IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S274 of 2016

BETWEEN:

MICHAEL AUBREY (MA)
Appellant

and

THE QUEEN
Respondent

10 **APPELLANT'S REPLY**

Part I: Publication

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

Part II: Argument

2. In response to [14] of the respondent's submissions, it was the appellant's argument in the Court of Criminal Appeal – which argument is still asserted – that s. 35 and s. 5 *Crimes Act 1900* were to be considered in the light of the Imperial provisions and
20 decisions. This included the decision in *R v. Clarence*[1], which had been considered as governing the law in New South Wales since 1888. The history of the New South Wales legislation is to be found in short form in the introduction to Sir Alfred Stephen's *Criminal Law Manual*, which refers to the imperial acts of 1861, their predecessors, and the recommendations of the Royal Commissioners, which resulted in the *Criminal Law Amendment Act 1883*.

3. The 1883 Act was not merely a consolidating act, but rather, as referred to in the *Criminal Law Manual*[2], was an amending act, based on a review of the aptness of all statutory, criminal law affecting liability for personal injuries. Section 7 replaced and
30 redefined the common law concept of malice arising out of "a wicked, depraved and malignant heart"[3]. The s. 5 (previously s. 7) definition of "maliciously" required the relevant act to be done "without lawful cause or excuse", even if intended or done "with indifference to human life or suffering or with intent to injure". The absence of lawful cause or excuse is a reference to the onus on the prosecution to prove the unlawfulness or lack of excuse. It is submitted that the same must apply where the act is done "recklessly" or "wantonly", i.e. the asserted reckless act must be proved to have been unlawful. It is not to be contemplated that the section was to make unlawful acts otherwise lawful in which the possibility of harm had been contemplated. It has never been suggested that s. 5 should be construed as extending so far. It is submitted
40 that, in respect of s. 35, the unlawfulness would be fulfilled, only where the relevant act amounted to an assault, or was otherwise unlawful, and thus involving a direct, or

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[1] (1888) 22 Q.B.D. 23.
[2] *See* the introduction, the notes, and, in particular, the appendix concerning homicide.
[3] 4 Blackstone, *Commentaries* 199.

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at least a not too remote, application of force; and advertence to the prospect of grievous bodily harm.

4. Until the decision of the Court of Criminal Appeal, *Clarence* had stood for well over a century. Although it had not been affirmatively upheld by superior courts in New South Wales, it cannot be said this was because there had been any disagreement with the majority view, as apparently suggested by the respondent[4]. Rather, the majority's view had, for all those years, governed the approach to prosecutions, in circumstances to which it was applicable, in New South Wales. The majority's views are consistent with the ordinary meaning of the words "inflict", and of the ordinary concept of recklessness, so far as it is to be considered as involved in the statutory definition of "maliciously". The minority view, including that of Hawkins J., that "inflict" is equivalent to "cause", did not, and does not, reflect the ordinary use of language. The word is not a word of specialist legal meaning.

5. The respondent's submissions ultimately advocate that the word "inflict" ought to be construed as meaning, "to impose something that must be borne or suffered" or "to impose (anything unwelcome)"[5]. The basis of this submission would appear to be the citation by the Court of Criminal Appeal, of one of the modern dictionary definitions of one of the meanings of "inflict", as though it were the ordinary meaning of the term[6]. However, to do so disregards the danger of attempting to equate one dictionary definition – amongst a number of dictionary definitions – with a legal concept. That is not a proper approach to statutory interpretation. "Dictionary definitions may assist in identifying the range of possible meanings a word may bear in various contexts, but will not assist in ascertaining the precise meaning the word bears in a particular context. As much was recognised by a unanimous High Court (and earlier by Learned Hand J) in *Thiess v Collector of Customs*… when observing that a mature and developed jurisprudence does not 'make a fortress out of the dictionary'"[7].

6. The introduction of s. 5 (previously s. 7) plainly contemplated that the word "inflict" (not the same word as "cause") would be read more narrowly. Section 35, read in conjunction with s. 5, was never intended to mean that an accused was liable, if he or she imposed something unwelcome on another, adverting to the possibility that some harm of more than a transient nature (including psychological distress) might be occasioned by reason of that other person's acquiescence in an act, unlawful on the basis that acquiescence has been obtained by a collateral false statement said to vitiate consent.

7. It is submitted that s. 5 required unlawfulness to be established, otherwise than by the reckless inflicting; and that relevant recklessness requires at least some such qualification to the concept of possibility as requires advertence to the degree of risk, or the seriousness of any consequence. Such a concept is better to be described as probability. Advertence to a possibility would disregard the necessity to look at the degree of risk, or the seriousness of any consequence.

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[4] At [30].
[5] Respondent's written submissions at [42].
[6] *R v. Aubrey* (2012) 82 NSWLR 748 at 759 [52] *per* Macfarlan JA (**AB 26**).
[7] *TAL Life Ltd. v. Shuetrim; MetLife Insurance Ltd. v. Shuetrim* (2016) 91 NSWLR 439 at 457-58 [80] *per* Leeming JA, *quoting with approval Thiess v. Collector of Customs* (2014) 250 CLR 664 at 672 [23].

8. In any event, there can be no suggestion that the act of intercourse had been rendered unlawful by reason of some such doctrine as that in rape by a trick[8]. Whatever representation was made by the appellant, whether by omission or otherwise, neither the nature of the act, nor the relationship, was in any way misstated.

9. The amendments to the *Crimes Act 1900,* effected by *Crimes (Injuries) Amendment Act 1990,* were introduced, specifically, to deal with the intentional communication of diseases, as can be seen by the very terms of s. 36, which required proof of intent. The legislature did not see fit to change s. 35, even though, in the Second Reading Speeches, the effect of *Clarence* was specifically adverted to. There is nothing in the extrinsic materials affecting the settled interpretation of s. 35. If the law in Australia were to be changed, it should have been changed by legislation.

10. It is submitted that neither *R v. Dica*[9] nor *R v. Wilson*[10] shows a sufficient basis for adopting a new meaning of such dramatic difference. Whatever may be the applicability of those decisions to the United Kingdom, the meanings that they attributed to the English provisions cannot be said to justify a reinterpretation of s. 35, where the legislature had chosen to introduce a specific offence of intentional communication, but chose not to alter the terms of s. 35, nor the s. 5 definition, nor the definition of grievous bodily harm[11]. In those circumstances, "contemporary ideas"[12] could not warrant an overturning of the decision in *Clarence*. It is not open to assert that *Clarence* has not been applied in New South Wales. It has been unquestioned; and it is recognised as having effect, even in the parliamentary speeches.

11. Contrary to the submissions of the respondent[13], the decision of *R v. Salisbury*[14] in no way undermines or overturns *Clarence*. To suggest otherwise ignores the analysis of the Victorian Full Court and, in particular, its reliance upon the reasoning of Wills J., as well as the earlier authority of *R v. Martin*[15], the judgment in which was delivered by Coleridge LCJ, who also formed part of the majority in *Clarence*.

12. *Clarence* was, of course, a decision of the Court of Crown Cases Reserved. The majority decision would have been considered to be binding in New South Wales, and, even if it is not now to be considered as being binding, it was to be followed, unless shown to be patently wrong.

13. The respondent seeks also to diminish the precedential importance of the decision in *Salisbury*. The respondent contends that the Court's statement that the expression "inflict" includes an act, which, although not itself a direct application of force, does directly result in force being applied, did not form part of the *ratio decidendi*. It is submitted that this is a misunderstanding of the Court's reasoning. On the basis of its

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[8] *Cf. Papadimitropoulos v. The Queen* (1957) 98 CLR 249.
[9] [2004] Q.B. 1257.
[10] [1984] A.C. 242.
[11] This stands in contrast to the position that came into effect upon the passing of the *Crimes (Amendment) Act 2007*. The definition of "grievous bodily harm" in s. 4 *Crimes Act 1900* now includes "(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."
[12] *Cf. R v. Dica* [2004] Q.B. 1257 at 1265 [28] *per* Judge LJ (as his Lordship then was).
[13] At [22].
[14] [1976] V.R. 452.
[15] (1881) 8 Q.B.D. 54.

analysis of the English authorities, the Court concluded that an assault was not an alternative to the offence of inflicting grievous bodily harm. The reason for this conclusion was precisely because grievous bodily harm could be inflicted *either* by an assault *or* because of some other act, which results in force being applied directly to the body of the victim. Thus, this aspect was central to the Court's reasoning, and, therefore, this formed part of the *ratio*.

14. The reference in the respondent's submissions[16] to the offence under s. 39 *Crimes Act 1900* appears to turn on the suggestion that the administration of poison is not a direct application of force; and nor is the causing of a person to flee, whereby he or she sustains injury[17]. One does not "inflict" poison or fear; and yet, both poison and the immediate threat of harm can be said to be such an application of force so as to amount to an assault.

15. Additionally, the respondent argues[18] that because "a grievous bodily disease may not necessarily manifest as grievous bodily harm, this overlap does not render s. 36 superfluous." This submission, however, sits uneasily with the English authorities, upon which the respondent places considerable reliance. The very basis of the Court of Appeal's reasoning in *Dica* is that a serious disease may, itself, amount to grievous bodily harm. Notably, the Court did not uphold the appellant's convictions on the basis that the injuries suffered by the victims, namely thrush and swollen glands, themselves amounted to grievous bodily harm.

16. The terms "possibility" and "probability" notoriously embrace a wide range of differing concepts. Assuming that the relevant possibility must be a real, and not merely hypothetical, possibility, and that both terms consistently relate to "risk", i.e. "taking a chance", it is nowhere in the criminal law intended that the mere fact that something in the universe might possibly occur, and that advertence to that fact has occurred would allow a finding of recklessness being a substitute for malice or intent. The concept of recklessness involves foresight of some degree of probability. That embraces the idea that at least some degree of possibility will be necessary. The extent of that may need to be defined by the possible consequence, that is, the nature of the risk, and the likelihood that consequences will occur (the extent of the risk). To talk simply about possibility without qualification does not accord with *Zaburoni v. The Queen*[19], i.e. an advertence to a particular kind of risk, to the extent of awareness, and the likelihood of the risk materialising[20]. This is what underlies this Court's observations in *R v. Crabbe*[21].

17. The distinction between s. 35 recklessness, as defined by s. 5, i.e. "without malice but with indifference to human life of suffering or with intent to injure some person… and without lawful cause or excuse or done recklessly", and "reckless indifference" in accordance with s. 18 is that s. 35 points to the consequence of possible grievous bodily harm, rather than possible death. At common law, as this Court observed in

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[16] At [34].
[17] *See Royall v. The Queen* (1990) 172 CLR 378.
[18] At [37].
[19] (2016) 256 CLR 482 at 489 [10] *per* Kiefel, Bell and Keane JJ.
[20] The "line of division between probability and the possibility" as well as the ambit of the expression "may well happen" were considered by the New South Wales Court of Criminal Appeal in *R v. Annakin* (1988) 37 A.Crim.R. 131 at 152.
[21] (1985) 156 CLR 464 at 469.

Crabbe, reckless indifference to the occasioning of grievous bodily harm could support a charge of murder. It would be unusually inconsistent, if the consequence of death were to redefine the mental element of recklessness, particularly since the changes effected by the *Criminal Law Amendment Act 1883* were intended to move away, not only from constructive, or implied, malice, but also to limit recklessness in murder to there being a risk of death. The introduction of s. 5 (previously s. 7) was not designed, only to limit the ambit of malice, but was designed to include also the actual advertence to a real risk of particular harm, where the person concerned has an awareness of a "significant", i.e. real and of substance, not merely fanciful or hypothetical, likelihood of the risk materialising, but still engaging in the conduct.

18. The decision in *R v. Coleman*[22] does not accord with the decision in *R v. Cunningham*[23]. Inherent in the word "might" is an ambiguity. In Australia, at least in accordance with the second stem of the rule expressed by Lord Diplock in *R v. Caldwell*[24], the application of *Coleman* would seem to have accepted that there had to be an actual recognition of some real, and not fanciful, risk; and that the possibility of that risk eventuating is sufficiently reasonable, as to have some degree of probability, rather than to be fanciful. The concept of recklessness is not designed to have the accused found guilty on an objective test, and particularly not on the basis of the jury, with hindsight, assessing the nature and extent of the risk, in contrast to the accused doing so at the relevant time. *Coleman,* at the time it was decided, did not deal with those questions, nor has the issue otherwise been thrown up until this case.

19. *Crabbe,* and the cases adverted to by the respondent,[25] all accept that, as a matter of principle, the degree of foresight necessary for the blameworthiness of someone, who does an act with the foresight of the probability of harm, is equivalent to that of the person, who actually intends such harm. No such logic applies to a possibility. The respondent's argument[26] seeks to distinguish between the logical relationship of the accused's mental state to the consequence. The argument does so on the basis that murder is, somehow, logically different to the occasioning of grievous bodily harm, even though the intent to cause grievous bodily harm, or recklessness as to which can, at common law, be a sufficient intentional state for murder. Yet it is said that the concept of recklessness requires some different mental state, where death does not result. It is only where foresight of the probability of harm is present that the offender's state of mind is comparable to that of an offender, who intends to kill, or inflict grievous bodily harm.

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[22] (1990) 19 NSWLR 467.
[23] [1957] 2 Q.B. 396.
[24] [1982] A.C. 341 at 354F.
[25] At [59].
[26] At [59] *et seq.*