]; Morrison JA agreed with Gotterson JA and gave some further reasons). His Honour found that it was open to the jury to conclude that the appellant had a genuine appreciation of the risks of transmission because the lies told by him to the complainant and to the police evidenced such an appreciation (QCA at [43], [44], [48]). There was no evidence that the appellant was aware of the statistical risks or transmission associated with unprotected sexual intercourse (QCA at [44]). There was likewise no evidence regarding the appellant's appreciation of the level of risk of transmission as a result of unprotected sexual intercourse – that is, whether it was possible, probable or certain.

19. Gotterson JA held that the jury could infer the requisite intent based on the appellant's knowledge and conduct (QCA at [46]). His Honour found that *"[i]t was open to the jury to reason from this and their own knowledge and experience of human behaviour that whereas one or several acts of unprotected sexual intercourse might be viewed as reckless as to whether infection would be transmitted or not, such acts repeated frequently with the same partner over many months, defied description as mere recklessness as to the risk of transmission.*" (QCA at [46]). This is the critical passage in the judgment and the basis on which his Honour dismissed the appellant's appeal. His Honour considered that the frequency of the unprotected sexual intercourse was of "*singular significance*" on the question of whether the requisite intent was established (QCA at [46])

20. This reasoning appears to involve the following three related propositions:
    1. The frequency of the conduct increases the prospect of transmission of the disease to a level of likelihood.
    2. The jury could use their human experience to infer that the appellant must have known that frequently engaging in conduct increases the prospect of transmission of the disease to a level of likelihood.
    3. The appellant's knowledge or foresight of the likelihood of a consequence of his conduct (the likelihood of which was increased by virtue of the frequency of that conduct) was sufficient to establish the mental element required under s317 of the *Criminal Code* namely an intention to bring about a specific result.

21. It is submitted that this reasoning erroneously conflated the concept of recklessness (i.e. an awareness of some (unspecified) risk of transmission) with an intent to bring about a particular result.

22. The offence under s317 of the *Criminal Code* requires the prosecution to prove that the appellant had an actual and subjective intention to bring about a specific result: here the transmission of HIV (*R v Ping* [2006] 2 Qd R 69 at [27]). The term intent, as it is used in the *Criminal Code*, is to be given its ordinary and natural meaning – to mean, to have in mind, having a purpose or design (*R v Willmott (No 2)* [1985] 2 Qd R 413 at 418, see also *Ping v R* at [27], [29] and Applegarth J at QCA [76]). Knowledge or foresight of the consequences of one's conduct should not be equated with intent (Applegarth J at QCA [76]-[77], *R v Reid* at [2007] 1 Qd R 64 at [108]-[109] per Chesterman J).

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23. Broadly speaking there are three states of mind which give rise to criminal liability (putting to one side offences of strict and absolute liability): intention, recklessness and negligence. States of awareness of the consequence of one's act (consequence being an element of an offence) may broadly be categorised as follows: (1) awareness the consequence is possible (recklessness); (2) awareness the consequence is probable or likely (reckless indifference for murder at common law and in some Code states); (3) awareness the consequence is near certain/certain/inevitable or will occur in the ordinary course of events (defined as intent in the *Criminal Code 1995* (Cth) or also known as oblique intention – discussed below). Whether or not one can reason
20 towards intention from one or more of these mental states is an issue raised by this appeal. It is not part of the appellant's argument that any of these mental states actually equates to an intention to cause a specific result in the sense that a person means such a result to happen or that the purpose of his or her act is to bring about that result. These questions are discussed further below (see Applegarth J at QCA [86]-[88]).

Awareness that a result is a probable consequence of conduct

24. In *Crabbe v The Queen* (1985) 156 CLR 464 an actual subjective intent was distinguished from awareness of the probable consequences of one's act (at 468).
30 Awareness that death or grievous bodily harm was a probable consequence of one's act was there described as "comparable" with intent to kill or cause grievous bodily harm in *Crabbe v The Queen* (at 469). Nevertheless to say that the two states of mind are comparable does not mean they are identical (*R v Reid* at [111] per Chesterman J).

25. The distinction between intention and recklessness (or reckless indifference) is an important one. Intention is the most culpable form of criminal liability and, generally speaking, where a person intends to bring about a prescribed result he or she will receive a greater punishment than would otherwise be the case. As such, the person's state of mind forms a critical part of criminal liability. An analogy can be drawn with
40 offences of aiding/abetting, conspiracy and attempts (offences which criminalise a

person's state of mind) where knowledge or foresight of the probable or likely consequences of one's actions has been held to be insufficient to establish intention.[1]

26. Awareness of the probable consequences of one's conduct was rejected as forming part of the test for intent under the *Criminal Code* in *Willmott v R (No 2)* at 418, see also *R v Reid* at [66]-[71] per Keane JA (as his Honour then was) and [108] per Chesterman J).

27. It has been observed that an intention to cause a specific result may be inferred from evidence that the accused was aware that that particular consequence was a probable one (*He Kaw Teh v The Queen* (1985) 157 CLR 523 at 570 per Brennan J, *Willmott (No 2)* at 419, *R v Reid* at [111] per Chesterman J). It is unclear whether the reference to "probable" in these passages is a reference to a consequence being "merely" probable or whether a high degree of probability is required before the inference can be drawn. In any event, whether an inference of intent should be drawn in any given case may depend on whether the awareness extends to a near certain consequence. The English authorities (discussed below) appear to have disavowed the proposition that, as a matter of evidence, an intent to cause a specific result can be inferred from an awareness, only, that the result is a probable consequence of one's act.

28. The appellant submits that awareness that a particular consequence of conduct is probable is insufficient to establish intent whether treated as a matter of law or of sufficiency of evidence. To the extent that the reasons of Applegarth J suggest otherwise (see QCA at [77], [103] and [104]) the appellant does not embrace them. Evidence that an accused had such an awareness (i.e. probable but not near certain or inevitable) may be some evidence of the requisite intent however, it is submitted, that in such a posited circumstance further evidence as to an accused's state of mind (either of purpose or appreciation of risk to a very high degree) would be required to establish the requisite intent.

Awareness that a result is certain or "near certain"

29. In England, at common law, an awareness that the consequences of one's conduct are near certain or inevitable may be sufficient to establish that a person intended a particular result (*R v Woollin* [1999] 1 AC 82*)*. In *Woollin*, Lord Steyn held that in the rare case where the standard direction on intent for murder was not sufficient (i.e. intent has its ordinary meaning to bring about or purpose) the jury should be told that they cannot find the necessary intention "*unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case*"

[1] *Giorgianni v The Queen* (1985) 156 CLR 473 at 506, *R v RK; R v LK* (2010) 241 CLR 177 at [67], [94], [110].

(*R v Woollin* at 96 citing *R v Nedrick* [1986] 1 WLR 1025 at 1028 per Lord Lane CJ with approval). In *Nedrick* Lord Lane CJ had also said "*Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen. The decision is one for the jury to be reached upon a consideration of all the evidence.*" (*R v Nedrick* at 1028, quoted with approval in *R v Woollin* at 96).

30. In *Woollin* Lord Steyn held that it was a material misdirection to direct a jury to the effect that it would be open for them to return a verdict of guilty for murder if satisfied that the defendant had an appreciation that there was a substantial risk of serious injury (at 89 and 95). Lord Steyn said "*By using the phrase "substantial risk the judge blurred the line between intention and recklessness, and hence between murder and manslaughter. The misdirection enlarged the scope of the mental element required for murder.*" (*R v Woollin* at 95, emphasis in the original).

31. In English law considerable controversy has surrounded the *mens rea* required for murder at common law. The history of the common law on the subject is summarised (briefly) in *Woollin* (see at 90—95). For present purposes the controversy commenced with the decision in *DPP v Smith* [1961] AC 290 where Viscount Kilmuir LC held that it is presumed that a person intends the natural and probable consequences of their actions or, put another way, intention is established where the result is what the ordinary responsible man would, in all the circumstances of the case, have contemplated such as the natural and probable result (at 327 and 331). This aspect of *DPP v Smith* was subsequently reversed by the enactment of s8 of the *Criminal Justice Act 1967* (UK). *DPP v Smith* was emphatically rejected by Dixon CJ in *Parker v The Queen* (1963) 111 CLR 610 at 632. Dixon CJ at 632 affirmed what was said about such a presumption in *Stapleton v The Queen* (1952) 86 CLR 358 namely that it was "*seldom helpful and always dangerous*" (at 365).

32. The controversy continued following the decision in *R v Hyam* [1975] AC 55 and, as observed in *Woollin* (at 91), *Hyam* left the test for murder at common law in a state of disarray. In *Hyam* the House of Lords held that evidence of an awareness of the likely or probable consequences of one's actions was sufficient to establish the requisite *mens rea* for murder. There was a divergence of opinion in *Hyam* as to whether this state of mind was part of the test for actual intent or whether it constituted a separate species of malice aforethought (see also *Smith & Hogan's Criminal Law*, 14th Ed, D Ormerod & K Laird, 2014 at pp.117-118). This uncertainty in the law for murder was largely avoided in Australia as the High Court in *Crabbe v The Queen* treated an awareness of the probable consequences of one's actions as a separate species of

malice aforethought, namely reckless indifference, and different to an actual intent (at 468-469).

33. In a series of decisions commencing with *R v Moloney* [1985] AC 905 and ending with *Woollin* the House of Lords retreated from the decision in *Hyam* and the proposition that *mens rea* for murder can be established upon proof that the person was aware that death or serious bodily harm was the probable or likely result of his or her actions. In *Moloney* Lord Bridge held that the *mens rea* for murder at common law was an intention to cause the death or grievous bodily harm (at 927). His Lordship went on to say that at law intent cannot be established where there is foresight of the probable consequence of one's act, even where the probability can be defined as exceeding a certain degree (at 928). Such a proposition was found to belong to the law of evidence and may be material from which intent could be inferred (*R v Moloney* at 928, 929). The probability required for a crime of specific intent had to be "*little short of overwhelming before it will suffice to establish the necessary intent*" (*R v Moloney* at 925). The requirement that a person had to be aware that the consequence of his conduct was "overwhelming" or near certain was maintained in the later decisions of *R v Hancock* [1986] AC 455, *Nedrick* and *Woollin*.

34. It should be noted that an aspect of *Woollin* which may be open to doubt is whether it is necessary that the death or grievous bodily harm itself be a virtually certain result of the defendant's act. It is unclear why the result itself must be virtually certain before intent can be established which suggests, in part, an objective inquiry into the question of intent (see *Smith & Hogan's Criminal Law*, 14th Ed, D Ormerod & K Laird, 2014, 118-119). It may not be necessary to resolve this in the appellant's case although it is noted that this would not be established in this case having regard to the statistical probabilities of transmission of HIV through unprotected sexual intercourse.

35. It remains unsettled in England whether an awareness of the certainty of the results of one's conduct is itself intention (i.e. intent at law) or whether it is only evidence from which intent (i.e. purpose or design) can be inferred. Lord Bridge in *R v Moloney* suggested that such an awareness is evidence from which intent can be inferred. *Woollin* may be ambiguous on this subject and could suggest either that such an awareness is a form of "intent" or that intent (in fact) can only be inferred from such awareness (see discussion in Smith & Hogan at 119-120). The English Court of Appeal has refused to hold that such an awareness is intent (at law) and has said that it is only evidence from which intent can be inferred: *R v Matthews & Alleyne* [2003] 2 Cr App R 30. In *Matthews & Alleyne* Rix LJ held that the rule in *Woollin* was not a substantive rule of law and the "intent" at law did not include appreciation of virtual certainty (at [43]).

36. The distinction between substantive law and the laws of evidence may be a fine one as "*almost always a person who foresees an illegal consequence as the virtually inevitable result of his act will desire it*" (G Williams, *Oblique Intention*, Cambridge Law Journal Vol 46, No. 3 (Nov 1987) p.422, see also *R v Nedrick* at 1028, *R v Matthews & Alleyne* at [45]). However, the distinction between the two is nevertheless important as it recognises the difference between two states of mind, one being the having of a purpose or design, the other being an awareness of the consequences of one's acts. That the two states of mind are actually different is reflected in s5.2(3) of the *Criminal Code 1995* (Cth) which provides that a person has an intention with respect to a result means to bring it about or is aware that it will occur in the ordinary course of events.

37. Support for the proposition that an awareness that a result is a certain or near certain consequence of one's conduct is evidence from which an intent may be inferred but is not intent itself can be found in the decisions of *Willmott* at 418-419 and *Reid* at [111]-[114] per Chesterman J. This also appears to be the view of Windeyer J in *Parker v The Queen* at 649 and Kirby and McHugh JJ in *Cutter v The Queen* (1997) 71 ALJR 638 at 642, 648. Although all three judges were in dissent in those cases nothing in the judgments of the other members of the respective Courts appears to cast doubt on the conclusions reached. In *He Kaw Teh* Brennan J appears to have accepted that knowledge that the prescribed result will occur is sufficient at law to establish intent for crimes of specific intent (at 570). However, this passage in *He Kaw Teh* may also be ambiguous as to whether the distinction is drawn between evidence supporting an inference of intent or the legal test for intent itself.

38. If awareness that a prescribed result is the certain consequence of one's act is sufficient to constitute intent at law under the common law a further question arises: whether that state is comprehended by the term "intent" as it is used in the Queensland *Criminal Code* having regard to the principles applied when construing a Code (*Brennan v The King* (1936) 55 CLR 253 at 263, *Stuart v The Queen* (1974) 134 CLR 426 at 437). The Commonwealth *Criminal Code* extends the definition of intent to such an awareness. However, unlike the Commonwealth *Criminal Code*, intent is not defined in the Queensland *Criminal Code*.

39. Whatever be the ultimate answer on this subject, in the appellant's case there was no evidence that established that he appreciated that the level of risk of transmission (either individually or by virtue of the frequency of his conduct) was certain, near certain or even probable. Further, other evidence pointed away from an inference of

intent (as it is ordinarily understood) – including the motivating reason for engaging in the impugned conduct being sexual pleasure.

The reasoning of Gotterson JA

40. Gotterson JA made no finding that he was satisfied beyond reasonable doubt that the appellant had the requisite intent in the sense that it was his purpose to infect the complainant during the relevant time. Nor did his Honour find it was open to the jury to so find. Nothing in the critical passage of his Honour's judgment suggests that he was satisfied that the appellant's awareness of the risk of transmission rose to a level of certainty or near certainty or that transmission would occur in the ordinary course of events. The evidence could not support such an inference. The evidence only established an awareness of some unknown level of risk which was increased by virtue of the frequency of conduct.

41. Frequency of conduct may strengthen an inference that a person had the requisite intent by increasing the known prospect that a specific result will be achieved. However, this will not be sufficient to establish the requisite intent in the absence of evidence which either indicates an actual intent (such as an admission or evidence of malice) or which elevates the known likelihood or probability of the result occurring to one of near certainty or at least, of a very high probability. There was no such evidence in the appellant's case. Nor could it be said that the appellant engaged in a course of conduct designed to achieve the prescribed result. There was a further difficulty with reliance on the frequency of conduct. Each act of intercourse carried with it the same risk of transmission. The increased chance of the complainant contracting HIV by virtue of the frequency of conduct was not that transmission was more likely with each act of intercourse but rather that over the course of that period her exposure to the risk was at a cumulated level. Although the appellant's lies as to the frequency of unprotected sexual intercourse indicated an appreciation that the risk of transmission increased by virtue of the frequency of unprotected sexual intercourse – there was no evidence to suggest that this awareness rose to anything like a level of certainty of transmission. Moreover transmission may well have occurred early in the relationship.

R v Reid

42. The appropriate jury direction for the offence of transmit a serious disease with intent contrary to s317 of the *Criminal Code* was considered in *R v Reid*. The directions given to the jury in that case were set out at [62] and [63] of the judgment. Although the jury in that case were initially directed that "people ordinarily intend the foreseeable or ordinary consequences of their actions" they were later directed "the focus is on what the defendant actually intended". It was argued that the first direction

was erroneous because it failed to direct the jury that intention could only arise if the accused knew it was probable or likely that the disease would be transmitted (based on the decision in *Crabbe v The Queen*).

43. Keane JA held the direction on intent was sufficient and accurate because it explained *"to the jury that they could only convict the appellant if they were satisfied that the appellant intended to transmit the HIV virus to the complainant"* (*Reid* at [71]). His Honour observed that on the accused's argument in *Reid* the appellant may have received a direction more favourable to him than the one he asserted should have been given (*Reid* at [71]). Earlier his Honour had said *"The language of the Criminal Code, and in particular s317(b), obviates the need for any elaboration of the meaning of "intent" in the Criminal Code by reference to common law concepts of foreseeability, likelihood and probability."* (at [67]). This observation did not broaden the test for intent to one which permits an intent to achieve a specific result to be established where a person is aware of the probable or likely consequences of one's actions (Chesterman J at [115] agreed with the conclusions of Keane JA).

44. Nothing in *Reid* supports the proposition that the requisite intent could be established if it were shown that the accused was aware of the likely or probable consequences of his or her actions. Nor does *Reid* suggest that intent can be inferred from the frequency of a person's conduct which has the effect of increasing the risk of transmission to a level of probability or likelihood (see Applegarth J at QCA [96]). The evidence in the appellant's case established that he had an appreciation of risks of transmission associated with unprotected sexual intercourse. However, there was no evidence to suggest that the appellant had an appreciation that transmission was certain, likely or probable. This is in contrast with the case in *Reid* where the statement *"loaded gun"* indicated an appreciation of the near certainty or high probability of transmission (see full extract at *Reid* [42]).

45. In *Reid* Keane JA found that it was open to the jury to find that the accused had the requisite intent. His Honour said it was clear that the accused had an awareness that unprotected sexual intercourse was likely to infect the complainant with HIV (*Reid* at [51]). This awareness could be inferred from the accused's statement to police that he felt like he had a *"loaded gun"* (*Reid* at [51]). In *Reid* the accused was aware that post-exposure prophylaxis could prevent infection and he had not told the complainant to seek such treatment after ejaculating inside him (*Reid* at [44], [54]). Further, there was evidence that he taunted the complainant after the complainant was diagnosed with HIV (*Reid* at [53]). Properly understood *Reid* was not a case involving an inference of intention from awareness of risks associated with unprotected intercourse. Rather, it involved the primary reasoning on intent, namely that it could be inferred that his

purpose was to transmit the disease, an aspect of which was his awareness of the high risk that the disease would be transmitted.

Circumstantial Case

46. The principal question for determination at trial and on the appeal was whether the prosecution had proved beyond reasonable doubt that the appellant intended to transmit the disease to the complainant. The prosecution case on this element was wholly circumstantial and required inferences to be drawn as to the appellant's state of mind.

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47. Gotterson JA referred to the appellant's contention that there was no reasonable basis for the jury to be satisfied that the appellant had the requisite intent and said "*This ... proposition combined two related elements: first a concession that the evidence could justify an inference of intent and, second, that, notwithstanding, the evidence did not exclude at least one other reasonable hypothesis concerning the [appellant's] conduct consistent with an absence of intent.*" (QCA at [19]). There was no concession that the evidence in the appellant's case could support an inference of intent (if that was what his Honour meant at QCA [19]). Counsel for the appellant below accepted that intent could be inferred from evidence that the outcome of one's conduct is likely but did not
20 say that intent could be inferred from such evidence alone (see T1-2.40-.44).

48. Gotterson JA and Applegarth J appeared to approach the issue on the appeal as being whether recklessness could be excluded (Gotterson JA at QCA [19], [48]; Applegarth J at [104]). The jury were directed (erroneously, according to *Knight v The Queen* (1992) 175 CLR 495 at 503) that where there were two equally competing hypotheses (one consistent with guilt; the other consistent with innocence) the jury should give the appellant the benefit of the doubt and acquit him (SU 3-8).

49. However, this was not a case where there were two different inferences which were
30 open on the evidence and one had to be excluded. Rather, it was a case where the most that could be inferred from the evidence was that the appellant was reckless; an inference of intent was not open on the evidence. It was not a matter of "excluding a reasonable possibility" that the appellant was reckless. Rather, the question was whether the evidence was adequate to support an inference of intent.

50. Further, there is difficulty in speaking of excluding reasonable possibilities consistent with innocence when drawing inferences as to a person's state of mind at a particular time.[2] Framing the question in terms of excluding reasonable possibilities such as

[2] See also *R v Tillott* (1991) 53 A Crim R 46 where it was held that the jury need not be given a circumstantial evidence direction where the only real issue was the accused's state of mind (at 50-51).

recklessness assumes that an inference of intent has already been established. When examining inferences as to a person's state of mind at a relevant time the real question is how "high" does the evidence go or, put another way, what inference can properly be drawn from the evidence. Furthermore, if one has already inferred the requisite intent then there is no room for an "alternate" state of mind. The difficulty is illustrated by the appellant's case: if the requisite intent is inferred then that necessarily excludes recklessness as a possibility because those two states of mind cannot occur concurrently.

51. *Knight v The Queen* and *Cutter v The Queen* both concerned the drawing of inferences as to a state of mind and both spoke of excluding reasonable possibilities consistent with innocence. However, it is submitted that the proper approach is to consider what can reasonably be inferred from the evidence, not whether a particular state of mind is or is not excluded as a reasonable possibility. *Knight* was a case where the requisite intent for murder could easily be inferred from the act causing death itself but the majority found that the evidence left it open that the shot was fired recklessly without the necessary intent (at 504-505). *Cutter v The Queen* was an application of the decision in *Knight v The Queen*. Similarly, in *Cutter v The Queen* the requisite intent for murder could be inferred from the act causing death itself but the accused's intoxication meant that the reasonable possibility that the act causing death was not accompanied by the requisite intent could not be excluded. These cases should be contrasted with the appellant's case where the necessary intent could not be inferred from the conduct which transmitted the disease to the complainant. In the appellant's case the issue was not whether a reasonable possibility consistent with innocence (here said to be reckless transmission) was excluded. Rather, it was whether it was open to infer the requisite intent.

52. In some cases it may be necessary to examine the surrounding circumstances of a person's conduct and the person's awareness of those circumstances to establish the requisite intent or to exclude the possibility of the absence of the requisite intent (see for example, *Cutter v The Queen* at 642). In the appellant's case it was the surrounding circumstances which were the evidence of his appreciation of the risks associated with unprotected sexual intercourse rather than evidence that elevated his state of mind to one of the requisite intent. Gotterson JA considered the appellant's lies to the complainant and to the police evidenced such an appreciation (QCA at [43]). These surrounding circumstances, namely failure to disclose and lies told to both the complainant and the police did not elevate his appreciation of the risk to an appreciation of the certainty of transmission or anything like it.

Lies

53. The prosecution relied upon a number of lies allegedly told by the appellant: lies to the complainant denying he had HIV during their relationship; lies told by the appellant to the complainant after she had been diagnosed with HIV to the effect that he had been diagnosed with HIV at some time after their relationship ended; and lies told to the police minimising his awareness of the transmissibility of the disease and the number of times he and the complainant had unprotected sexual intercourse.

54. The appellant's alleged lies to the complainant during their relationship denying he had HIV did not, of themselves, support an inference that the appellant intended to transmit the disease. These lies were incapable of giving rise to consciousness of guilt reasoning as they occurred before she was diagnosed with the illness. These lies were not left to the jury for consciousness of guilt reasoning. Gotterson JA used these lies as evidencing an appreciation that the disease was sexually transmissible through unprotected sexual activity (QCA at [42]). Applegarth J considered these lies showed irresponsible behaviour designed to persuade the complainant to have unprotected sexual intercourse with him (QCA at [79]). This, it is submitted, was the only way these lies could be used in support of the prosecution case.

55. At trial, the prosecution relied upon the telling of lies both to the complainant after her diagnosis and to the police as evidence of a consciousness of guilt for the offence charged – i.e. transmit a serious disease with intent. These lies were described as "critical" in the prosecution's case (SU 3-14). The lies relied upon were lies to the complainant after she was diagnosed about having only known about his diagnosis for 6 months; lies to the police about his awareness of the sexual transmissibility of the disease and the number of times he and the complainant had unprotected sex (T9-14). The directions given to the jury (set out at QCA [23]-[24]) made it clear to the jury that the lies could only be used as evidence of consciousness of guilt if the jury were satisfied that the reason the appellant lied was because the truth would implicate him in the offence with which he was charged (i.e. transmit a serious disease with intent). It therefore became a question for the jury (and later the Court when conducting their independent assessment) whether the lies were told for that reason or for another reason (such as consciousness of guilt for the offence of unlawfully causing grievous bodily harm to which he pleaded guilty).

56. It is not accepted that lies told by the appellant to the complainant after she was diagnosed or to the police could give rise to consciousness of guilt reasoning for the offence charged – i.e. transmit a serious disease with intent. Neither Gotterson JA nor Applegarth J used the lies as indicating a consciousness of guilt for the offence of transmit a serious disease with intent (QCA at [46]-[48], [97]). All Gotterson JA said on the subject was that the jury were given clear directions as to the use of the lies as

consciousness of guilt (QCA at [48]). Instead, Gotterson JA used the lies told by the appellant to support his finding that the appellant had a genuine appreciation of the risks associated with his conduct (QCA at [43]). This finding was an acceptance of the respondent's submission on the appeal in relation to the significance of those lies (see QCA at [43], [34]). It is difficult to see how the lies could be used for consciousness of guilt reasoning in relation to the offence charged, particularly in circumstances where the appellant pleaded guilty to the lesser offence of unlawfully causing grievous bodily harm and there was nothing to suggest that the truth would implicate him in the offence charged as opposed to the lesser offence. The lies said nothing about the appellant's state of mind at the relevant times during the relationship. The lies could not rise to more than an implied admission as to general wrongdoing or culpability.

Other Evidence

57. Other evidence at trial included the following: the appellant's failure to disclose to the complainant that he had HIV after she fell ill in mid 2007; the appellant told the complainant that his brother died of AIDS in Africa (which was challenged); and the appellant arranged for a friend to take a blood test in lieu of him for a visa application in 2005. These matters and the lies were not sufficient of themselves to give rise to an inference of intent to transmit the disease. Nor did these matters viewed in combination together with the frequency of the conduct and awareness of risks associated with the unprotected sexual intercourse to give rise to an inference that the appellant intended to transmit the disease. The only rational and available inference on the evidence was one of recklessness which fell short of any intent.

58. There was a further aspect to the appellant's case which was that the evidence suggested that the purpose of the appellant's act – unprotected sexual intercourse – was the pursuit of pleasure and intimacy. This evidence pointed away from any inference that the appellant intended to transmit the disease to the complainant. In such circumstances other evidence was required to establish the requisite intent (such as an admission or evidence of malice).

Objective Test

59. The language used by Gotterson JA at QCA [46] appears to suggest an objective test for the wholly subjective test for intention under s317 of the *Criminal Code*. His Honour's reference to the jury using their own knowledge and experience and that the appellant's conduct may be "viewed" and "defied description" indicates an objective rather than subjective inquiry into the appellant's state of mind. A direction to the jury in similar terms has been held to be misleading because it suggests "*that intention is to be assessed by an objective evaluation of what is a likely consequence of an act*" (*R v Ping* at [37]). As earlier said such an approach has long been rejected.

Temporal Concurrence (Ground (1)(ii))

60. Section 317 of the *Criminal Code* requires that the physical element (here the transmission of the serious disease to the other person) coincide with the mental element (here an intention to transmit the disease). However, Gotterson JA stated that the jury were not required to identify the precise point in the relationship when the appellant's conduct ceased being reckless and gave way to intention (QCA at [47]). His Honour erroneously held that "*a jury may infer from the protracted duration of the conduct that the requisite intent existed from the first act of unprotected sexual intercourse to the last.*" (QCA at [48], see also Morrision JA at [69]).

61. Gotterson JA cited *R v Reid* at [56] in support of this proposition. However, in *Reid* the requisite intent was not inferred from the frequency of the conduct. In *Reid* the requisite intent was inferred from the evidence identified by Keane JA at [53]-[55]. His Honour's statement that "*the jury were entitled to infer that the appellant's intention in that regard was the same at the time of the first act of unprotected sex as it was throughout the sexual activity between the complainant and the appellant*" at [56] was directed to the circumstances of that case and an argument raised that the infection may have occurred early in the relationship. The issue of temporal concurrence did not arise in *Reid* because the requisite intent in that case was inferred from matters which did not depend on the frequency of the unprotected sexual intercourse. Further, in *Reid* it was open to conclude that the requisite intent existed at the time of the first instance of unprotected sexual intercourse. His Honour was not stating a principle to be applied to satisfy temporal concurrence between the physical and mental elements of the offence where a person's intention is to be inferred from the frequency of conduct.

62. The reasoning of Gotterson JA supporting the verdict in the instant appeal relied upon the frequency of the appellant's conduct to establish the requisite intent. This reasoning necessarily involved the notion of a passage of time before the requisite intent arose. By virtue of this it was then necessary to determine when (or a particular time frame in which) the actual transmission occurred and whether at that time the conduct was sufficiently frequent to establish the requisite intent so as to satisfy the requirement under s317 of the *Criminal Code* that the mental and physical elements of the offence coincide.

63. This was particularly so where it was impossible to say at the commencement of the course of conduct that the conduct would in the continuous future be engaged in frequently. For example, and obviously enough, the appellant's case the conduct (unprotected sexual intercourse) required the future consent of the complainant which

was a matter outside the appellant's control. Whether the complainant would consent (and continue to consent) to that conduct was unknown at the commencement of the conduct. The possible frequency of those acts was unknown at the outset of the relationship and continued to be unknown. Accordingly, it could not be said that the appellant intended to transmit the disease at the outset of the relationship because at that time he did not know (and could not know) how often he would in the future engage in the conduct.

64. The prosecution in this case could not isolate the precise act of sexual intercourse nor the time frame in which the transmission occurred except in so far as it occurred at some point during their sexual relationship (i.e. the period alleged on the indictment). Further, the evidence raised the distinct possibility that the transmission occurred in the first 6 months of their sexual relationship. There was evidence that the complainant became sick in mid 2007 and this may have been seroconversion illness due to HIV infection but it was not certain that this was the case (Ex 2 at [21]).

65. Gotterson JA and Morrison JA effectively backdated the appellant's alleged intent, (which only arose on their reasoning due to the passage of time), to conduct occurring at the beginning of the sexual relationship when, on his Honour's own reasoning, the conduct was reckless. It is impermissible to convict an accused where the mental element of the offence was formed after the physical element had been completed (*Campbell v R* (2008) 73 NSWLR 272 per Spigelman CJ at [129], see also Weinberg AJA at [180]-[181]).

66. Even if the broader analysis of Gotterson JA can be accepted it could not be said that the appellant had the requisite intent at the commencement of the sexual relationship with the complainant. Accordingly it could not be considered that "*the accused has the requisite intent at the outset of his or her execution of a series of acts designed to cause*" a specific result in accordance with the extension of temporal concurrence set out by Mason CJ in *Royall v The Queen* (1991) 172 CLR 378 at 392).

67. Nor could the requisite intent arise on the extension of temporal concurrence identified by Brennan J in *Royall v The Queen* where his Honour held that "*it is not essential ... to identify which act or series of acts in the course of that conduct caused the victim to take the final step provided the jury be satisfied on the whole of the evidence that some or all of those acts caused the death and was accompanied by one of the mental states prescribed*" (at 405). This is because his Honour was there considering circumstances where the requisite intent arose independently from the frequency of the conduct, which is similar to what was found to be the case in *Reid*. However, where the inference of intent arises due to the frequency of the conduct, it is not sufficient to

establish temporal concurrence without identifying the time at which the intent arose and the time the physical element occurred.

Part VII: Applicable provisions

68. Section 317 of the *Criminal Code 1899* (Qld) provides

> "Any person who with intent,
> (b) to do some grievous bodily harm or transmit a serious disease to any person; ...
> (e) in any way unlawfully wounds, does grievous bodily harm, or transmits a serious disease to, any person;
> is guilty of a crime, and is liable to imprisonment for life."

69. The provision is still in force in the same terms as at 10 December 2015.

Part VIII: Orders sought

70. The following orders are sought:
    (1) The appeal is upheld.
    (2) The conviction is quashed.
    (3) A verdict of acquittal is entered on the transmit a serious disease with intent offence and a verdict of guilty is entered for the offence of unlawfully causing grievous bodily harm contrary to s320 of the *Criminal Code 1899* (Qld).
    (4) Alternatively, the appeal is remitted to the Queensland Court of Appeal to be dealt with in accordance with law.

Part IX: Oral argument

71. It is estimated the presentation of the appellant's oral argument will take approximately 1½ hours.

Dated: 10 December 2015

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