**IN THE HIGH COURT OF AUSTRALIA**
**SYDNEY REGISTRY**

No. S274 of 2016

BETWEEN:

**MA**
Appellant

and

**THE QUEEN**
Respondent



Part I: Publication

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: Issues

2. Does the causing of another person to contract a virus amount to the infliction of grievous bodily harm?

3. In cases other than murder, in order to establish malice in the sense of recklessness, must the prosecution establish beyond reasonable doubt that the accused foresaw a probability of harm eventuating or is some degree of foresight of a mere possibility of some degree of harm of the kind foreseen sufficient?

Part III: Section 78B

4. The appellant considers that notice pursuant to s. 78B of the *Judiciary Act 1903 (C'th)* is not required.

Part IV: Citations

5. In relation to ground 1, the citation for the reasons of judgment of the New South Wales Court of Criminal Appeal (Macfarlan JA, Johnson and Davies JJ.) is *R v. Aubrey* (2012) 82 NSWLR 748. In relation to ground 2, the citation for the reasons of judgment of the New South Wales Court of Criminal Appeal (Gleeson JA, Button and Fagan JJ.) is *Aubrey v. R* [2015] NSWCA 323.

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Part V: Narrative Statement of Relevant Facts

6. Under an *ex officio* indictment, presented in District Court, the appellant was charged with two offences: maliciously causing the complainant to contract a grievous bodily disease, namely Human Immunodeficiency Virus [("HIV")], with the intent of causing him to contract such grievous bodily disease, contrary to s. 36 *Crimes Act 1900 (NSW)* (count 1), and, in the alternative, maliciously inflicting grievous bodily harm upon the complainant, contrary to s. 35(1)(b) *Crimes Act 1900 (NSW)* (count 2).

7. On 5 March 2012, the appellant filed a notice of motion, seeking an order that count 2 of the indictment be quashed, on the ground that, on the basis of the acts alleged by the Crown, the appellant did not, at law, "inflict[] grievous bodily harm" upon the complainant. The Crown case was, in broad terms, that the appellant engaged in unprotected sexual intercourse with the complainant, in circumstances where the appellant knew that he had earlier been diagnosed with HIV. In written submissions, filed in response to the appellant's notice of motion, the Crown confirmed that it would not allege that there had been "an application of direct and intentional violence." Instead, the Crown contended that "the complainant was infected with a grievous bodily disease (HIV) as the immediate consequence of the relevant act of intercourse."

8. The appellant's notice of motion came before Sorby DCJ for determination. In a brief judgment, his Honour concluded that there was "uncertainty as to whether infecting another person with a serious disease constituted inflicting grievous bodily harm as proscribed in the offence of maliciously inflicting grievous bodily harm as it was defined under s. 35(1)(b) in 2004"[1]. On the basis of that uncertainty, his Honour stayed proceedings in respect of count 2.

9. By notice of appeal, filed pursuant to s. 5F(2) *Criminal Appeal Act 1912*, the Director of Public Prosecutions appealed against Sorby DCJ's judgment and order. On appeal, the Crown argued[2]: "[T]he word 'inflicts' should not be given a limited and technical meaning which requires that the harm result from a violent act which creates an immediate result. That being so, the transmission of a disease which manifests itself after a period of time can amount to the infliction of grievous bodily harm."

10. The Court of Criminal Appeal (Macfarlan JA, Johnson and Davies JJ. agreeing) accepted this interpretation of the expression "inflict grievous bodily harm". Accordingly, the Court allowed the Crown's appeal, set aside the order made by Sorby DCJ, and dismissed the appellant's notice of motion, dated 5 March 2012.[3] The appellant applied to this Court for special leave to appeal. On 10 May 2013, referring to the principle of restraint, exercised in respect of interlocutory decisions, this Court (Hayne, Bell and Gageler JJ.) dismissed the application.[4]

11. The appellant thereafter stood trial in the District Court (Marien SC DCJ and a jury of 12). At the conclusion of the trial, the appellant was acquitted of the first count, that is, of maliciously causing grievous bodily disease with intent to cause such grievous

[1] Judgment of 8 March 2012, unreported, at [23].
[2] Crown written submissions, dated 21 August 2012 at [35].
[3] *See R v. Aubrey* (2012) 82 NSWLR 748.
[4] *See Aubrey v. The Queen* [2013] HCATrans 110.

bodily disease, contrary to s. 36 *Crimes Act 1900*. However, the appellant was convicted of the alternative offence of maliciously inflicting grievous bodily harm, contrary to s. 35(1)(b) *Crimes Act 1900*, which was the offence, which had been the subject of the interlocutory proceedings. Consequently, the appellant was sentenced to a term of imprisonment of 5 years' imprisonment, with a non-parole period of 2 years.

12. Subsequently, the appellant appealed against his conviction. On 18 December 2015, the Court of Criminal Appeal, granted leave to appeal, but dismissed the appeal.[5] In this Court, which granted special leave to appeal on 16 November 2016[6], the appellant now appeals from the entirety of the Court of Criminal Appeal's judgment.

Part VI: The appellant's arguments

A. Ground 1

13. When appealing his conviction, the appellant re-iterated his argument that the word "inflict" required the application of force to the victim. The Court of Criminal Appeal did not reconsider that argument, instead dismissing the ground of appeal peremptorily, so as to "leave the way open for the Appellant to apply to the High Court"[7].

14. In construing s. 35 *Crimes Act 1900*, as it existed at the time of the alleged offences, it is, of course, necessary to consider the provision in its legislative context. Contrary to the approach taken by the Court of Criminal Appeal during the interlocutory appeal[8], it is submitted that this process ought, at least in the first instance, to be done without resort to extrinsic materials.[9] In undertaking this task, one must be mindful of the principle that each statutory word is, where possible, to be given meaning.[10] It is submitted that, rather than adopting this undisputed approach, the process of statutory interpretation, employed by Court of Criminal Appeal, looked to the end sought to be achieved, and reasoned toward that objective.

15. Schedule 2 *Crimes (Injuries) Amendment Act 1990* inserted into the *Crimes Act 1900,* in s. 36, an offence, with which the appellant was also charged (count 1), but ultimately acquitted. A comparison between that section and s. 33 *Crimes Act 1900* (as it then stood), which criminalised the malicious infliction of grievous bodily harm with intent, demonstrates that s. 36 would have had no work to do, if the Court of Criminal Appeal's construction of the words "inflict grievous bodily harm" were correct. If the transmission of a sexually transmitted disease, by means of intercourse,

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[5] *See Aubrey v. R* [2015] NSWCCA 323.
[6] *MA v. The Queen* [2016] HCATrans 277.
[7] *Aubrey v. R* [2015] NSWCCA 323 at [24] *per* Fagan J.
[8] *R v. Aubrey* (2012) 82 NSWLR 748 at 756 [33] *per* Macfarlan JA.
[9] Section 34 *Interpretation Act 1987*; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265 [33], *citing with approval citing Catlow v. Accident Compensation Commission* (1989) 167 CLR 543, 550 *per* Brennan and Gaudron JJ. ("[I]t it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction.").
[10] *Project Blue Sky Inc. v. Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] *per* McHugh, Gummow, Kirby and Hayne JJ., *quoting with approval The Commonwealth v. Baume* (1905) 2 CLR 405 at 414 *per* Griffith CJ. *See also Beckwith v. The Queen* (1976) 135 CLR 569 at 574 *per* Gibbs J.; *Chu Kheng Lim v. Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 12-13 *per* Mason CJ.

constituted the infliction of grievous bodily harm, then s. 36 would have been wholly redundant, since such acts would have been squarely caught by s. 33. Assuming the correctness of the Court of Criminal Appeal's construction of the expression "inflict grievous bodily harm", there is, quite simply, no explanation of the purpose, which lay behind the enacting of s. 36. The maximum penalty for both s. 33 and s. 36 was 25 years. And that, too, provides no purpose for the introduction of s. 36. Also, the express inclusion of an 'attempt' provision in s. 36 still does not mean that the provision would, on the basis of the prosecution construction, be anything other than redundant, since s. 344A *Crimes Act 1900* already criminalised attempts to commit offences.

16. If one were to assume the correctness of the Court of Criminal Appeal's construction, the inclusion of s. 36 *Crimes Act 1900* would be a particularly egregious breach of the principle expressed in *Baume,* and subsequent cases, since not only would individual words be redundant, but, indeed, the entire provision relating to the offence would be redundant. The legislator, in enacting s. 36, would have acted entirely in vain.

17. Instead, the inclusion of s. 36 in the *Crimes Act* is an expression of the legislative intent, to limit criminal liability for the communication of diseases to circumstances, in which the actor intended that that person would contract the disease. This must also be the reason why the legislature did not re-enact s. 35 in another form, using the concept of a grievous bodily disease as in s. 36. The inclusion of s. 36 in the *Crimes Act* demonstrates that the transmission of diseases was not caught by s. 33 (and, therefore, also not by s. 35). It is submitted that the Court of Criminal Appeal erred in holding the contrary.

18. By resort to the Second Reading Speech concerning s. 36, the court below concluded that "s. 36 was introduced because the legislature was concerned that s. 33 might not cover the causing of harm by the intentional transmission of a disease"[11]. Firstly, the Court erred by turning to the extrinsic material at the outset of its interpretive exercise. The first port of call must always be the legislative text itself, and it is from this text that one derives the purpose of the legislation[12].

19. Rather than seeking to interpret the legislative text in a consistent and meaningful manner, the Court of Criminal Appeal leapt straight to the extrinsic materials, to explain why s. 36 might have been enacted, even though s. 36 would have no work to do. The answer to that question was not to be found in the extrinsic materials, but rather in an acknowledgment that the act of "caus[ing] another person to contract a grievous bodily disease" is not encompassed in the expression "inflict[ing] grievous bodily harm upon any person".

20. More importantly, though, the flaw in the Court of Criminal Appeal's reasoning is exposed by its subsequent reasoning (emphasis added)[13]:

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[11] *R v. Aubrey* (2012) 82 NSWLR 748 at 756 [33] *per* Macfarlan JA.
[12] *See Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v. Cross* (2012) 248 CLR 378 at 388 [23] - 390 [26] *per* French CJ and Hayne J.; *Independent Commission Against Corruption v. Cunneen* (2015) 89 ALJR 475 at 484 [35] *per* French CJ, Hayne, Kiefel and Nettle JJ.
[13] *R v. Aubrey* (2012) 82 NSWLR 748 at 756 [32]-[33] *per* Macfarlan JA.

> *For the terms of s. 36 to assist the respondent in the present case, the conclusion would have to be reached that the legislature, by enacting s 36, intended to change the meaning of ss. 33 and 35(1)(b).* (If the word "inflicts" already had the narrow meaning contended for by the respondent, there would be no need for him to resort to this argument)
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> ...
>
> The legislature did not proceed on the basis that s. 33 had a settled meaning conforming with the respondent's contentions in this case or had a wider meaning that needed to be narrowed to give the new section some operation. Rather, it showed an intention to fill the gap in s 33, if there was one. It follows that there was no narrowing of the ambit of s 33 as a result of the 1990 legislation, and no corresponding effect on the ambit of s 35(1)(b).

21. When the legislature enacted s. 36, it did not make consequential amendments to ss. 33 or 35. Thus, there is no basis for assuming that s. 33 or s. 35 had any different meaning, after the introduction of s. 36. Nor was it necessary for the appellant to demonstrate, as the Court of Criminal Appeal suggested, that s. 36 had the effect of narrowing the ambit of ss. 33 and 35. On the contrary, assuming that, prior to the introduction of s. 36, neither s. 33 nor s 35 criminalised the causing of a person to contract a grievous bodily disease (as argued by the appellant), then the legislation would be quite consistent within itself, both prior to, and after, the introduction of s. 36, without any change to s. 33 or s. 35.

22. In any event, the suggestion, that the introduction of s. 36 was designed to do no more than resolve a pre-existing doubt, is not borne out by the amendment, which was made. The legislature did not, by its language, state that it was simply removing such a doubt, a tried and tested method of providing statutory guidance.[14] Nor did the legislature simply alter the legislation, as it did by *Crimes Amendment Act 2007*, by amending the definition of grievous bodily harm in s. 4 to include grievous bodily disease. Instead, it created an entirely new, independent, and distinct offence.

23. Accordingly, the legislature must have proceeded on the assumption that the act of causing a person to contract a grievous bodily disease was not criminalised by pre-existing legislation, and so introduced a new provision to deal with such conduct. The Court of Criminal Appeal thus erred in justifying its conclusion by its resort to extrinsic material.

24. In any event, to the extent that this Court might conclude that s. 33, 35 and 36 are ambiguous, it is submitted that resort to the extrinsic material supports the appellant's argument. When s. 36 was introduced, the Second Reading Speech included the following:

> [T]here is some doubt in the criminal law whether the contraction of a disease as a result of an assault constitutes bodily harm. This doubt results from the English decision in *R v. Clarence*, reported in volume 22, Queen's Bench, 1888, at page 23. A person who intentionally inflicts a serious disease upon

[14] *See, e.g.,* s. 343 *Crimes Act 1900* ("To remove any doubt, it is declared that...") (enacted at almost the same time as s. 36 by the *Crimes (Public Justice) Amendment Act 1990*).

another should be convicted of an offence that reflects the gravity of the harm. This bill, therefore, creates a new offence that removes any doubt as to whether such conduct can be treated appropriately by the criminal law.

25. Contrary to the Court of Criminal Appeal's holding, that the appellant had sought "to use comments in the speeches about the pre-existing law as authoritative expositions of the law"[15], the appellant pointed to the Second Reading Speech to demonstrate that s. 36 was introduced to remedy a perceived defect in the pre-existing legislation. This is an entirely orthodox approach, since it is necessary to consider the context of the legislation, and "'context' in its widest sense [] include[s] such things as the existing state of the law and the mischief which, by legitimate means ... one may discern the statute was intended to remedy."[16]

26. The appellant does not contend that views expressed by the legislature, as to the state of the law, can trump the proper construction of the statutory language, and for this reason, the Court of Criminal Appeal's reference to the decision of *Harrison v. Melhem*[17] was entirely inapposite. However, legislative views, concerning the state of the law at the particular time, remain relevant.[18] The statement in the Second Reading Speech evinces a legislative belief that the expression "inflict grievous bodily harm" did not aptly cover the conduct criminalised by s. 36; and a remedy was required.

27. For this reason, the Court of Criminal Appeal's repeated reference to the legislature's uncertainty does little to assist in the interpretation of ss. 33, 35 and 36. It held[19]: "[T]he comments [in the extrinsic material] do not... indicate that the relevant minister had a view as to the correct construction of s. 35(1)(b). They simply indicate, in both cases, that the minister considered there to be uncertainty concerning the ambit of offences involving the infliction of grievous bodily harm."

28. The lower court's reasoning demeans the legislative function. It attributes to the legislature an inability to ascertain whether the causing of a grievous bodily disease was criminalised by ss. 33 and 35 as at 1990. It is this presumed ineptitude, which is then said to be the motivation for the enacting of s. 36. However, this line of reasoning ignores two fundamental tenants of statutory construction. Firstly, the legislature is presumed to know the law.[20] Secondly, it is to be presumed that the legislature does not act in vain. Therefore, the legislature must have acted, because it perceived that there was a need to act. In other words, legislation was enacted to redress a perceived gap in the *Crimes Act*. It is submitted that this Court would not infer that the legislature had passed legislation, which may, or may not, have had work to do,

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[15] *R v. Aubrey* (2012) 82 NSWLR 748 at 757 [37] *per* Macfarlan JA.
[16] *CIC Insurance Ltd v. Bankstown Football Club Ltd.* (1997) 187 CLR 384 at 408 *per* Brennan CJ, Dawson, Toohey, and Gummow JJ.
[17] (2008) 72 NSWLR 380.
[18] *Compare Dennehy v. Reasonable Endeavours Pty. Ltd.* (2003) 130 FCR 494 at 501 [18] *per* Finkelstein J. ("It is clear that if parliament legislates upon an erroneous view of the law, that view will effect [sic.] the construction of the legislation."); *Lowsley v. Forbes* [1999] 1 AC 329 at 342 [51] *per* Lord Lloyd, *quoting with approval Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 648 *per* Lord Simon ("Once it is accepted that the purpose of ascertainment of the antecedent defect in the law is to interpret Parliament's intention, it must follow that it is Parliament's understanding of that law as evincing such a defect which is relevant, not what the law is subsequently declared to be.")
[19] *R v. Aubrey* (2012) 82 NSWLR 748 at 757 [38] *per* Macfarlan JA; *see also* at 756 [33], [35].
[20] *Williams v. The Official Assignee of the Estate of William Dunn* (1908) 6 CLR 425 at 441 *per* Griffith CJ.

merely because it could not ascertain the actual state of the law. It is submitted that the Court of Criminal Appeal erred in reaching precisely that conclusion.

29. However, even putting these various aides to construction to one side, it is submitted that the Court of Criminal Appeal erred in concluding that the expression "inflict grievous bodily harm" was not to be interpreted in accordance with the reasoning of the judgment of the *R v. Clarence*[21]. In that case, which is virtually on all fours with the present matter, the Court quashed the convictions of a man, who knowingly caused his wife to contract gonorrhoea as a result of sexual intercourse, in circumstances where he knew he had the disease. The Court concluded that the conduct of the appellant constituted neither the offence of assault occasioning actual bodily harm, nor, significantly, unlawfully and maliciously inflicting grievous bodily harm.

30. Wills J., in the majority, spoke of the need to prove the "infliction of direct and intentional violence" in order to establish that grievous bodily harm had been inflicted. As an example, his Lordship referred to the earlier case of *R v. Martin*[22], in which it was held that a person could inflict grievous bodily harm by creating a panic in a theatre, thereby causing persons to trample on each other. Thus, Wills J. concluded that, absent an infliction of direct violence, the appellant in *Clarence* could not be convicted of the offence of maliciously inflicting grievous bodily harm.

31. That reasoning was cited with approval by the Full Court of the Victorian Supreme Court in *R v. Salisbury*[23], which held:

> In our opinion, grievous bodily harm may be inflicted, contrary to s. 19A, either where the accused has directly and violently "inflicted" it by assaulting the victim, or where the accused has "inflicted" it by doing something, intentionally, which, though it is not itself a direct application of force to the body of the victim, does directly result in force being applied violently to the body of the victim, so that he suffers grievous bodily harm.

It is submitted that the reasoning of the Victorian Full Court ought to have been followed by the Court of Criminal Appeal, unless it took the view that the reasoning was plainly wrong.[24]

32. Notably, the Court of Criminal Appeal did not state that the decision in *Salisbury* was plainly wrong. Nor did the Court identify a single development in Australia, which meant that the reasoning of the Full Court ought no longer to be followed. Such developments, as might have occurred in England, are submitted not to be in accordance with the Australian approach to statutory interpretation, and, at most, may have been persuasive of the way in which the law in Australia could develop. However, such developments as took place in England did not automatically form part of the common law of Australia. As noted by Gummow J., "[T]he common law as evolved in this country may diverge from that of England."[25]

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[21] (1889) L.R. 22 Q.B.D. 23.
[22] (1881) 8 Q.B.D. 54.
[23] [1976] VR 452 at 461.
[24] *Compare Farah Constructions Pty. Ltd. v Say-Dee Pty. Ltd.* (2007) 230 CLR 89 at 151-52.
[25] *Adams v. Eta Foods Ltd.* (1987) 19 FCR 93 at 95.

33. *Clarence* has stood as authority since 1888, being a decision of the Court for Crown Cases Reserved. The decisions in *R v. Ireland*[26] and *R v. Dica*[27] are not in accordance with Australian approaches to statutory construction; fail to recognise the strength of *Clarence* as a precedent; and diverged from the meaning given to *Clarence* on bases, which should not be followed in Australia. It was not to the point that assault may not have been a statutory or common law alternative offence. The line of authority relied upon by the Crown. and approved of by Macfarlan JA, which culminated in the English Court of Appeal's decision in *Dica*, moved well beyond the principles espoused by the Courts in *Clarence* and *Salisbury*; and did so as though the restrictions in *Clarence* had been identified as a mischief, to be cured by proper interpretation. However, "[t]he courts - including this Court - have no authority to 'provide a solvent' for every social, political or economic problem or wrong."[28]

34. Remarkably, acceptance of the English line of authority would seemingly lead to the position that, "it would be sufficient to constitute an offence of inflicting grievous bodily harm to contemplate that by one's act, which in no way bore physically upon another, there was a mere possibility of causing them serious mental injury."[29] It is submitted that such a broad proposition is not supported by parliamentary, or case law, authority, and does not correctly reflect the common law in Australia at present.

35. In *Breen v. Williams*[30], this Court discussed the process by which the common law evolves:

> In a democratic society, changes in the law that cannot logically or analogically be related to existing common law rules and principles are the province of the legislature. From time to time it is necessary for the common law courts to re-formulate existing legal rules and principles to take account of changing social conditions. Less frequently, the courts may even reject the continuing operation of an established rule or principle. But such steps can be taken only when it can be seen that the "new" rule or principle that has been created has been derived logically or analogically from other legal principles, rules and institutions.

36. The piecemeal evolutionary process was further discussed in *Momcilovic v. The Queen*[31] by Heydon J., who collated a number of criteria, which guide courts in deciding whether a common law rule ought to be modified or developed:

> [T]he courts seek not to "overstep the boundary which we traditionally set for ourselves, separating the legitimate development of the law by the judges from legislation." There are "limits to permissible creativity for judges" and there is "forbidden territory". The following are among the factors relevant to marking the limits between what is permitted and what is forbidden: whether the rule being changed is seen as dealing with "[f]undamental legal doctrine", for that

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[26] [1998] A.C. 147.
[27] [2004] Q.B. 1257.
[28] *Commonwealth v. Yarmirr* (2001) 208 CLR 1 at 108 [236] *per* McHugh J., *quoting with approval Tucker v. US Dep't of Commerce*, 958 F.2d 1411 at 1413 (7th. Cir. 1992) *per* Posner J.
[29] *MA v. The Queen* [2016] HCATrans 277.
[30] (1996) 186 CLR 71 at 115 *per* Gaudron and McHugh JJ.
[31] (2011) 245 CLR 1 at 157-58 [396].

"should not be lightly set aside"; whether the "solution is doubtful", in which case the matter is best left to the legislature; whether the change is large or small, radical or insignificant; whether the courts have particular expertise in assessing the merits of the change and the methods by which it is to be effectuated; whether the Executive and the legislature have superior methods of investigating the need for change, and of persuading the public to support it or at least accept it; whether the change deals with controversial moral issues, or "[d]isputed matters of social policy", rather than "purely legal problems"; whether the change will fail to produce "finality or certainty"; whether the change will destabilise or render unclear or incoherent other parts of the law; whether the field is one in which the legislature has been active, or one in which the legislature "has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched"; whether the change will have "enormous consequences" for important institutions like "insurance companies and the National Health Service"; and whether argument in favour of the change has been cursory or not.

37. It is submitted that these factors, collectively, tell against the significant leap, which would be required from the holdings of *Clarence* and *Salisbury* at one end, to the expansive interpretation supported by the English authorities at the other end. It is submitted that this is not the approach to statutory interpretation upheld by this Court, and as applicable in Australia. Therefore, it is submitted that the Court of Criminal Appeal erred in departing from the earlier decisions of *Clarence* and, importantly, *Salisbury*.

38. Quite aside from its precedential value, it is submitted that the reasoning of the Court in *Clarence*, as adopted by the Full Court in *Salisbury*, was in any event, correct, and ought to have been followed by the Court of Criminal Appeal. The transmission of a disease may be the communication of the medium by which the disease is carried, but it is not, itself, the infliction of bodily injury or necessarily the infliction of bodily injury in the future. There may be a lengthy period of incubation, or indeed, the disease may manifest itself in a way, which does not cause bodily injury, let alone really serious bodily injury. The distinction between an injury, and an event, which might at some future point in time lead to what might properly be termed an injury, was recognised by Stephen J. in *R v. Clarence*.[32]

39. The requirement that there be an immediate connection between the *actus reus* and the injury is further supported by the language used in other sections of the *Crimes Act 1900*. By contrast, for example, s. 53 *Crimes Act 1900* provides, "Whosoever by any unlawful or negligent act, or omission, *causes* grievous bodily harm to any person, shall be liable to imprisonment for two years" (emphasis added). It is submitted that the word "causes" is of much wider application than the word "inflict".

40. It is therefore submitted that the Court of Criminal Appeal erred in concluding that the term "inflict" did not require an act, the direct result of which was force being applied to the body of the victim and that the transmission of the virus amounted to the infliction of grievous bodily harm.

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[32] (1889) L.R. 22 Q.B.D. 23 at 41-42.

B. Ground 2

41. In dismissing the appellant's appeal on the ground concerning the definition of the necessary mental element, *viz.*, "maliciously", which was defined by s. 5 *Crimes Act 1900*, the Court of Criminal Appeal referred to recklessness (the only part of the definition said to be apposite), and acknowledged that "the manner in which the jury was directed upon the element of recklessness was fundamental to their deliberations".[33] The learned trial judge had directed the jury in relation to the element of "malice" as follows (emphasis added)[34]:

> The element of recklessness is made out if you are satisfied beyond reasonable doubt that at the time the accused did the act he realised that some physical harm may possibly be inflicted upon [redacted] by his actions, yet he went ahead and acted as he did. [I]t is not necessary that the accused realised the degree of harm that was in fact caused to [redacted], provided that he realised that some harm of the type that was inflicted on him would possibly occur. *The accused cannot be found to have acted recklessly unless the prosecution proves beyond reasonable doubt that the accused actually thought about the consequences of his act and at least realised the possibility of some harm of that type being inflicted upon* [redacted]. [I]f you are not satisfied beyond reasonable doubt that the accused acted maliciously, then you must find him not guilty of alternate count 2. If you are satisfied the accused acted maliciously, then you would find him guilty of alternate count 2.

42. The learned trial judge then turned to a portion of the appellant's evidence, including the following passage[35]:

> Q. But you knew there was a possibility that you could infect [redacted]. Correct?
> A. A possibility, correct.
>
> Q. Yet you went ahead anyway and had had sex with him, unprotected anal sex knowing that there was a possibility that you could infect [redacted]?
> A. Correct.

43. The learned trial judge considered this evidence to be tantamount to an admission by the appellant of the elements required to make out count 2. Having quoted the above passage, the learned trial judge continued by directing the jury[36]:

> You might think, members of the jury, in relation to the issue of recklessness, the accused agreed that he acted recklessly, but of course, the fact that he acted recklessly does not mean he is guilty of the offence because the Crown still has to prove, firstly, beyond reasonable doubt, that the accused actually infected [redacted].

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[33] *Aubrey v. R* [2015] NSWCCA 323 at [85] *per* Fagan J.
[34] SU30.
[35] T610, ll. 1-9.
[36] SU31.

> If you are satisfied of that beyond reasonable doubt, then you go on to consider the issue of, when he did that, was he acting maliciously or, in other words, recklessly in the way that I have set out, realising that, at the time he had the unprotected anal sexual intercourse with the accused, he realised that some physical harm may possibly be inflicted upon [redacted] by his actions, yet he went ahead and acted as he did. You may take the view that, in that evidence that I just read to you, the accused effectively admitted that he was reckless in that manner.

44. At the relevant time, the expression "maliciously" was defined by s. 5 *Crimes Act 1900* in the following terms:

> Every act done of malice, whether against an individual or any corporate body or number of individuals, or done without malice but with indifference to human life or suffering, or with intent to injure some person or persons, or corporate body, in property or otherwise, and in any such case without lawful cause or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient in the crime.

45. Section 5 incorporated the common law concept of malice, but also extended the definition for the purpose of the *Crimes Act*[37]. This extended definition has on occasions attracted the scrutiny of the courts.[38] The individual terms employed in it, if extracted from their context, are liable to give a meaning to the statutory offences, of which malice is an ingredient, such that an incongruous culpability can arise. Particularly with "recklessly", if considered on its own, an offence, involving mere advertence to a possibility of harm to some degree, would be seen to replace, or be equivalent to, an intention to injure, or reckless indifference to human life (one of the bases for murder which under s. 18 *Crimes Act 1900* requires advertence to a probability of death). In this case, the Court of Criminal Appeal applied recklessly without regard to the content.

46. The Court of Criminal Appeal has in the recent case of *R v. IL*[39] dissected the extended definition into its constituent components and analysed the provision as follows:

> ... [T]he purpose of s. 5 was to adopt and then extend the ordinary understanding of "malice". Adoption of the ordinary meaning follows from the use of the word "malice" itself in the opening phrase. The fact that "malice" is twice used in the definition of "maliciously" indicates that it was used, and intended to be understood, in its conventional legal sense. I will return to consider what that conventional sense is. Omitting the subordinate clauses, the section would have read:

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[37] *See* Stephen, *Criminal Law Manual: comprising the Criminal Law Amendment Act of 1883* (1883) at s. 7; *see also R v. Coleman* (1990) 19 NSWLR 467 at 474E-F *per* Hunt J.

[38] *See, e.g., Mraz v. The Queen* (1955) 93 CLR 493 at 510 *per* Fullagar J. (describing s. 5 as a "a mere question-begging definition, saying no more than that 'every act done of malice ... shall be taken to have been done maliciously'").

[39] [2016] NSWCCA 51 at [91]-[92] *per* Simpson JA (citation omitted), special leave to appeal granted *IL v. The Queen* [2016] HCATrans 279.

> "Every act done of malice ... shall be taken to have been done maliciously ..."

This is in accord with what Fullagar J said in *Mraz*. The concept is then, by the subordinate clauses, extended to acts done:

> "... without malice, but with indifference to human life or suffering, or with intent to injure ... in property or otherwise ... and ... without lawful cause or excuse, or done recklessly or wantonly ...",

which acts are also:

> "... taken to have been done maliciously ..."

It seems to me that the effect of s 5 is to declare that acts done with a variety of states of mind (other than those that come within the ordinary understanding of "malice") are to be taken to have been done maliciously. Broken up into its component parts, the section begins by stating (tautologically) that:

> "Every act done of malice ... and without lawful cause or excuse ... shall be taken to have been done maliciously."

The section goes on to declare that certain acts done without malice shall nevertheless be taken to have been done maliciously. Those acts are:

- acts done with indifference to human life or suffering (and without lawful cause or excuse);
- acts done with intent to injure either a person or a corporate body (in property or otherwise) (and without lawful cause or excuse) (although it is difficult to see how an act done with intent to injure could be seen as other than malicious);
- acts done recklessly or wantonly.

Thus, an act that comes within any of those descriptions (but done without malice) is, by s. 5, taken to have been done maliciously.

This was the approach at the time of the Court of Criminal Appeal's decision in *R v. Coleman*[40].

47. In accordance with that approach, the learned trial judge concluded that the relevant aspect of the definition of "maliciously" was whether the appellant's act was done recklessly. At [8] of the written direction, the learned trial judge instructed the jury that the relevant question was in the following terms, namely whether, "... you are satisfied beyond reasonable doubt that at the time the accused did the act he realised that some physical harm may possibly be inflicted upon [redacted] by his actions yet he went ahead and acted as he did." In doing so, the learned trial judge's direction picked up

[40] (1990) 19 NSWLR 467.

the language used in a number of authorities exemplified by *Coleman*[41]. It is submitted that this line of authority is erroneous, and should not be followed.

48. In order to determine the meaning of the concept of recklessness under the *Crimes Act*, as it the stood, it is necessary to have regard to the context in which the expression appeared[42]. In particular, recklessness appeared in conjunction with other particularly culpable states of mind: evil intent (i.e. malice at common law), with indifference to human life, with an intent to injure or wantonly. The very context, in which the expression appears, demonstrates the significant degree of culpability required, before any act, including a reckless act, can be said to have been done maliciously.

49. Although the word "recklessly" is an expression used in everyday language, one must be cautious to place undue reliance upon these everyday definitions. So, for example, the *Oxford English Dictionary* defines "reckless" as "1. Of a person: heedless of the consequences of one's actions or of danger; incautious, rash... b. Negligent in one's duties etc., inattentive... c. Inconsiderate of oneself or another... 2 Of an action, behavior, etc.: characterized by heedlessness or rashness, incautious; careless, esp. willfully careless". The *Macquarie English Dictionary* defines "reckless" as meaning: "1. utterly careless of the consequences of action; without caution... 2. characterised by or proceeding from such carelessness... 3. Reckless of, careless of the consequences to...". Notably, these definitions include conduct, which is merely negligent, and thus would not amount to recklessness at law.[43] Unsurprisingly, it has therefore been said "that recklessness has many meanings, both according to ordinary speech and in law"[44].

50. In setting out the requirements for the state of mind of recklessness in the case of murder, this Court stated in *R v. Crabbe*[45]:

> [I]t should now be regarded as settled law in Australia, if no statutory provision affects the position, that a person who, without lawful justification or excuse, does an act *knowing that it is probable* that death or grievous bodily harm will result, is guilty of murder if death in fact results.

51. Although *Crabbe* was concerned with the application of the common law, rather than s. 18, which limits reckless indifference in murder to the probability of causing death, the language of s. 18 concerning reckless indifference is echoed in s. 5. It is of significance that recklessness, a term taken from s. 5, is to be considered in the context of states of mind, which are treated as being equally culpable with common law malice, and particularly, an intent to injure.

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[41] *See also R v. Stokes & Difford* (1990) 51 A.Crim.R. 25; *Blackwell v. R* (2011) 81 NSWLR 118 at 134 [78] *per* Beazley JA (as her Honour then was); *Chen v. R* [2013] NSWCCA 116 at [34] *per* Button J.; and most recently in the Court of Appeal's judgment in *CB v. DPP* [2014] NSWCA 134 at [46] *per* Barrett JA.

[42] *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19 at [10] *per* French CJ, Kiefel, Nettle and Gordon JJ.

[43] *Banditt v. The Queen* (2005) 224 CLR 262 at 275 [36] *per* Gummow, Hayne and Heydon JJ.; *Rhodes v. OPO* [2015] 2 WLR 1373 at [84] *per* Lady Hale and Lord Toulson.

[44] *R v. BBD* [2007] 1 Qd.R. 478 at 489 [48] *per* Philip McMurdo J.; *see also La Fontaine v. The Queen* (1976) 136 CLR 62 at 76-77 *per* Gibbs J.

[45] (1985) 156 CLR 464 at 469-70 (references omitted) (emphasis added); *see also Boughey v. The Queen* (1986) 161 CLR 10 at 20 *per* Mason, Wilson and Deane JJ.

52. It is submitted that there is no reason to distinguish between recklessness in the case of murder, and recklessness in any other case. While, in *Coleman*, the Court of Criminal Appeal referred to a number of earlier decisions, which ostensibly lent support to the proposition that the question was one of foresight of a possibility, rather than a probability, such authorities, to the extent they might have held that the foresight of even a remote possibility was sufficient to make out recklessness, have been overtaken by this Court's reasoning in *Crabbe*.

53. In *Coleman*, the New South Wales Court of Criminal Appeal relied upon a number of bases for concluding that a lower threshold applied in respect of offences other than murder. However, an analysis of each basis demonstrates that the foundation of the Court's decision has all but evaporated.

54. Firstly, the Court reasoned that the "general acceptance" in Australia of the "possibility test" flowed from the decision of the English Court of Appeal in *R v. Cunningham* [1957] 2 Q.B. 396. However, it is submitted that the Court's acceptance of the proposition that not more than a foresight of harm was required for offences other than murder was, with respect, based upon a misconception of the decision in *Cunningham*.

55. It is submitted that the test in *Cunningham* is, in fact, two-pronged, and does not provide support for the proposition that a mere advertence to a risk of harm is sufficient to constitute recklessness. In *R v. Stephenson*[46], Lane LJ (as his Lordship then was) held: "A man is reckless when he carries out the deliberate act appreciating that there is a risk that damage to property may result from his act. *It is however not the taking of every risk which could properly be classed as reckless. The risk must be one which it is in all the circumstances unreasonable for him to take.*" Subsequently, in *R v. G*[47], the House of Lords expressed the test, in conformity with cl. 18(c) of the Criminal Code Bill annexed by the Law Commission to its Report "A Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill"[48] as follows:

> A person acts recklessly within the meaning of section 1 of the *Criminal Damage Act 1971* with respect to -
>
> (i) a circumstance when he is aware of a risk that it exists or will exist;
>
> (ii) a result when he is aware of a risk that it will occur;
>
> and it is, in the circumstances known to him, unreasonable to take the risk."

56. The appellant accepts that the Court in *Cunningham* did not expressly address the second prong, namely the unreasonableness of the risk-taking. For that reason, it has been said[49], "In one sense the definition in *Cunningham* is defective since it fails to make explicit that not only must D foresee the risk of the proscribed harm, but he must take it unjustifiably..." However, in more recent times, the English Court of Appeal has held that the definition of recklessness, set out in *Stephenson's case,* and now

[46] [1979] Q.B. 695 at 703F (emphasis added).
[47] [2004] 1 A.C. 1034.
[48] Law Com. No. 177, April 1989.
[49] Smith & Hogan, *Criminal Law* (14th ed. 2015) at 130 n.97.

accepted by the House of Lords in *G*, has wider application, which extends beyond just the section under consideration in *G*[50]. It appears also to have been accepted by the Court of Appeal, as applying to the offence of maliciously wounding, or inflicting grievous bodily harm, contrary to s. 20 *Offence Against the Person Act 1861*[51].[52] Therefore, it is submitted that, in *Coleman*, the Court of Criminal Appeal failed to take into account the second prong, which restricts, significantly, the ambit of the concept of recklessness.

57. In any event, it is a questionable approach to statutory interpretation, to import concepts of common law malice from England & Wales, when the common law had been replaced by an express statutory provision in New South Wales. Moreover, the probability versus possibility debate is not one, which has arisen in the English context, but is one, which is peculiar to Australia[53]. For those reasons, a cautious approach was required, before it could be said that the English authorities provided support for a possibility test.

58. Secondly, the Court in *Coleman* relied upon a series of Victorian decisions to conclude that, in that jurisdiction, foresight of a probability was required for murder, but foresight of a possibility was sufficient for all other offences. However, it could not be said that these authorities demonstrated a "general acceptance" of the proposition in Australia. For example, the Court of Criminal Appeal did not refer at all to South Australian authority, which adopted the probability test[54].

59. In any event, the proposition, for which *Coleman* stands, no longer has support from the Victorian authorities. As the Victorian Court of Appeal stated in *R v. Campbell*[55]:

> It cannot be supposed that the legislature intended that there be, or that the courts would interpret the relevant sections so as to produce, a different requirement concerning the extent of "the intent" with regard to each of those sections.
>
> It should also be said that the Crown cited a number of cases that favour the test of "might" or "possibility" over the "probability" test for intent. These are relatively old cases and concerning the now repealed offences of unlawful and malicious wounding or unlawful and malicious infliction of grievous bodily harm. The spirit of the decision in *Crabbe* indicates that such cases should not

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[50] *Attorney-General's Reference (No. 3 of 2003)* [2005] Q.B. 73 at 83H *per* Pill LJ; *see also Foster v. Crown Prosecution Service* [2013] EWHC 3885 (Admin.).

[51] *R v. Brady* [2006] EWCA Crim. 2413 at [15] *per* Hallett LJ; [2007] Crim. LR 564.

[52] The correspondence between the test accepted in *G* for recklessness, and that adopted in *Cunningham,* in respect of malice, has been affirmed in Judicial Studies Board, *Crown Court Bench Book* (2010) at 53.

[53] *See* Lord Irvine of Lairg LC, *Intention, Recklessness and Moral Blameworthiness: Reflections on the English And Australian Law of Criminal Culpability* (2001) 23 Sydney L.R. 5 at 18.

[54] *R v. Hoskin* (1974) 9 SASR 531 at 537; *Selig v. Hayes* (1989) 52 SASR 169 at 174 *per* Jacobs J. (dealing with the offence of unlawfully and maliciously wounding). This line of authority has been consistently followed since then, *see Laurie v. Nixon* (1991) 55 SASR 46 at 51 *per* Olsson J., *Gillan v. Police* (2004) 149 A.Crim.R. 354 at 358 [19] *per* White J.

[55] [1997] 2 V.R. 585 at 593 *per* Hayne JA (as his Honour then was) and Crockett AJA, *citing with approval R v. Nuri* [1990] V.R. 641. In the ACT, it would appear that the test of recklessness adopted in *Crabbe* has been applied to offences other than murder, *see R v. Barker* [2014] ACTSC 153 at [21] *per* Refshauge J. ("[R]ecklessness means that she was aware of the risk that the consequences, here the causing of damage, was likely to result but nevertheless committed the acts that caused the damage.").

be applied to the offence of recklessly causing injury. *Nuri* used a test of "probability" in a kindred section to this case and it must be the case that all relevant sections in the group bear the same interpretation

60. As this Court noted recently in *Zaburoni v. The Queen*[56], "To engage in conduct knowing that it will *probably* produce a particular harm is reckless." It is submitted that this is the appropriate test for all offences involving recklessness. There is a general importance attached to the mental element for criminal culpability.[57] However, the Court of Criminal Appeal in *Coleman* and its progeny have cast aside issues fundamental to the question of culpability. The formulation chosen by Hunt J. in *Coleman* supplants consideration of the nature of the consequence, as well as the extent of any risk, which the consequence might incur. These are matters, which bear necessarily upon the question of culpability. Instead, *Coleman* introduces the test of possibility, which is capable of being apprehended by the jury as meaning that the accused foresaw a consequence, regardless of how remote, theoretical, or hypothetical, such consequence might have been.

61. By analogy, in tort law, the risk associated with a negligent breach of duty must be a real one, and not too remote[58]. There, one is dealing with a probability, the content of which is sufficient for the attribution of responsibility. The mere possibility, to which Hunt J. referred in *Coleman,* and which has been taken up by the Court of Criminal Appeal below, imposes a standard for criminal liability significantly different to, and lower than, that imposed elsewhere, when considering the substitute for malice, i.e. s. 5 *Crimes Act 1900*, even though it appears to introduce an equivalence to malice.

62. In the Court below, Fagan J. held[59]:

> The appellant also submitted that even if the Court should continue to follow *R v. Coleman*, "that line of authority was not intended to encompass the recognition and disregarding [by an accused] of any and all possibilities of harm regardless of how remote. The requirement of malice is not satisfied by a realisation of a merely theoretical possibility of harm". The appellant contends that the learned trial judge should have directed the jury that "the requirement of recklessness is only satisfied where the accused treated the possibility of harm as a matter of reality".
>
> I do not consider that the requirement of proof that the accused had foresight of the possibility of the virus being transmitted to [redacted], in accordance with the line of authority commencing with *R v. Coleman*, called for any direction to the jury requiring them to distinguish between a "merely theoretical possibility" which may have been appreciated by the accused and a "possibility of harm as a matter of reality". "Possibility" is an ordinary English word of perfectly clear meaning.

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[56] (2016) 256 CLR 482 at 489 [10] *per* Kiefel, Bell and Keane JJ. (emphasis added).
[57] *Banditt v. The Queen* (2005) 224 CLR 262 at 267 [8] *per* Gummow, Hayne and Heydon JJ.
[58] *See simply Romeo v. Conservation Commission (NT)* (1998) 192 CLR 431 at 480 *per* Kirby J.
[59] *Aubrey v. R* [2015] NSWCCA 323 at [83]-[84].

63. It is submitted that this passage demonstrates how low is the threshold for criminal liability. Certainly, the word "possibility" is an ordinary English word, but it is one of considerable breadth. As has been noted, "Virtually anything is possible."[60]

64. For those reasons, it is submitted that the appropriate test requires foresight of a probability of harm. That is not to say that proof of foresight of a probability of harm requires that the prosecution prove beyond reasonable doubt that the accused thought it was more likely than not that the harm would occur. As this Court noted in *Boughey v. The Queen*, "[T]he meaning of the words 'probable' and 'likely' is liable to vary according to the context in which they are used"[61]. In this way, the concept of malice takes into account the extent and nature of the harm emanating from the risk posed by the accused's actions. Thus, the concept of recklessness acquires flexibility on the one hand but, on the other hand, also acknowledges that there must be a risk which, once adverted to, it is unjustifiable to take, as is now accepted to be the position in England, *cf.* also s. 5.4 *Criminal Code (C'th)*:

> (1) A person is reckless with respect to a circumstance if:
>
> (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
>
> (2) A person is reckless with respect to a result if:
>
> (a) he or she is aware of a substantial risk that the result will occur; and
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
>
> (3) The question whether taking a risk is unjustifiable is one of fact...

65. It is submitted that the Court of Criminal Appeal erred in holding that the learned trial judge's direction to the jury - namely, that it could be satisfied that the appellant acted recklessly, if it were satisfied that the appellant "did the act [realising] that some physical harm may possibly be inflicted upon [redacted] by his actions", was correct. This error was fundamental[62], particularly in view of his Honour's direction to the jury, that it could conclude that the appellant had "agreed that he had acted recklessly"[63].

66. In the present case, the evidence of the appellant was to the effect that he believed there was a "possibility", but he discounted that possibility because of the advice he had been given[64]. Therefore, there was clearly an issue as to whether, in the appellant's mind, the risk of infection was a real and substantial one, or instead, was

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[60] *Darkan v. The Queen* (2006) 227 CLR 373 at 418 [153] *per* Kirby J.
[61] (1986) 161 CLR 10 at 20 *per* Mason, Wilson and Deane JJ., *citing with approval inter alia Tillmanns Butcheries Pty. Ltd. v. Australian Meat Industry Employees' Union* (1979) 42 FLR 331 at 346-47.
[62] *Paton v. R* [2011] VSCA 72 at [49] *per* Tate J. (Nettle JA (as his Honour then was) and Neave JA agreeing).
[63] SU32.
[64] *See* T573, l. 3 - T574, l. 10.

merely theoretical. Yet the trial judge's comment to the jury, concerning the appellant's evidence, effectively removed this issue from the jury's consideration. The passage in evidence, which was treated by the learned trial judge as if it were an admission of the element of recklessness, was not to be understood as such.

67. The mathematical probability of the communication of the disease turned on the frequency of unprotected sex, the mode of sexual contact employed, the viral load of the accused at the time, and the immunity or resistance of the accused's partner.

10 68. The direction given by Marien SC DCJ was significantly in error. It removed from the jury's consideration those matters, which might have inflected the jury's assessment of the necessary degree of risk, to which the accused must have adverted, before he could be held to be culpable by reason of recklessness. In conclusion, it is therefore submitted that it was incumbent upon the learned trial judge to direct the jury that a finding of recklessness depended upon its satisfaction that the appellant had foreseen a probability of harm to the complainant.

Part VII: Relevant materials

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69. The relevant statutory provisions are set out verbatim in Annexure A (attached).

Part VIII: Orders sought

70. The following orders are sought:

(a) An order that the judgment and orders of the Court of Criminal Appeal of
30 New South Wales be set aside, and in their place

(b) An order that the appeal to the Court of Criminal Appeal of New South Wales be allowed and the appellant's conviction quashed; and

(c) An order

(ii) directing that a judgment and verdict of acquittal be entered; or, in the alternative,

40 (iii) that a re-trial be had.

Part IX: Estimate of Time

71. The appellant estimates approximately 90 minutes will be required to present his argument.

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Dated: 21 December 2016

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**IN THE HIGH COURT OF AUSTRALIA**
**SYDNEY REGISTRY**

No. S274 of 2016

BETWEEN:

**M A**

Appellant

and

**THE QUEEN**

Respondent

## STATUTORY PROVISIONS

Crimes Act 1900 (NSW) (as in force on 5 January 2004)

**s. 4 Definitions**

(1) In this Act, unless the context or subject-matter otherwise indicates or requires:

...

*Grievous bodily harm* includes any permanent or serious disfiguring of the person.

...

**s. 5 Maliciously**

*Maliciously*: Every act done of malice, whether against an individual or any corporate body or number of individuals, or done without malice but with indifference to human life or suffering, or with intent to injure some person or persons, or corporate body, in property or otherwise, and in any such case without lawful cause or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient in the crime.

**s. 18 Murder and manslaughter defined**

(1)

(a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or

done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

(b) Every other punishable homicide shall be taken to be manslaughter.

(2)

(a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.

(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.

**s. 33 Wounding etc. with intent to do bodily harm or resist arrest**

Whosoever:

maliciously by any means wounds or inflicts grievous bodily harm upon any person, or

maliciously shoots at, or in any manner attempts to discharge any kind of loaded arms at any person,

with intent in any such case to do grievous bodily harm to any person, or with intent to resist, or prevent, the lawful apprehension or detainer either of himself or herself or any other person, shall be liable to imprisonment for 25 years.

**s. 35 Malicious wounding or infliction of grievous bodily harm**

(1) Whosoever maliciously by any means:

(a) wounds any person, or

(b) inflicts grievous bodily harm upon any person,

shall be liable to imprisonment for 7 years.

(2) A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in the company of another person or persons. A person convicted of an offence under this subsection is liable to imprisonment for 10 years.

**s. 36 Causing a grievous bodily disease**

A person:

(a) who maliciously by any means causes another person to contract a grievous bodily disease, or

(b) who attempts maliciously by any means to cause another person to contract a grievous bodily disease,

with the intent in any such case of causing the other person to contract a grievous bodily disease, is liable to imprisonment for 25 years.

**s. 344A Attempts**

(1) Subject to this Act, any person who attempts to commit any offence for which a penalty is provided under this Act shall be liable to that penalty.

(2) Where a person is convicted of an attempt to commit an offence and the offence concerned is a serious indictable offence the person shall be deemed to have been convicted of a serious indictable offence.

Crimes Act 1900 (upon amendment by the *Crimes Amendment Act 2007*, which relevantly commenced on 15 February 2008)

**s. 4 Definitions**

(1) In this Act, unless the context or subject-matter otherwise indicates or requires:

...

*"Grievous bodily harm"* includes:

(a) the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm, and

(b) any permanent or serious disfiguring of the person, and

(c) any grievous bodily disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease).