

## APPENDIX II – ISSUES CHECKLIST

### 1 PRELIMINARY OFFENCES

#### 1.1 Abetting suicide

- No longer illegal (*Crimes Act* s 6A)
  - However, it is an offence to aid or abet suicide
  - A will be guilty of manslaughter (s 6B(2)(b))

#### 1.2 Culpable driving

- If A causes death, he could be charged under s 318 of the *Crimes Act*
  - If A causes serious injury, use s 319 instead
- If P is successful, A will be liable to level 3 imprisonment
- P must establish one of the following mental standards
  - Recklessness? (s 318(2)(a))
    - Did A 'consciously and unjustifiably' disregard a 'substantial risk' that the death of another or the infliction of grievous bodily harm upon another may result from his driving?
  - Negligence? (s 318(2)(b))
    - Did A fail 'unjustifiably and to a gross degree' to observe the standard of care which a reasonable man would have observed in all the circumstances?
    - *Shields*: this standard is the same as that for negligent manslaughter
  - Intoxication? (s 318(2)(c))
    - Was A under the influence of alcohol such as to be 'incapable of having proper control of the vehicle'?
    - Drugs: s 318(2)(d)
- A can also be charged under s 24 (negligently causing serious injury)
  - Did A's negligent driving cause serious injury to V?

#### 1.3

## 2 HOMICIDE

### 2.1 Preliminary issues

#### 2.1.1 Death

- ❑ Was the victim alive to begin with?
  - Foetus needs independent existence from mother (*R v Hutty*)
  - A foetus that dies after delivery because of injuries caused by the accused was legally alive (*R v West*)

- ❑ Is the victim legally dead? (*Anthony Bland*)

**Rule:** If artificial feeding is withheld from a victim who is unable to live independently of the artificial device, and if, only by virtue of this abnormal dependency, the victim dies, then the accused will not be guilty of homicide because the victim was neither human nor legally 'alive'.

- Is the victim 'an example of a living death'? (may be dead)
- Law of homicide chiefly protects sanctity of the 'living', but qualified by principle of self-determination (autonomy, separate and independent existence)
- Act in the best interests of the patient, considering quality of life as determined by doctors
- The most that can be done is to *discontinue* life support
- Law would not condone killing by intervention

#### 2.1.2 Age

- ❑ Children under 10: incapable of committing a crime (*Children and Young Person's Act 1989* (Vic) s 127)
- ❑ Children between 10 and 14: prima facie incapable under *doli capax* rule but rebuttable by the prosecution
  - Prosecution must show moral knowledge of the wrongfulness of act (*Veneballs & Thompson v Balurer*)

#### 2.1.3 Sanity

**Rule:** burden of proof rests upon the defendant to prove insanity *beyond reasonable doubt* (plea of 'unfit to plea')

#### 2.1.4 Jurisdiction

- ❑ *Crimes Act* s 9: where the act partially occurs in one jurisdiction, accused can be prosecuted as though the prohibited outcome occurred entirely in that jurisdiction
  - Applied in *DPP v Sutcliffe*

## 2.2 Voluntariness

- ❑ The act which causes death must be proved by the prosecution to be a voluntary act (*Ryan* per Barwick CJ)
  - Assess the sequence of acts leading up to the act causing death (*Ryan* per Windeyer J)
  - The act must be willed (but consequence need not be intended)
  - 'Will' is just the particular bodily movement
  - Does not require consciousness (*Murry & Ugle*)
- ❑ Even if final act a reflex action, if the series of acts leading to it are voluntary, final act will be voluntary (*Ryan* per Windeyer J)
- ❑ Alternatively, recharacterise the relevant act as one prior to the reflex (*Ryan* per Barwick CJ)

## 2.3 Causation

**Rule:** the prosecution must prove beyond reasonable doubt that A's voluntary act was the cause V's death.

### 2.3.1 Introductory considerations

- ❑ Identify the relevant conduct by A
- ❑ Is it an act of omission?
- ❑ A may seek to deny causal responsibility for the prohibited consequence on the basis that X is not the legal cause V's death

### 2.3.2 Operating and substantial cause

**Rule:** there must be a factual link between A's act and V's death.

- ❑ Is A's act a factual cause of V's death? (*Hallett*)
  - 'Operating': but for A's act the victim would not have died
  - Factual causation to be determined by common sense (*Royall*)

- Need not be the sole cause of death to be operating
- Foresight of the accused completely irrelevant

**Rule:** for liability to attach to A's act it must be a substantial cause of V's death.

- ❑ If there are multiple factual causes, is A's act the 'substantial' (ie, legal) cause of death? (*Royall*)
  - Consider whether subsequent acts break the chain of causation
  - Is there a subsequent cause 'so overwhelming' as to 'overtake' A's conduct as the legal cause of V's death (*Evans & Gardiner (No 2)*)?
  - See [2.3.5]

### 2.3.3 Natural consequence

**Rule:** where V is injured trying to escape from A, A will be liable for V's injury if it was a natural consequence of A's conduct (*Royall* per Mason CJ). Arguably similar to the test applied by McHugh and Brennan JJ; here, mental element is implicit.

- ❑ Did A induce in V a 'well-founded apprehension' that A was going to inflict physical harm?
  - V's apprehension of harm must be reasonable
  - What did A do that could induce apprehension?
    - *Royall*: verbal and physical abuse prior to imprisonment
    - A had hit V, possibly with an ashtray
    - A had been in the bathroom
    - A had been banging on the door
    - History of domestic violence in the relationship
- ❑ Was it a 'natural consequence' that V would try to escape from A?
  - Was it a 'very likely thing to happen' (*Beech*; affirmed *Royall* per Mason CJ)?
  - Was the mode of escape reasonable (ie, was it proportional to A's act)?
    - If irrational, might sever the chain of causation
    - *Royall*: jumping out window proportional to assault
    - *Fagan*: jumping out of moving car proportional to rape
  - V cannot be expected to make a 'sound or sensible' judgment in the circumstances (*Royal* per McHugh J)
  - Was this the only mode of escape (windows in *Royall*, since A was approaching from the door)?

### 2.3.4 Reasonable foresight of consequence

**Rule:** where there is an intervening act of V or a third party, A will be liable for the consequences if the event is 'reasonably foreseeable' (*Royall* per McHugh and Brennan JJ).

- Was the intervening act 'reasonably foreseeable' by someone in A's circumstances?

### 2.3.5 Intervening events

**Rule:** if a new intervening act supersedes A's act as the substantial cause of death, A will not be liable for the consequence. Having identified a potentially severing act, consider [2.3.3] (act of victim) and [2.3.4] (.).

#### 2.3.5.1 Medical treatment

- Is it 'palpably bad' or 'abnormally wrong'? (*Jordan*; affirmed *Smith*)
  - If so, it will break the chain (*Jordan*)
  - Cf *Evans & Gardiner (No 2)*: medical treatment, 'however inept or unskilful', is *not* the cause of death (negates *Jordan, Smith*)
- Ask whether A's act is still a substantial cause of the death; if so, then A is the legal cause of death

#### 2.3.5.2 Natural events

- Is it an 'exceptional' or regular natural event?
  - Will only break chain when 'freak act' of nature
  - If V's death is a normal or 'natural' consequence of A's act, the act of nature will not break the chain
  - *Hallett*: actions of the tides not intervening act

#### 2.3.5.3 Acts of a third party

- Is the intervening act voluntary? (*Padgett*)
  - If yes, potentially breaks chain (but not sufficient)
  - Ask whether it is the new (substantial) cause of death (*Royall*)
  - Examples:
    - *Padgett*: police returning fire an instinctive response and therefore involuntary (does not break chain)
    - *Wilson*: initiating violent confrontation a substantial cause of death even where another party contributes to the violence

### 2.3.5.4 Acts of the victim

- ❑ Is the intervening act voluntary? (*Padgett*)
  - If yes, will break the chain unless one of the following exceptions applies (*Royall*)
- ❑ Fright and self-preservation (was V's escape a natural consequence of A's conduct?)
  - *Stephenson*: prostitute raped, overdoses on drugs to remove pain caused by A; causally responsible
  - *Lewis*: V suicided after the A inflicted lethal wound to avoid painful death; causally responsible
- ❑ Does the act relate to the person or body of V?
  - A must take the V as he finds her (*Blaue; Moffat*)
  - Includes religious beliefs or other 'idiosyncrasies'
  - *Blaue*: refusal to undergo treatment on the basis of religious belief does not break chain because not truly voluntary
    - It would be paradoxical to expect V to stop being herself in order to save herself
- ❑ Did V commit suicide?
  - Does not break chain where A's conduct still an operating and substantial cause of death (*Royall*)
  - If V is insane and insanity caused by A, A causally responsible (*Latham*)

## 2.4 Mental state

### 2.4.1 Intent

**Rule:** P should attempt to prove BRD (*Woolmington*) that A acted with *knowledge* that at least the *virtually certain* result of X is the death or GBH of X (*Hancock & Shankland; Woollin*).

- ❑ Did A make any admissions or confessions from which an inference of intent can be made?
- ❑ Did A intend the consequence of X to be death or GBH?
  - Precise manner of inflicting injury need not be intended; just consequence (*Woollin*)

- ❑ Did A originally intend to kill someone else?
  - If so, the doctrine of transferred malice may apply
  - A will still be liable for death of new V (*Saunders & Archer*)

#### 2.4.2 Recklessness

**Rule:** to be guilty of murder, P must at least prove BRD that A had subjective foresight that the probable result of X would be death or GBH but nevertheless ran that risk (*Crabbe*).

- ❑ Did A foresee death/GBH as a probable consequence of X?
  - 'Substantial', 'real and not remote chance' (*R v Boughey*)
  - 'More likely than not' (*R v Windsor*)
  - Not a matter of mathematical probability (*Faure*)
  - Relevant factors:
    - Kind of weapon being used by A to bring about death
      - Sawn off or modified for the purpose (*Pemble*)
      - Cocked and loaded (*Pemble*)
      - Finger on trigger (*Pemble*)
      - Pointed at V (*Moloney*)
      - Any intrinsic characteristic that makes it dangerous
    - Circumstances in which A acted
      - People in vicinity (*Crabbe*)
      - Belief as to where block will fall (*Hancock*)
      - Extent of strangulation during sex (*Boughey*)
      - Status of the firing chamber in a game of Russian roulette (*Faure*)
      - Level of light (*Pemble*)
      - Sneaking up on victim (*Pemble*)
- ❑ Can A's subjective knowledge of probability be inferred from the facts/A's conduct? (*Parker*)
  - Construct two counter-narratives using facts
  - Ultimately question of fact for the jury, but seems likely/unlikely that this will be found on the first/second construction of the factual narrative
- ❑ Was A acting in wilful blindness?
  - Did A's 'failure to make enquiries' about X preclude foresight of the probability of death/GBH?
  - If it did, this is not fatal to P's case – deliberate abstention from enquiry might be evidence of knowledge (*Crabbe*)
  - Closing mind to risk of X may indicate that he realises there is a risk in respect of its eventuation (*Caldwell*)

- Just another evidentiary factor from which the jury may draw an inference of recklessness (*Crabbe*)

### 2.4.3 Constructive murder

**Rule:** if P cannot establish intent or recklessness to the requisite degree, it may also be possible to convict A under s 3A of the *Crimes Act*, which does not require a subjective mens rea.

- ❑ Did V die during the course of A's furtherance of a 'violent crime'? (*Butcher, Ryan*)
  - Is there a link between act of violence and death? (*Ryan*)
  - Is the crime an indictable offence punishable by >10 years?
  - Is violence an 'essential part of the definition'? Examples:
    - Aggravated burglary (s 77)
    - Intentionally causing serious injury (s 16)
    - Using a firearm to resist arrest (s 29)
    - Setting traps to kill or cause serious injury (ss 25-6)
- ❑ Can the elements of the original offence be proven?

### 2.4.4 UDA manslaughter

**Rule:** if P cannot establish BRD that A acted with intent or recklessness, it may be possible to secure conviction on the basis of an UDA causing death (*Wilson*).

- ❑ Was A's conduct unlawful?
  - P must prove BRD that A's conduct amounts to a criminal act (*Pemble*)
  - Is it an assault? (cf *Lamb*)
    - *Lamb*: A pointing gun at V, V thought it was a joke, V killed; no assault (no apprehension of imminent violence); no UDA
  - Is it a summary offence? (*Wilson*)
  - Can the conduct be constructed as unlawful?
    - *Cato*: injection of an illegal drug causes death; UDA
  - Must be an act, not an omission (*Lowe*)
- ❑ Was A's conduct dangerous such that a reasonable person in the position of the accused would foresee an appreciable risk of serious injury?
  - P must prove that a reasonable person in A's position would foresee an 'appreciable risk of serious injury' as a result of A's U act (*Wilson*)
  - No idiosyncrasies relevant (no intoxication); ask in respect of 'all sober and reasonable persons' (*Newbury*)



- A 'mere threat of force' may not be dangerous – assault (*Chai*)
  - P will seek to characterise the unlawful act as dangerous
  - Look at circumstances in which A acted – appreciable risk?
    - Doesn't have to cause 'really' serious injury (*Wilson*)
    - Did it 'expose the deceased to injury'? (*Wilson* per Brennan, Deane and Dawson JJ)
    - Strong normative component to dangerousness assessment
  - Examples of UDAs:
    - Robbery or burglary
    - Unlawful wounding
    - Unlawful administration of a noxious substance (*Cato*)
    - Discharging firearm in a public place (*Pemble*)
- ❑ Did A intend to do the UDA?
- To establish the MR, P must prove BRD that A intended to do X
  - A need not know that the act is unlawful or dangerous (*Wilson*)
  - Just need subjective awareness of circumstances making it dangerous and intent to carry out the act; need not advert to consequences or risks (*Wilson*)

If P is unsuccessful in securing a guilty verdict in respect of UDA manslaughter because the act was not dangerous, it may still be possible to prosecute for negligent manslaughter.

#### 2.4.5 Negligent manslaughter

**Rule:** if UDA manslaughter cannot be established, P can argue on the basis of *Nydam* that in doing X A is criminally negligent.

- ❑ Did A's conduct breach the standard of care required by law?
- A's conduct falls short of the required standard if a reasonable person would have realised that there was a 'high risk' of death/GBH resulting from X (*Nydam*)
  - 'Probability' → 'High risk' → 'appreciable risk'
- ❑ Did A's conduct involve such a high risk of death/GBH that it merits criminal punishment?
- A's conduct must constitute 'such a falling short' of the standard of care required by law, and involve 'such a high risk' that death/GBH would follow X that it merits criminal punishment (*Nydam*)
  - Was X 'culpable', 'gross' or 'wicked', showing disregard for life and safety? (*Bateman*)
  - Need more than breach of a civil standard (*Andrews*)
  - Culpable driving:

- *Shields*: degree of negligence same as for manslaughter
- Cf *Andrews*: lower threshold required

Even if P cannot establish criminal negligence, it is likely that a non-fatal reckless endangerment offence will apply.

#### 2.4.6 Manslaughter by omission

**Rule:** P may allege that A's failure to do X constitutes manslaughter by omission (*Tak Tak*).

- ❑ Was A's failure to do X the cause of V's death?
  - See [2.3]
- ❑ Was A under a duty to act?
  - A will note that he is under no general duty to take positive action (*Shephard*)
  - P must categorise the failure as one covered by a recognised relationship of care
    - Civil duties: by statute or contract
      - Eg, employment contract (*Lowe*)
    - Status relationship between A and V
      - Eg, parent-child (*Russell*: to save A's child from drowning)
      - No husband-wife duty (*Russell*)
      - *Smith*: no duty to call doctor when wife ill
    - Voluntary assumption of care
      - Making efforts to care (*Stone & Dobinson; Tak Tak*)
      - Placing V in a position where others can no longer help her (*Tak Tak*)
      - *Tak Tak*: duty arises after taking overdosed V off street, denying her the chance to be rendered aid by passing strangers; however, no 'mere negligence' here insufficient for manslaughter
      - Creating a dangerous situation (*Miller*: starting a fire)
- ❑ Is A's failure criminally negligent?
  - Apply *Nydam* [2.4.5]
  - 'Grossly negligent' failure to obtain medical care (*Stone & Dobinson*)
  - A's failure to care for V because too poor to provide food insufficiently 'wicked' to be negligent (*Nicholls*)
  - Relevant factors:

- Nature of efforts to care (*Tak Tak*: finding a doctor, *Ston & Dobinson*: nothing)
- V's chances of being helped by others (*Tak Tak*: reduced)
- Duration of time in which V in A's care (*Tak Tak*: too short)
- A's awareness of V's situation (*Tak Tak*: not wholly aware)

### 2.4.7 Temporal coincidence

**Rule:** A's voluntary act causing V's death must coincide with his possession of the prohibited mental state.

- ❑ Did A possess MR at beginning of course of conduct?
  - It can be formed during the course of conduct (*Fagan*)
- ❑ Did A possess MR at the time he performed the act causing death?
  - If A possessed MR at the outset of a series of acts, AR can be constructed as a series of connected acts (*Thabo-Meli*)
  - If, however, MR formed after V dead, will not be murder
- ❑ Examples
  - *Fagan*: A drives on foot of police officer with no intention to injure, but stayed still when police yelled to get off
    - MR formed during course of conduct, so guilty
  - *Thabo-Meli*: the As get V drunk, hits him on head with intent to kill him; in fact, only unconscious; As throw 'body' off a cliff, at the base of which V dies from exposure
    - As' conduct was a 'single continuum' of acts leading to death
    - MR possessed at outset, so guilty
  - *R v Miller*: A falls asleep while smoking, wakes up to find house on fire, but walks to another room and returns to sleep
    - Possessed MR during relevant omissions causing the result, so guilty

## 2.5 Defences

### 2.5.1 Provocation

**Rule:** A may argue that V's death was a result of provocative conduct such as to cause him to lose self-control. If A can raise prima facie evidence of provocation, it may be left to the jury. This will require P to disprove the elements of the defence BRD (*Masciantonio*).

- ❑ Did A have prior intent to kill V?
  - If yes, provocation will not disturb prior intention (*Parker*)
  - There must be a sui generis provocative act (*Parker*)

### 2.5.1.1 Provocative conduct

- ❑ Was there provocative conduct? (*Stingel; Masciantonio*)
  - Need not be illegal or wrongful, but must trigger the loss of self-control (*Masciantonio*)
  - Words
    - Prima facie, mere words are insufficient evidence of provocation (*Holmes*)
    - Must be of a 'violently provocative' character (*Moffa*)
    - Of an 'exceptional' nature (*Parker*)
    - Consider as part of the context of V's acts (*Kumar* per Eames JA)
    - Consider social/racial context (*Camplin*)
  - Adultery/sodomy
    - Confessions by V insufficient (*Holmes*)
    - However, taunts or insults may be sufficient (*Moffa* per Barwick CJ)
  - Noise
    - Crying of a child insufficient (*Terry*)
- ❑ Look at the cumulative effect of V's conduct (*Parker*)
  - *Moffa*: confession of adultery, racial insults, 'bastard', impugning sexual inadequacy, throwing photos of V naked at A (yes)
  - *Kumar*: taunts about A's family, boasting of sex with other men (no)
  - *Camplin*: 'dirty nigger' said by V to a black man
  - *Parker*: 'didn't love A anymore', rode off on bicycle with new lover, A thought he killed her (yes)
  - *Tuncay*: threat to leave, would rather see A dead (no)
- ❑ Did A act out of fear or panic?
  - Loss of self control may result from resentment, fear, apprehension, emotional anguish or panic (*Van Den Hoek* per Mason CJ)
    - *Van den Hoek*: wife stabs husband after being chased by him with knife; provocation should have been left to the jury
  - Fear of homosexual advance (*Green*)

- ❑ Was the source of the provocative conduct someone other than V?
  - Prima facie, provocative conduct must be V's (*Parker* per *Menzies J*)
  - However, the defence may be raised if there is a sufficient nexus between the provoker's words and V's presence – proximity requirement (*Gardiner*)
  - Provocation can arise even if V was not the provoker when (*Kenny* per *Brooking J*):
    - V is acting in concert or aiding and abetting the provocateur;
    - A killed V in the mistaken belief that V did that act (belief need not be reasonable); or
    - A killed V accidentally, intending to kill the provocateur
  
- ❑ Was the provocative conduct directed at someone other than A?
  - Can only amount to provocative conduct if it occurred in A's presence (*Terry*) and A has some relationship to the target
    - *Terry*: A kills V, who hit his sister
  
- ❑ Was A mistaken or deluded about the nature of the conduct?
  - Even if A was mistaken or deluded, must be left to the jury (*Voukelatos* per *Young and Murphy JJ*, applying *Stingel*)
    - *Voukelatos*: A has delusional belief that his wife is having an affair with V, their neighbour; provocation left to the jury
  - However, it must be a reasonable mistaken belief (*R v Croft*)
    - *Croft*: A, while intoxicated, killed his de facto wife while she was visiting another man, mistakenly believing that she was sleeping with him
    - *Abebe*: mistaking a wink for provocation not reasonable
  
- ❑ Was the provocation self-induced?
  - Where A initiates provocative conduct, cannot use V's response to found defence of provocation unless V's response goes beyond what was reasonably predictable (*Edwards*; *Allwood*)
    - *Edwards*: a considerable degree of violence is a reasonable response
    - V's response by attacking A with a knife went beyond what is reasonable
  - A cannot thus rely on a predictable response to his actions (*Radford* per *Johnston J*)
    - *Radford*: applies *Edwards*; V's response to A coming to V's house is to threaten A with a cricket bat

- A shoots V with a gun in response; provocation allowed
- This would be to allow A to give himself an excuse (*Voukelatos* per Murphy J)

### 2.5.1.2 Seriousness of provocation

**Rule:** having adduced evidence of provocative conduct, its gravity is measured by reference to the personal situation of the accused (*Stingel*; *Masciantonio*). The prosecution must prove BRD that provocation of such a gravity could not have caused an ordinary person to act as the accused did (intent to cause death/GBH).

- Would a typical person in the position of A have lost control?
  - Age, gender, ethnicity, physical attributes, personal relationships, and past history are relevant (*Masciantonio*)
  - Race, gender, age (*Camplin*)
  - Sensitivity due to childhood sexual abuse and family history are relevant (*Green*: homosexual advance giving rise to visual memory of prior abuse)
  - Mental instability or weakness relevant (*Masciantonio*)
  - Intoxication is *not* relevant (*O'Neil*; affirmed *Stingel*)
- Was the conduct so provocative that it might provoke an ordinary person to lose self-control to the extent of forming an intention to kill or cause GBH?
  - Sets a minimum standard of self-control expected of an accused
  - Age the *only* characteristic relevant at this stage (*Stingel*)
  - Although a 'condescension to human frailty' (*Kirkham*), the ordinary person is not able to be provoked beyond the 'common range of human temperaments' (*Masciantonio*)
  - Not excitable or pugnacious (*Stingel*)
  - Never intoxicated (*O'Neil*)
  - Not impotent (*Bedler* – not relevant where prostitute mocks A)
  - Belief, religion, ethnicity, prejudices are all irrelevant (*Stingel*)
    - However, a purportedly objective standard must inevitably contain and suppress the true normative components of decision-making (see McHugh J in *Masciantonio*)
    - The standard is racialised and gendered, and assesses A against what he is not

On a construction of the events most favourable to A, no jury, acting reasonably, could fail to be satisfied BRD that A's reaction to V's conduct fell far below the minimum limits of the range of powers of self-control which must be attributed to any hypothetical ordinary N-year-old. Therefore the killing of V was unprovoked in the relevant sense.

### 2.5.1.3 Actual loss of control

**Rule:** A must have been acting whilst under the influence of provocation at the time when he killed V (*Masciantonio*).

- ❑ Was A actually acting whilst out of control when he killed V?
  - A must act 'whilst deprived of self control'
  - Examine whether A's emotions in command of faculties
  - Question of fact to be assessed by reference to the actual A
- ❑ Was there time for A's passions to cool? (*Masciantonio*)
  - If A had the 'opportunity to regain his composure' he will no longer have been acting under provocation at the relevant time
  - A frenzied or vicious attack implies loss of control (*Masciantonio*)
  - Revenge implies time to cool (*Duffy*)

### 2.5.1.4 Effect of provocation

Even if P fails to disprove, provocation will only reduce murder to voluntary manslaughter. For this reason, A may wish to argue SD (a complete defence). If SD is unsuccessful, A will be liable to level 3 imprisonment. Otherwise, A will be acquitted.

## 2.5.2 Self-defence

**Rule:** A can plead both SD and provocation in the alternative (*Chhay*). For SD to be left to the jury, A will need to construct a version of the facts that supports an inference that he honestly believed on reasonable grounds that it was necessary to do X to defend himself from Y (*Zecevic*).

- ❑ Did A honestly believe that it was necessary to do what he did to defend himself? (*Zecevic*)
  - P will attempt to deny A's belief in necessity by narrating the facts in such a way as to make A's belief appear fabricated
    - P may also attempt to show that A held a prior intent to kill
  - A may seek to establish his belief as honest by enlarging his perception of the threat
    - Physical size (V bigger than A; A unable to defend himself; A believed a weapon was necessary; woman/man)
      - Zecevic thought V was proficient in Karate

- *Colon*: intoxication relevant to A's perception of the threat posed by Vs attempting to steal plants
    - V's capacity to harm A
      - Violent disposition
      - Possession of weapons
      - Zecevic thought V was going to get a shotgun
      - Zecevic's brothers claimed A had a knife
    - A's intoxication
      - Drunkenness may make it more believable that A honestly believed that the force used was necessary
      - [However, belief must still be reasonable]
    - Factors influencing A's perception of the threat posed by V
      - History of physical or mental abuse (battered wives)
      - Mental Disorder
      - *Kurtic*: A had delusions causing him to believe his life was in danger
  - Is A mistaken?
    - Does not matter if A mistakes V's conduct for a threat, so long as the mistake is honest and reasonable (*Zecevic*)
    - If A can adduce evidence that the belief was held, P must disprove BRD the presence of the exculpatory belief
- ❑ Was A's belief based on reasonable grounds?
- Was it objectively reasonable to apprehend death or serious bodily harm? (*Zecevic* per Deane J)
  - Could A have retreated?
    - No longer any general duty to retreat (*Zecevic*) but may not be reasonable to kill if A could have easily escaped
  - Was V's attack unlawful?
    - Need not be but may support reasonableness of A's belief (*Zecevic* per Wilson, Dawson and Toohey JJ)
  - Was V's attack imminent?
    - Imminence not required but makes it more likely that belief in force was reasonable (*Zecevic*)
    - *Taikato*: carrying an illegal precautionary measure (spray) not defensible by SD because there is no imminent attack (Dawson J)
    - *Osland*: evidence of abuse may make a belief in SD reasonable even where no imminent attack (Kirby J)
    - *Secretary*: A killed abusive husband while sleeping, but open to find that A was defending herself from the continuing threat of an assault, so long as the assault was continuing



- Hallucination or mistake
  - It is the belief of A which must be reasonable (*Conlon* per Hunt CJ), and *not* that of a reasonable person
  - However, there must be a reasonable possibility that at least some action in fact took place which could have been mistaken as a threat or a danger to A (*Kurtic*)
- Was help available?
  - *Colon*: alone and intoxicated being confronted by thieves
  - *Secretary*: remoteness of location
- Was V insane?
  - A may use deadly force to prevent life-threatening attacks by an insane V (*Zecevic*)
- Was there a threat of sexual violence?
  - Threat of sexual violation (even where there no fear of death or GBH) may sustain a *reasonable* belief in the necessity of inflicting GBH/death (*Zecevic* per Gaudron J)
  - SD against rape may, in appropriate circumstances, justify death (*Lane* per Lush J)
- Did A take excessive measures to defend herself?
  - If force is unnecessary or unreasonable it will be murder (*Zecevic*)
- Did A defend a third party believing V posed a threat to them?
  - A will be excused if, 'at the time of the killing, [they] believed on reasonable grounds that a third party – relative or stranger – was in imminent danger of death or serious bodily injury' (*Redman* VIC)
    - Cf *Duffy*: need to be related to third party to act in defence
- Did A attempt to prevent the commission of an indictable offence or arrest a known offender?
  - *Crimes Act* s 462A:
    - A may use force proportionate to the objective of preventing the commission, continuance, or completion of an indictable offence
    - A may use force proportionate to the objective of lawfully arresting an offender or suspected offender of any crime
  - At common law, A is justified if he knew V was committing or about to commit an offence (*Dadson*; however, an *unknown* justification is irrelevant)
- Did A seek to defend their property from V?
  - A can plead SD in relation to property (*McKay*; *Turner*)

- Eg, the *Home Invasion (Occupants Protection) Act 1998* (NSW) makes it legitimate to kill or injure in a defence of a residence
- The force must still be reasonable; what is reasonable will be less than what is reasonable to defend a person

### 3 NON-FATAL OFFENCES

#### 3.1 Common assault

##### 3.1.1 Actus reus

**Rule:** if P can prove BRD that A caused V to apprehend immediate and unlawful force, A will be guilty of an assault (*Zanker, Barton*).

- Did V apprehend or fear immediate and unlawful violence or force?
  - V must know she is being threatened (*Pemble*)
    - Eg, if V knows the gun is loaded (*McNamara*)
  - Mere words
    - Insufficient; need some additional conduct (*Knight*)
    - *MacPherson*: yelling *and* obstruction causes fear or apprehension of physical assault
  - Omission
    - Assault normally requires positive act
    - *Fagan*: doing 'precisely nothing' can be an act for the purposes of assault
  - Future threats
    - Prima facie, future threats are not immediate (*Knight*)
    - However, if there is a present and continuing apprehension of imminent force, will be sufficient (*Zanker*)
    - *Zanker*: threat of future rape ('he will really fix you up') can induce a continuing fear of violence
      - V powerless to prevent A carrying out his threat
      - Helpless and imprisoned in moving vehicle
    - *Barton*: future threats over telephone can be immediate if they place V in continuing fear of harm and relationship such as to make fear reasonable
    - *Beech*: breaking open V's door induced fear of imminent sexual assault
    - *Knight*: threats made to police not assault because they don't threaten immediate violence
  - Conditional threats
    - *Rosa*: taxi driver to V: 'if you don't move I'll stab you with this knife' can create apprehension of harm

**Rule:** if A actually applied force to V, A may be guilty of a battery (*Collins*).

- Did A actually apply physical force to V?

- Low threshold; force need not be violent or cause injury (*Collins v Wilcock*: touching sufficient)
- A's force must be directed at V
- A's force must be unlawful
  - Consider: consent, SD, lawful arrest

### 3.1.2 Mens rea

**Rule:** to be guilty of an assault or battery, A must have intended or been reckless as to inducing V's apprehension of force (*Beech*; *Venna*).

- Did A intend to cause/recklessly caused apprehension of force?
- Did A intend to apply/recklessly applied force?
  - Recklessness is foreseeing the apprehension as a 'possible' consequence of X (*Venna*)
- Did MR temporally coincide with AR?
  - P may construct the events as a single continuum (as in *Fagan*)
  - MR must occur sometime within the course of the crime
  - Need not occur contemporaneously; MR can arise during the course committing the AR
  - However, MR cannot arise after AR is complete (*Fagan*)

## 3.2 Causing injury

### 3.2.1 Type of injury

**Rule:** if P can prove BRD that A caused injury/serious injury to V, A will be guilty of an offence under s 16/17/18/19A/24 of the *Crimes Act*.

- Was V injured?
  - Injury includes unconsciousness, hysteria, pain, mental harm, disease, and any substantial impairment of bodily function
  - Need not be permanent but must be more than merely transient or trifling (*Donovan*)
- Was A seriously injured?
  - Serious injury is a high standard: something short of death (*Kane*)
  - A very serious disease (ie, HIV) is serious injury: s 19A

### 3.2.2 Mens rea

- ❑ Did A intend to cause the injury?
  - A must have willed or desired the consequence (injury/serious injury)
  - The consequence is what is relevant (*Westway*)
  - Section 16 (serious injury)
  - Section 18 (injury)
  - Section 19A (intentionally transmitting very serious disease)
  
- ❑ Was A reckless as to causing the injury?
  - Conflicting authorities: foresight of a 'possibility' (*Coleman*) cf foresight of a 'probability' (*Campbell; Nuri*)
  - P must establish A foresaw at least the possibility (or probability) of injury/serious injury and was indifferent to the consequences
  - Section 17 (serious injury)
  - Section 18 (injury)
  
- ❑ Did A negligently cause the serious injury?
  - Apply *Nydam* – see [2.4.5]
  - Section 24 (serious injury only)

### 3.2.3 Defences

- ❑ Did A have a lawful excuse for causing the injury?
  - A must establish the excuse BRD
  
- ❑ Was A's conduct done with an 'intention of goodwill'? (*Phillips*)
  - *Phillips*: no battery where A drags V across sand to determine whether she is alright
  - Cf *Boughey*: (murder) touching carotid arteries for gratification irrelevant
  
- ❑ Did V consent to the injury (but not serious injury)?
  - If V expressly or impliedly consented to the injury, A will not be liable (*Collins*)
  - Situations in which consent will preclude liability:
    - Contact sports (within the rules of the game: *Brown*) and prize fighting
    - Dangerous Pastimes (bravado, mortification)
    - Rough horseplay
    - Prostitution
    - Consensual fighting
    - Medical treatment and surgery (but not gross conduct)
    - 'Common intercourse of life' (implied consent: *Brown*)

- Consent may be vitiated:
    - Public policy (*Brown*: consensual sexual acts)
    - Fraud
    - Youth
    - Mental disability
  - Serious injuries *cannot* be consented to by V
    - *Brown*: sadomasochistic sexual injuries cannot be consented to even though no permanent injury
    - *Wilson*: heterosexual branding can be consented to
    - *Brown* protects both individual and society – upholds norms
  - Transmission of HIV is a serious injury
    - *Mohammed Dica*: V knew of A's HIV, but cannot consent to the transmission because it is a serious injury
- ❑ Was A acting in self-defence?
- See [2.5.2]

### 3.3 Supporting offences

- ❑ Intentionally transmitting a 'very serious disease' (HIV) s 19A
- ❑ Threats to kill (intentionally or recklessly causing V fear) s 20
- ❑ Threats to cause serious injury (same MR) s 21
  - Wider than common law assault: need not be immediate
  - Broader in scope than common law threats
- ❑ Recklessly engaging in conduct that places or may place another person at risk of death s 22
- ❑ Recklessly engaging in conduct that places or may place another person at risk of serious injury s 23
- ❑ Setting a trap with intent/reck to kill another persons s 25
- ❑ Setting a trap to cause serious injury (same MR) s 26
- ❑ Extortion with threat to kill (obtaining by violence) s 27
- ❑ Extortion with threat to destroy property s 28
- ❑ Using firearm to resist lawful arrest s 29
- ❑ Threatening injury to resist arrest or investigation s 30
- ❑ Assault with intent to commit indictable off (eg, rape) s 31(1)(a)
- ❑ Assault of police/assault with intent to resist arrest s 31(1)(b)
- ❑ Use of firearms in the commission of indictable offence s 31A

### 3.4 Stalking

**Rule:** if it can be proven that A engaged in a course of conduct for the purposes of causing physical/mental harm in V or arousing apprehension of fear, A will be guilty of stalking V under *Crimes Act* s 21A.

- ❑ Has A engaged in a course of conduct that could amount to stalking under s 21A(2)?
  - (a) Following V or anyone else
  - (b) Contacting V or by any means whatsoever
  - (ba) Publishing by electronic communication to any person material (i) concerning or (ii) purporting to concern V or any other person
  - (bb) Causing an unauthorised computer function in a computer owned by V or anyone else
  - (bc) Tracing V's use of electronic communications
  - (c) Entering or loitering outside or near V's or any other's residence or business or any other place frequented by V
  - (d) Interfering with property in V's or any other person's possession
  - (e) Giving/leaving offensive material to/for V or any other person
  - (f) Keeping V or any other person under surveillance
    - *Gunes v Pearson* per McDonald D
    - *Berlyn v Brouskos* per Nettle J
  - (g) Acting in any other way that could reasonably be expected to arouse apprehension or fear in V for their safety
  
- ❑ What is the course of conduct?
  - The locus of the offence of stalking is a protracted course or pattern of conduct
  - Has A's romance with V gone wrong?
  - Is there a neighbourhood or political disputes between A and V?
  - Is A excessively trying to seduce V?
  - Is A an excessive fan of V?
  - Relevant factors:
    - Timeframe in which conduct occurred (*Connolly*: protracted)
    - Number and frequency of acts
    - Intent with which acts were done (*Connolly*: A trying to win ex-girlfriend back)
  
- ❑ Did A intend to cause physical or mental harm to V or arouse apprehension or fear in V for their safety? (s 21A(2))
  - Intention includes where A knows (subjectively) or ought to have known (objectively) that his course of conduct would be likely to cause such harm or arouse such apprehension or fear (s 21A(3)(a), s 21A(3)(b))
  - A need not have *actually* caused the apprehension
  - It does not matter whether V was outside of Victoria if A was in Victoria (s 21A(7))

- It does not matter whether A was outside of Victoria if V was in Victoria (s 21A(6))

### 3.5 Endangerment offences

**Rule:** A may be guilty of endangerment if P can establish that A's conduct placed or may have placed V in danger of death (s 22) or of serious injury (s 23).

- Would a reasonable person engaging in X foresee that its 'probable' consequences place V at an appreciable risk of death/serious injury?
  - Objectively, the risk must be a 'probable consequence' of X
  - V need not actually suffer serious injury or death; concerned with potential consequences of A's conduct
  - P must adduce evidence that the risk of death or serious injury is at least 'appreciable' (dangerous)
    - Dangerous if an 'appreciable risk' of death/serious injury
    - Eg, evidence of actual risk of infection from unprotected HIV sex, and actual risk of death or serious injury if infected
  
- Did A intend to engage in X while being reckless as to the danger of death (s 22) or of serious injury (s 23) in which V is or may be placed and went ahead regardless of the foreseen 'probability' of death or serious injury?
  - A must foresee death or serious injury as 'probable' consequences of doing X (*Mutemeri*)
  - *Mutemeri*: A has HIV, has unprotected sex with V, knowing of risks; A needs to intend to engage in the conduct; he must foresee an appreciable risk of death or serious injury; such a low probability of catching the disease (between 1/667 and 1/2000) that the risk of death was 'not appreciable'
  - *Filmer v Barclay*: As make and set off bombs in a park; 2 do not explode; later, they explode when children are in the playground; no-one is hurt; As must have foreseen that bombs would 'probably' result in death or serious injury



## 4 PROPERTY OFFENCES

### 4.1 Theft

#### s 72:

- (1) A person steals if he *dishonestly appropriates property belonging to another* with the intention of *permanently depriving* the other of it.
- (2) A person who steals is guilty of theft.

#### 4.1.1 Appropriation

#### s 73:

- (4) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.

- Did A assume a right of ownership? (s 73(4))
  - Don't need to assume all rights – only need some (*Stein v Henshall*)
  - Using the car for himself is appropriating some rights of ownership
  
- Did V consent to the appropriation?
  - Adverse interference with rights approach (usurpation of owner's rights – *Morris, Baruday* - VIC)
    - Consent does not adversely effect owner's rights, so no appropriation (Lord Roscow)
    - Deception vitiates consent (Southwell J in *Baruday*)
    - No appropriation in *Lawrence* because taxi driver only consented to correct fare – A exceeded this authority
    - Effectively conflates MR with AR elements (*Gomez*)
  - Neutral approach (any right of ownership – *Lawrence, Gomez*)
    - Consent irrelevant – merely exercise right of ownership
    - Only need assumption of rights – consistent with s 73(4)

- *MacLeod* (HCA): critics *Morris* approach and *Roffel* (Vic SC); adopts *Gomez* approach – but NSW

Did A appropriate from a company owned by them?

- *Roffel* (Vic SC): *Morris* approach – consent so no adverse interference caused by misuse of the cheque
- *MacLeod* (HCA): company separate from its officers, consent is immaterial (McHugh J), *Roffel* wrong in law (Callinan J)
  - By spending the company's money, M appropriated it – exercised a right of ownership (spending)

Did A find the property?

- s 73(4): can still appropriate by keeping or dealing with it as owner – did A deal with it as owner?

Was A a bona fide purchaser of property?

- s 73(5): A 'acting in good faith'?
- Stolen property 'transferred for value'?
- A 'believed himself to be acquiring' the right?
- If so, appropriation will not amount to theft
- Eg, sale of cars: good title passes and A cannot be charged with theft under s 73(5)

#### 4.1.2 Property belonging to another

**s 71:**

- (1) Property includes money and all other property real and personal including things in action and other intangible property

Theft of land? (see s 73(6))

**s 73:**

- (6) Land cannot be stolen, or things forming a part of the land, unless
- a) A has been entrusted with some legal power to dispose of the land owned by another, and deals with the land in breach of this trust
  - b) A appropriates anything forming a part of the land (eg, something growing on it) where he is not in possession of that land
  - c) A is in possession of land under a tenancy and appropriates any part of the fixtures attached to the land

❑ Is X property?

- X can acquire property status if they acquire different attributes by rendering skill upon them (*Kelly*: corpse – dissection and preservation sufficient skill)
- Includes intangible property – broad:
  - Bank accounts, electronic property, export quotas
  - Debts, trademarks
  - Stealing a telephone call? (*Akbulut v Grinshaw*)
  - ‘Call’ is not a thing – just energy – better suited to OBFAD

**s 72:**

- (2) In this Division, property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest

❑ Does X belong to another? (s 72(2))

- Need one of:
  - Ownership (a proprietary right or interest)
  - Possession (personal proximity)
  - Control (eg, physical or operational control)
- Abandoned property is neither possessed nor controlled

❑ Does X belong to the thief?

- Simultaneous rights can vest in both a third party (possession, control) and A (ownership)
- If the third party has possession and/or control, it will be property belonging to another (*Turner*: A steals his car back from the garage)

- Garage owner had a lien over the car: work performed but not paid for
- *Meridith*: A's car towed for parking violation, went to impound, broke lock on his car, and drove off with it

**s 73:**

- (9) Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.

❑ Can V be deemed to have ownership? (s 73(9))

- Is A obliged to deal with the property in a certain way? (eg, as trustee – may have legal and equitable ownership, but still obliged to deal with trust for beneficiary, so owned by third party) (see *Meech*)
- *Hall*: travel agent accepting money from customer obliged to spend money on tickets, not the company

**s 73:**

- (10) Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds.

❑ Did A accidentally receive X?

- Did A know of the error at the time they were provided X but keep it anyway?
  - Appropriation
  - *Milks*: A overpaid by bookmaker, knew at time of overpayment but kept dividends; theft
- Did A only learn of the mistake later?
  - Not appropriation
  - However, if A keeps the benefit after discovering it, will be theft

- *A-G (Ref) No 3 [1983]*: overpayment of salary, A discovers but does nothing about it; theft

#### 4.1.3 Intention to permanently deprive

##### **s 73:**

- (12) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights

##### Did A borrow X?

- s 73(12): borrowing still evinces an IPD if the lending is 'for a period and in circumstances' making it equivalent to an 'outright taking or disposal'
- However, may not be equivalent to an outright taking if returned before V misses it, and not returned in a worthless state (*Lloyd*)
  - A took films to make pirate copies and returned within hours; no IPD
  - Film still has value (since can be shown for a fee) so the borrowing is not a taking – not returned in such a changed state that all its value is gone

##### Did A appropriate X with intention to return it?

- Even if A takes and returns X, if X has been deprived of its proprietary value, A has acted with IPD (*Parsons*)
  - Taking and cashing cheques
  - Cheques returned, but still IPD since worthless now

##### Was A's intention conditional?

- Did A IPD only if a certain condition was met? (eg, purse wasn't empty)
- *Easom* (UK): A takes V's handbag; nothing of value; returns it
  - A simply 'on a scouting mission' so no theft (though there was appropriation)

- *Sharp v McCormick* (Vic): A takes car coil (\$30) from employer; only planned to keep it if he could use it
    - A's taking evinces intention to dispose of as he sees fit without regard for the rights of his employer (Murphy J)
    - Treated the return of the coil as an act at his choice and discretion
  - Distinguish *Easom*?
    - Crime was in progress in *Sharp*; less easy to draw an inference that D would have returned X (*Easom*: handbag already returned when arrested)
    - Greater separation between appropriation and intended return (work, transport to home, install, return to work), whereas *Easom* was in the space of minutes
    - A treated the coil as his own – *Easom*: handbag arguably treated as his own by taking it from the seat without permission
  - *Easom* may still be relevant – perhaps where A returns property prior to arrest
  - **Critical factor** will be whether IPD can be inferred from A's conduct – did they **treat it as their own** to dispose of **as they please**? (If so, deem IPD: s 73(12))
- Can intention nevertheless be deemed?
- s 73(13): did A part with property to a third party in circumstances suggesting the return might not be possible? If so, A has an IPD
  - s 73(14)(a): did A steal a car or plane? If so, P need only prove that he used the craft without consent of the owner – that is 'conclusive evidence' of IPD
  - s 73(14)(b): same as (a) but applies to **attempt to steal**

#### 4.1.4 Dishonesty

##### **s 73:**

(2) A person's appropriation of property belonging to another is not to be regarded as dishonest

(a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or

- (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or
- (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

- Did A believe he had a legal right to deprive V of it?
- Must be legal, not moral (*Salvo*)
  - Defined by reference to actual A's belief – doesn't matter whether A's means used to effect the right are objectively honest, just that A in fact believed in the right (*Salvo*)
  - *Salvo* (OPBD but dishonesty the same):
    - Rejects the *Ghosh* and *Feely* approach – they 'dangerously place' criminal liability on the 'shifting sands of juror's beliefs' (and not A's actual intent)
    - Does **not matter that A used subterfuge** to obtain what he thought he had a legal right to
  - P must negative the existence of A's belief in a legal right to do X at the time of appropriation (if they can't, there is no dishonesty)
  - *Brow* (Vic): follows *Salvo* in the context of theft: s 73(2) uses a subjective test of dishonesty; not a question of fact for the jury
  - *Bonollo*: again follows *Salvo*, but with a twist:
    - Did A believe that appropriation would not cause any 'significant practical detriment' to V's interests? (McGarvie J)
    - If so, will not be dishonest
  - Note *Peters*: *Ghosh* hybrid approach in fraud offence under CA (Cth)
    - UK approach may apply to certain offences
    - Arguable that it applies to OBPD and OBFAD, but not to theft (as a result of s 73(2))
- Did A believe that V would consent had she known of the appropriation and its circumstances?

- Must be honest, subjective belief
- Was A not a trustee, and did A appropriate in the belief that the owner could not 'be discovered by taking reasonable steps'?
- Native title?
  - *Galarwuy*: see p 98

## 4.2 Obtaining by deception

### s 81:

- (1) A person who by any deception dishonestly obtains **property** belonging to another, with the intention of permanently depriving the other of it, is guilty of an indictable offence (10 years maximum)

### s 82:

- (1) A person who by any deception dishonestly obtains for himself **a financial advantage**, is guilty of an indictable offence (10 years maximum)

- Did A obtain **property** or a **financial advantage**?
  - What is a financial advantage?
    - Left undefined
    - Increasing credit
    - Obtaining services and not paying for them, where it is understood they are to be paid for
    - Avoiding a debt acquired for services/goods
  - *Matthews v Fountain*:
    - Passing invalid cheques allows A to OFAD
    - A retained use of employee's services for 2 weeks, receiving services for which they deceptively avoided paying
  - *Fisher v Bennett*:
    - A wrote bad cheques, but did not avoid their debt
    - Interest owing continued to accrue
    - Did not increase credit, nothing had changed
    - Monies still owing, just a temporary delay in paying
    - No financial advantage



**s 81:**

- (2) For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and "obtain" includes obtaining for another or enabling another to obtain or to retain.

 Did A obtain X?

- Did A get ownership, possession, or control of it?

**s 81:**

## (4) Deception

- (a) means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person;
- (b) includes an act or thing done or omitted to be done with the intention of causing
- (i) a computer system; or
  - (ii) a machine that is designed to operate by means of payment or identification

to make a response that the person doing or omitting to do the act or thing is not authorised to cause the computer system or machine to make.

 Was there a deception?

- Did A 'deceive' a machine (ATM/computer) to get money?
  - Use s 81(4)(b)
- V need not have lost anything in order to have been deceived
  - Though A does need to gain property/FA
- **'Deliberate or reckless'**
  - Deliberately deceptive if A knows their representation is false
  - Can also be deceptive where A has knowledge of a 'substantial risk' that what they are representing is false

*(R v Smith)*

- *Smith*:
    - Cheques selectively dishonoured – randomly
    - A uses cheques to pay suppliers knowing some will be dishonoured
    - Starke J (Crockett J agreeing): '**substantial risk**' is sufficient to be recklessly deceptive
    - Must be **actual advertence** to risk
    - Lower standard than probability (2 JJs)
  - If there is no deception and A obtains property, and assumes one or more rights of the owner, s 72 may apply
- ❑ Who was deceived?
- Doesn't matter if it was not V (*Kovacs*)
    - A third party can be deceived, causing V to render the property/FA to A
    - *Kovacs*: overspending on bank account; supposed to return chequebook; bought property, paying with cheques; bank honoured cheques and extended overdraft to cover these amounts
    - Irrelevant that bank was deceived and not storeholders
    - Bank suffered loss (overdraft) and not owners (A purchased property from them with bank's money), but this is still deceptive
- ❑ Did A truthfully **make a representation** but then falsify it through conduct? (*Ray v DPP*)
- **Silence** regarding A's change of mind will amount to deception because the original representation is a continuing event
  - *Ray*: ordering, eating, leaving without paying
    - Dishonesty: waiting until waiter went inside before leaving
    - FA: not having to pay for the meal
    - Deception: intention to pay when eating so not deceptive; leaving after eating clearly dishonest but not deceptive
    - Lord McDermott: ordering entails representation that it will be paid for
    - Look at **whole transaction** in its entirety
    - The earlier representation is **continuing**, but false – so deceptive

Did A use a credit card?

- Using a CC can be deceptively where A knows they are acting without the bank's credit or authority to pay
- Implied representation that they are **able and authorised** to put the goods on credit (*Lambie*)
- *Lambie*: A substantially exceeded credit limit and bank requested she return her CC
  - A continued using to purchase goods
  - Lord Roskill: OPBD more appropriate here, since A was dishonest and obtained the goods by deception
  - FA: **evasion of an expense** for which she would otherwise be immediately liable
  - Use of card entails representation that she had credit and authority to use it
  - Infer that fraud means store owner would not have allowed transaction had they known (avoid evidentiary problems – may not be able to remember)

 Did A use a cheque?

- If there's a **substantial risk** of being dishonoured, it will be deceptive (*Smith*)

 Was A silent?

- A may deceive by **being silent** about a fact
- Where representation **falsified** by change of mind (*Ray*) or conduct (*Lambie*)

 If s 81, is it property?

- s 71(1): all real and personal property including intangibles
- s 73 exclusions **do not apply** to s 81  
Land can be stolen, eg

 If s 81, did property belong to another?

- s 71(2): ownership (proprietary or equitable interest), possession or control

- ❑ If s 81, did A do so with IPD?
  - Only an element of s 81 (not s 82) – same meaning as theft, and subject to ss 73(12) and 73(13)
  - However, s 73(14) does not apply – no automatic presumption IPD for cars and planes
  
- ❑ Was A dishonest?
  - Not defined; s 73(2) does **not** apply to deception offences (*Salvo*)
  - **Defence**: did A believe in a claim of right to engage in the relevant conduct?
    - If so, precludes dishonesty
    - Applies to both ss 81 and 82 (*Salvo*)
    - *Grout*: follows *Salvo* – need legal right (not moral)
  - *Peters*:
    - Leave dishonesty to juries, standards of ordinary decent people – objective test (applying *Ghosh*)
    - ‘The search is for A’s intent as well as actions’ (Kirby J)
    - ‘Dishonesty’ an ordinary word to be given ordinary meaning unless statute provides otherwise (McHugh J)
  - Was what was done dishonest according to **ordinary standards of reasonable and honest people**?
  - Must A have **realised** that his conduct was dishonest according to those standards?

## 5 PROVOCATION THEORY

### 5.1 Morgan; Horder

- Standard and application imbued with bias
  - Treatments of provocation are highly dependent on the way factual narratives are constructed
    - Eg, self-induced provocation: courts expand the time frame of the alleged provocative incident (*Allwood, Radford*)
  - Provocation imbued with gender bias?
    - But: LRCV report: more likely to be successful where man-man (12% rejection) than man-woman (36% rejection)
    - Statistics tell a different story?
    - But did not examine how provocation was constructed; substantive outcomes important?
- Questionable normative basis
  - Is it excusable for men or women to kill in these circumstances?
  - Objective test allows minimum standards to be set – when is it universally excusable (if not justifiable) to kill in anger?
  - If provocation is to remain, it is clear that some kind of an objective test is required
  - Is the current compromise between subjectivity and objectivity acceptable?
- Implicit normative content of the current standard
  - Horder: defending honour – retaliate to an affront (historical)
  - Enlightenment ideals of rationality and reason
    - Displacing anger and honour as dominant normative and conceptual paradigm in law
    - Desire for retaliation eclipses reason, surge of passion, colourful metaphors
  - Current standard still constructed around normative assertion that what is done in the influence of passion is less culpable because less wilful or voluntary
    - Not the product of a rational mind, D overtaken by passions – a concession to human frailty
    - Morgan: partially forgiving excesses of passion maintains rational ideal and preserves definition of self and law
  - This claim warrants re-examination in light about new advancements in our understanding of the conceptual and evaluative nature of human emotion
- Subjective or objective?
  - Yeo: should not be separate standards for women and men – if there were, ‘typical’ men might be held to lower standards of self-control
    - Problem: if purely objective, constructions get abstracted away, hidden beneath artifice of neutrality and formal equality

- McHugh J: notion of 'ordinary person' is 'pure fiction'
    - Does conflating all standards result in implicit and unacknowledged standardisation to similar effect?
      - Yes, both approaches reflective of an essentialist approach: whether attributing the dominant culture to minorities or conceiving of a single identity and standard for each (judicial re-characterisation of culture inevitable)
    - Morgan: 'equality with a vengeance' – formal equality not needed or wanted
  - Problem: if account is taken of race and gender, the same evaluations must be made – just openly; arguably preferable to be made openly, but does not lessen their difficulty
    - And: how much subjectivity? Just age? Why not let ethnicity factor into 'ordinariness'?
    - Would become 'meaningless' if idiosyncrasies factored in (McHugh J in *Masciantonio*) – arguably, it already is!
    - minimum thresholds of behaviour – need to be universal and objective
    - If the normative justification for the defence is diminished rational control, of what legal relevance is the identity of A?
      - Law makes it relevant to gravity – effectively as an evidentiary matter, to determine whether rational control was actually diminished
      - Having established that, the primary barrier is whether the diminished rational control was understandable or in someway morally excusable
    - Assessments of self-control ought not be culturally relative – equality before the law
  - It is an inherent concomitant, then, of setting minimum standards, that they *will* marginalise some – eg, the victim – and discriminate against others – eg, women
    - 'The natural consequence' of making criminal liability dependant on 'objective standards of personhood' (McHugh J)
- Institutional bias
  - So long as the standard is articulated, interpreted, and applied by one ethnicity, class, or gender, it most embody unarticulated and unexamined assumptions about the other and about the accused
  - Further, it must inevitably embody historical artefacts and reflect institutional norms, which are, in large part, unmovable (at least in short term)
  - The choice, then, is to accept these side-effects of the defence as unavoidable, or abolish it entirely
  - Given the questionable normative basis on which it proceeds and the frequent public outcry over its (mis)application, law would be better of without it
    - Horder's proposal should be accepted
      - Provocation should be relegated to sentencing
      - Guidelines should specify the maximum extent to which provocation can mitigate a sentence

- Only another factor to be considered with all the others
- No doubt provocative conduct can give rise to anger
  - But it should not be an excuse to lash out as a response
  - The normative basis of the defence is unjustifiable
- We have more control over our the content and occurrence of our emotions than was once thought
  - The conceptual basis of provocation is thus eroded
- The practical problems of its application are merely symptomatic of the fact that provocation no longer has any defensible rationale
- As such, it should be abolished