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MENTAL HEALTH and the CRIMINAL LAW

Local Court

1. Section 32 Mental (Forensic Provisions) Health Act provides:

32 Persons suffering from mental illness or condition

(1) If, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate:

(a) that the defendant is (or was at the time of the alleged commission of the offence to which the proceedings relate):
(i) developmentally disabled, or
(ii) suffering from mental illness, or
(iii) suffering from a mental condition for which treatment is available in a mental health facility, but is not a mentally ill person, and

(b) that, on an outline of the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant, it would be more appropriate to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with law, the Magistrate may take the action set out in subsection (2) or (3).

(2) The Magistrate may do any one or more of the following:

(a) adjourn the proceedings,
(b) grant the defendant bail in accordance with the *Bail Act 2013* ,
(c) make any other order that the Magistrate considers appropriate.

(3) The Magistrate may make an order dismissing the charge and discharge the defendant:

(a) into the care of a responsible person, unconditionally or subject to conditions, or
(b) on the condition that the defendant attend on a person or at a place specified by the Magistrate for assessment of the defendant's mental condition or treatment or both, or
(c) unconditionally.

(3A) If a Magistrate suspects that a defendant subject to an order under subsection (3) may have failed to comply with a condition under that subsection, the Magistrate may, within 6 months of the order being made, call on the defendant to appear before the Magistrate.

(3B) If the defendant fails to appear, the Magistrate may:

(a) issue a warrant for the defendant's arrest, or
(b) authorise an authorised officer within the meaning of the *Criminal Procedure Act 1986* to issue a warrant for the defendant's arrest.

(3C) If, however, at the time the Magistrate proposes to call on a defendant referred to in subsection (3A) to appear before the Magistrate, the Magistrate is satisfied that the location of the defendant is unknown, the Magistrate may immediately:

(a) issue a warrant for the defendant's arrest, or
(b) authorise an authorised officer within the meaning of the *Criminal Procedure Act 1986* to issue a warrant for the defendant's arrest.

(3D) If a Magistrate discharges a defendant subject to a condition under subsection (3), and the defendant fails to comply with the condition within 6 months of the discharge, the Magistrate may deal with the charge as if the defendant had not been discharged.

(4) A decision under this section to dismiss charges against a defendant does not constitute a finding that the charges against the defendant are proven or otherwise.

(4A) A Magistrate is to state the reasons for making a decision as to whether or not a defendant should be dealt with under subsection (2) or (3).

(4B) A failure to comply with subsection (4A) does not invalidate any decision of a Magistrate under this section.

(5) The regulations may prescribe the form of an order under this section.

2. The focus here is on an application for dismissal of the charge(s) and discharge of the defendant for a *mental condition* that is treatable in a mental health facility: s32 (1)(a)(iii).

3. Note the distinction between an accused having a "mental condition" and being a "mental ill person", the latter being dealt with under s33; leading primarily but not always, to the detention of the accused in a mental health facility.

4. No formal notice or documentation is required. Simply, putting on the record that you intend to make an application under s32 is enough.

5. Although the application can be made at any stage of the proceedings (s32 (1), and even when a plea of guilty has been entered, from a practical perspective, it is advisable to put on the record your intention prior to a plea of guilty being entered and before the date on which the matter may be set down for hearing (where a plea of not guilty was entered).

6. Section 31 only enables a s.32 application if the matter is to be dealt with summarily and consequently, precludes any matter that the ODPP have elected to proceed on indictment.

7. Assuming you have a client who has been assessed by a psychologist or psychiatrist as having a mental condition treatable in a mental health facility, that in itself is not enough for the court to grant the application but it is the first essential box to be ticked.

8. The provision that is subject to the most controversy is s32(1) (b): which in addition to the magistrate accepting that the accused has such a mental condition, requires the magistrate to exercise a discretion or a "value judgement" [see *Malwas*, below], that it is more appropriate to deal with the accused under the section rather than, according to law.

9. The principal authority is *DPP v Sami El Mawas* [2006] NSWCCA 154 (19 June 2006) and I will return to it shortly.

10. S32(2) sets out what the magistrate may do, which includes, an adjournment, the granting of bail and making any order he or she considers appropriate.

11. S32(3) empowers the magistrate, when dismissing the charge to discharge the accused on various terms/conditions, or unconditionally.

12. In any application under s 32, almost always, the defence will tender and rely upon a psychological or psychiatric report which must contain an "expert" opinion that the accused is suffering from a mental condition treatable in a mental health facility AND a "treatment plan" setting out what the expert recommends the accused follows.

13. It is usual for the magistrate to impose "conditions" under s32(3) that reflect the treatment plan recommended by the expert.

14. It is important to note that the court can only "deal with" a recalcitrant accused for a period of 6 months following finalisation of the matter under the section: s32(3A) and (3D). This often causes significant concern to the court and moreso, the more serious the offence. Magistrates often remark, that the accused requires more than 6 months of "treatment" to enable the court to have confidence that he is no longer a danger to himself or to the community.

    Tip: If you sense or know this is troubling the court and you cannot persuade the court to a contrary view, you may consider suggesting a lengthy adjournment of 3 or more months (during which the accused will follow the treatment plan), and that you will obtain an update report from the expert which will hopefully confirm that the accused has complied with all the conditions and that he has improved ETC. If necessary, the matter may be adjourned for lengthy periods on 2 or 3 occasions. It is not unheard of, for the court to grant an adjournment in some cases, of 6 months or more.

15. *Mawas* was a court of appeal decision following a determination by Greg James J overruling a decision by a magistrate to refuse to deal with charges under s32 of the former Act (but in similar terms). It should be noted that Mawas was facing a series of serious charges including two counts of malicious wounding (use of a knife). There was no issue before the magistrate in that case that the accused had a "mental condition". The court of appeal upheld the ODPP appeal and found that James J was in error. The more important points to take out of Mawas (on appeal) are:

    i) The words "appear to the magistrate…. it would be more appropriate.." is similar in effect, to the magistrate being "satisfied" of a relevant matter: at [3]-[5];
    ii) [Adopting the decision of Confos v DPP NSWSC] 1159 at [17]] the magistrate, in exercising his or her discretion has to balance two public interest factors; namely, the interests of the community in having persons with "mental conditions" being diverted from the criminal justice system and the interests of the community in having offenders punished (according to law); and the more serious the offending, the more important will be the public interest in punishment; and that reasonable minds may differ about how the discretion should be exercised: at [17]-[18]; [71]-[73];
    iii) The court cannot require the accused to incriminate himself/herself: at [52] and s36;
    iv) The court of appeal noted that when the [former] Mental health Act 1900 was introduced into parliament, the then health minister recognised the confusing and complex problems in the mental health area and the competing public interest of the protection of the community and helping to remove the "stigma" that would otherwise attach to accused persons (who meet the criteria under s32): at [57]-[58];
    v) Granting of an application under s32, doesn't mean that the offender has not been subjected to "punishment" and the magistrate may take this into account in determining the application: at [73];
    vi) The magistrate has powers of an inquisitorial and administrative nature: at [74];
    vii) The magistrate is involved in 3 essential steps in determining the application:

        a) A finding of fact as to whether the accused is "eligible' [does the accused have a mental condition….?] at [75];
        b) Whether it would be more appropriate to deal with the offender under the section or according to law: at [76] and that that determination involves an exercise of subjectivity or a value judgement but it nonetheless is a discretionary judgement and the magistrate will be permitted latitude in that regard: also at [76];
        c) Once the magistrate has determined to finalise the matter under s32, he or she must then determine the manner in which it is to be finalised: at [80].

    viii) S32 is open to serious offenders, subject to the determination that it is "more appropriate" for the matter to be dealt with in that manner, rather than according to law: at [79];

ix) S32 [implicitly] permits interlocutory orders to be made in finalizing the matter (lengthy adjournments).

16. There is no restriction as to how many applications may be made under s32 [whether to the same magistrate or not]: s32(1). For example, where:

a) The initial report may be inadequate and supplementary report obtained;
b) Substantial change in circumstances (significant improvement in the mental condition of the accused or material – favourable - change in the facts]; and
c) Negotiation with prosecution resulting in alternate less serious charge.

17. It is not necessary that there be a nexus between the commission of the offence and the mental condition; *Mawas*.

Appeal Decision of Magistrate to Reject s32 Application (Prior to Conviction/Sentence)

18. In the event you seek to challenge the determination of the magistrate prior to conviction/sentence, the accused has a right of appeal to the Supreme Court: s53(3)(b) Crimes (Appeal and Review) Act 2001.

19. Any appeal to the Supreme Court is limited to demonstration of an error of law on the part of the magistrate AND only with leave; which likely explains the limited judicial consideration of s32.

20. Note Mawas (supra), that magistrates will be afforded [significant] latitude as to the exercise of their discretion (as to whether it is "more appropriate…..").

21. Even if the appeal is successful it is likely to be remitted back to the Local Court for the matter to be dealt with according to law.

Appeal Decision of the Magistrate to reject s32 Application after conviction/Sentence

22. Once the accused is convicted/sentenced the accused has a right of appeal to the District Court: s11(1) Crimes (Appeal and Review) Act ["CARA"] 2001, provided the appeal is filed within 28 days of the conviction/sentence.

23. If the applicant is out of time, he/she may, within 3 months, apply for leave to appeal out of time under s13 of CARA.

24. Although the appeal is to be by way of "rehearing of the evidence": ss17 and 18 of CARA; as the appeal would be against conviction and sentence, "fresh evidence" can be given in the District Court (against sentence): s17(1). This will enable you to obtain an update report and/or to lead/tender other evidence on the appeal.

Mental Health Defences [May be utilized] in the Local Court

25. The "defences" include:

    a) An application under s33 Mental (Forensic Provisions) Health Act, where if the person is assessed by the mental health facility as being mentally ill, may lead to the charge(s) being dismissed and a community treatment order being made: s33(1)(c) and (1A); and
    b) Involuntariness, which is dealt with at length below.

26. There is also the defence of insanity at common law under the McNaghten Rules, but that discussion is beyond the intended scope of this paper: an accused is not guilty by reason of insanity if, at the time of the alleged criminal act, the accused was so deranged that he/she did not know the nature or quality of his/her actions or, if he/she knew the nature and quality of her actions, he/she was so deranged that he/she did not know that what he/she was doing was wrong: *Queen v. M'Naghten*, 8 Eng. Rep. 718 [1843].

Involuntariness

27. Assuming there is evidence that at the relevant time the accused was in a dissociated state (separation of the mind and the actions of the body), whether due to trauma, sleep walking, brainwashing or otherwise, and that the actions of the accused were involuntary, what then?

28. The lawyer would then need to consider whether the involuntariness was a result of sane or insane automatism; the former leading to an outright acquittal and the latter, to a qualified acquittal, with the accused being detained "at the Governor's pleasure" pending the Mental Health Tribunal determining that he/she was not a danger to himself/herself or anyone else in the community (notwithstanding the "not guilty" verdict that would follow).

29. For the sake of brevity, if the cause of the dissociative state is *transient* then sane automatism may well be open, however, if the cause is *non-transient* and prone to recur then likely, the court will not leave sane automatism open, but rather, insane automatism: *Queen v Falconer* [1990] 171 CLR30.

30. *Falconer* is a very important authority on dissociated states where the defence is seeking to argue that the actions of the accused were involuntary or not his/her will. Although, the charge in Falconer was murder, the law is equally applicable to any criminal charge, whether dealt with summarily or on indictment.

31. In *Falconer*, a woman was convicted of the murder of her husband. There was evidence of violence he inflicted on her and that she found out he was sexually interfering with her daughters a couple of months prior to killing him. On the day of the killing, the woman learned/believed that he had also sexually assaulted their 9 year old niece. Further, he had previously sexually assaulted the accused. The accused was charged under the W.A. Criminal Code which reflected the

common law on issues such as involuntariness and sane and insane automatism (see for example judgement of Toohey J).

32. In *Falconer*, one psychiatrist, Dr Schioldan-Nielsen, called by the defence, opined that the accused was in a dissociative state as a result of panic and another, Dr Finlay-Jones, opined that at the time of the killing, the accused was in "psychological conflict" and that she acted in an "automatic way". The trial judge rejected the evidence of the psychiatrists and refused to leave involuntariness to the jury. The WACCA upheld an appeal that the trial judge erred in rejecting the medical evidence. On appeal to the high court by the Crown, the court confirmed that evidence of dissociation was relevant to the independent exercise of will and should not have been rejected.

33. It is instructive that the evidence of Dr Schioldan-Nielsen was to the effect that, notwithstanding the dissociative state, witnesses who saw the accused whilst she was in that state would not likely have noticed anything unusual about her (p36). Dr Finaly-Jones also opined and it appeared that the court accepted that, psychological stress may lead to dissociation (p36). In involuntary cases, it will rarely be sufficient for there to just be evidence from an accused and medical evidence will usually be required: *Falconer*.

34. All seven justices in *Falconer* held that the trial judge had erred and that he should not have rejected the psychiatric evidence. Mason CJ and Brennan and McHugh JJ held that the matter should be referred back to the trial judge to reconsider the issue of voluntariness in light of the psychiatric evidence, whereas, Deane and Dawson JJ (in a joint judgement) and Toohey and Gaudron JJ all held that the psychiatric evidence should have been left to the jury for its assessment.

35. It should also be noted in Falconer that, Deane and Dawson JJ agreed with the reasoning of Toohey and Gaudron JJ (separate judgements) and so, in essence, those four judges formed the majority to the extent that there is any inconsistency between the judgements of Toohey and Gaudron JJ with the joint judgement of Mason CJ and Brennan and McHugh JJ.

36. In *Faloner* Deane and Dawson JJ recognised dissociative states as one of the confined examples of sane automatism at [p61.9].

37. Caution should be exercised in getting caught up in the use of technical and/or medical terms such as "automatism" which may have different meanings "on the lips" of lawyers as distinct from the lips of psychiatrists: Toohey J in *Falconer* [at pp68.10-69.4], with whom Deane and Dawson JJ and Guadron J agreed; And Barwick CJ in Ryan at [pp214.8 - 215) his Honour held:

> "It is important…….not to regard this description as of the essence of the discussion, however convenient an expression automatism may be to comprehend involuntary deeds where the lack of concomitant or controlling will to act is due to diverse causes. It is that lack which is the relevant determinant…….It is of course the absence of the will to act or, perhaps, more

precisely of its exercise rather than lack of knowledge or consciousness which, in my respectful opinion, decides criminal responsibility"…

38. In *Ryan* [at p213.9], the Chief Justice, referred to Woolmington (supra) and said: "In that case the description "unintentional" appears to be used to cover an act which was involuntary or unwilled, descriptions of it which for my part I would prefer. However, by whatever adjective or adjectival phrase it is described, the deed which was not the result of the accused's will to act cannot, in my opinion, be made the source of criminal responsibility in him".

39. Notwithstanding that "a claim of involuntariness is no doubt easily raised, and may involve nice distinctions, the accused, if the material adduced warrants that course, is entitled to have the issue properly put to the jury": *Ryan* at [p217.6].

40. In *Falconer*, Toohey J acknowledged instinctive scepticism with dissociation type cases but inter alia, reasoned that it is a matter for the jury to assess the credit of the accused's evidence and the psychiatric evidence at [p73.6].

41. Whilst considering whether there must be some sort of shock precipitating the dissociation, Toohey J (in Falconer) held that there was no reason why the shock cannot be the product of an emotional blow as much as the result of some external physical force at [p73.10] and his Honour approved of *Radford* 20 A Crim R 389 (1985) (see below) and *R v Joyce* [1970] S.A.S.R. 184 where it was considered that the accused had worked himself up into an *emotional frenzy*. Toohey J went on: "The question for the jury is whether the accused's conduct was involuntary……" at [p74.1]. Toohey J again referred to and approved of *Radford* when he confirmed "an unwilled act may be 'the reaction of a sound mind to external stimuli, including stress producing factors" at [p78.7].

42. Further, Toohey J in *Falconer*, reasoned that "there are real difficulties with the 'external factor' test" at [p75.5]; and "The application of the 'external factor' test is artificial and pays insufficient regard to the subtleties surrounding the notion of mental disease. As well, there is confusion in the idea of an external factor" at [p76.1] and is "apt to mislead" at [p78.7]. "Dissociation may warrant a conclusion that the act or omission ……occurred independently of his or her will" per Toohey J at [p76.9].

43. At [pp214 – 216.4] in *Ryan* the court approved of *Woolmington* and *Bratty* that, the ultimate onus remains with the prosecution to prove guilt; whilst there is a presumption of mental capacity at law, the accused is entitled to point to evidence that suggests that his act(s) were involuntary; when there is such evidence and the jury is satisfied with the accused's explanation or are left in reasonable doubt about it, the accused is entitled to be acquitted; the overriding principle is that the prosecution must prove every element of the offence including the accused's state of mind at [p215.5].

44. As to the rebuttal of the presumption (of mental capacity), Deane and Dawson JJ (in *Falconer*), held at [p61.7] that this is "merely a requirement that there be evidence to displace ordinary human experience"; that medical evidence is required before sane automatism can realistically be said to be raised: at [p61.8];

"dissociative states" are but one of the confined examples of sane automatism: at [p61.9]; the accused is not required to prove "his condition" on balance of probabilities, he merely has to raise a reasonable possibility that his actions were involuntary at [p62.1].

45. Psychological trauma may produce transient non-recurrent malfunction (of the mind) on an otherwise sound mind and there is no reason why such trauma should be distinguished from a physical trauma which produces a like effect: *Falconer*, per Mason CJ and Brennan and McHugh JJ at [p54.9].

46. In *R v Carter* [1959] VR 105, the accused was charged with intent to murder. The court accepted the psychiatric opinion that the accused suffered from post-traumatic automatism and that during such a state, sub conscious impulses might take control of the individual, and importantly, that it was possible that that the accused may have recollection both of the events prior to its commencement and of events since its commencement at [pp108-109]. The court referred to a Scottish case (*His Majesty's Advocate v Ritchie*, [1926] S.C. (J) 45) where a psychiatrist called a "somewhat similar state" as in Carter, "dissociation" at [p109.1]. The court went on and held that what was described was not a defect of reason but rather, a defect of volition or will at [p109]. That court held, before one even gets to consider any defect of reason, one must consider whether the act was voluntary at [p109.4]. The court in Carter held that the defence of involuntariness was to be left to the jury at (p111.1).

47. *Yousseff* (supra) involved an appeal to the NSWCCA following his conviction of manslaughter after the car he was driving struck and killed a pedestrian. There was medical and other evidence that the accused may have had an epileptic seizure at the relevant time of driving. The trial judge ruled that the medical evidence raised the issue of insane, not sane, automatism and refused to leave involuntariness to the jury. The principal ground of appeal was that the judge was wrong to exclude sane automatism as being available to the accused. The appeal was upheld. Importantly, Hunt J held that even if the evidence established that an accused "could have" been in state of automatism, then involuntariness "must go to the jury" at [p4.6]. If the accused is able to point to evidence from which it "*could*" be inferred that there is at least a reasonable possibility that his act was involuntary as a result of a state of automatism, then it is a matter for the jury to determine at [p4.8].

48. Hunt J in Yousseff confirmed the common law that automatism may also be relevant to the defence of mental illness, *if* there is a defect of reason proceeding from a disease of the mind, where the accused did not appreciate the nature and quality of his physical act.

49. Where there was a knife fight and the victim was killed, the accused argued that the deceased walked into the knife and claimed self defence; whilst self defence was left to the jury, the trial judge declined to leave involuntariness and an appeal to the WACCA was dismissed. On appeal to the High Court, it unanimously held that the issue of involuntariness ought to have been left to the jury as it was open to the jury to find that the act of the accused in the stabbing of the deceased was

an *unwilled act*: *Ugle v Queen* [2002] 211 CLR 171 per Gaudron J at paragraph [5].

50. Where there is evidence of involuntariness, the issue should be left to the jury and it is for the jury to evaluate the evidence: *Ugle*, per Gummow and Hayne JJ at paragraphs [30] and [31] respectively. Also in *Ugle*, it was held that notwithstanding that the accused had problems with his self defence argument (because he deliberately intruded in the altercation), the issues of self defence and unwilled acts require separate consideration and "unwilled act directions" ought to have been left to the jury: per Kirby J at paragraphs [47] and [48].

51. Lastly, in *Ugle*, Callinan J held that the trial judge ought to have told the jury that the prosecution must negate the possibility of an unwilled act and that it is a matter for the jury to assess all the evidence and any conflicting versions.

52. In *R v Williamson* 67 SASR 428 the accused was charged with having stabbed to death the deceased. The accused argued that he did not know that he was holding a knife at the time of the stabbing. Notwithstanding that the accused's trial counsel conceded manslaughter (at trial) the SACCA held on appeal that, the trial judge ought to have left involuntariness to the jury. *Pemble v The Queen* (1971) 124 CLR 107 was referred to and the CCA restated that a jury cannot be told that it cannot acquit at [430]; and that it is for the prosecution to prove that the accused voluntarily struck the deceased *knowing* that he had the knife in his hand at [pp. 436.4 and 447.6].

53. In *Williamson* the court discussed the wider and narrow view(s) in determining what constitutes the act that must be done voluntarily, and which, if not done voluntarily, cannot support a conviction at [pp433-434]. Each case turns on its own facts. The court followed the view expressed by Mason CJ, Brennan and McHugh JJ in Falconer: "…..the prosecution had to prove that the accused made a *conscious choice* to do an act of the kind done" at [p434.4] (italic emphasis added) and held that the prosecution had to prove that the accused knew he had the knife in his hand and intended to and did deliberately strike the deceased. The court further held that the common law in effect, mirrored s 23 of the SA Criminal Code in relation to murder at [p445.2 and p447.6].

54. In *Radford*, a man was convicted of murdering a woman who was friendly with his wife. The accused believed that his wife and the woman were in a lesbian relationship. There was psychiatric evidence that the accused had dissociated due to acute stress, not due to a disease of the mind. The trial judge refused to leave automatism to the jury. On appeal the CCASA held that (relevantly) automatism should have been left to the jury at [p392 and p398.9]. King CJ distinguished between disease of the mind and "involuntary or automatic behaviour" and confirmed the common law that, these terms arise from the reaction of a healthy mind to extraordinary external stimuli and "the point of automatism is that the conduct was not subject to the control and direction of the will…." at [p397].

55. Importantly in *Radford* (approved by the high court in *Falconer* and other appellate authorities on many occasions), the chief justice held that there is no reason to distinguish between disturbance of mental faculties by reason of stress caused by external factors and disturbance caused by effects of physical trauma or sleep walking at [p397.9]; and notwithstanding that sane automatism cases may result in outright acquittals the chief justice held: "I do not see any reason to shrink from that consequence" and "If a person was not morally responsible ……because that action was an unwilled act, he should not suffer conviction or punishment" at [p398.3].

56. The court (in *Radford*) acknowledged the psychiatric evidence to the effect that the accused killed the deceased in a state of depersonalisation or dissociation brought about by severe stress at [p398.5]; and although King CJ expressed a degree of scepticism as to how the accused could have fired 7 bullets into the deceased without it being his will, he and Johnson J held that that, given the evidence of the psychiatrist, that evidence had to be assessed by the jury at [p398.8].

57. King CJ in *Radford* at [p397.4) referred to *Ryan* (supra) and observed that "the critical point ……., is that the conduct was not subject to the control and direction of the will, *not the accused's consciousness or awareness of his conduct*" (emphasis added). It follows that an accused may be conscious or aware of his conduct and his actions may still be involuntary. The chief justice referred to a number of authorities where automatism resulting from psychological or emotional stress was left for the consideration of the jury at [p397.9].

    2x Case Studies - Not Guilty even when Accused admitted commission of the Act(s)

    a) Murder Trial R v Dean Waters; and
    b) District Court trial – Destroy Auditorium by fire - $5M damage.

    [Both will be dealt with orally if time permits].

Mental Health and Sentencing [Parts extracted from NSW Sentencing Benchbook]

58. The fact that an offender was, or is, suffering from a mental disorder or disability either at the time of the commission of the offence or at the time of sentencing may be taken into account at sentencing: *R v Anderson* [1981] VR 155; (1980) 2 A Crim R 379.

59. An offender's mental condition can have the effect of reducing a person's moral culpability and matters such as general deterrence, retribution and denunciation have less weight: *Muldrock v The Queen* (2011) 244 CLR 120 at [53]; *R v Israil* [2002] NSWCCA 255 at [23]; *R v Henry* (1999) 46 NSWLR 346 at 354. This is especially so where the mental condition contributes to the commission of the

offence in a material way: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177]; *Skelton v R* [2015] NSWCCA 320 at [141].

60. The High Court explained the rationale for the principle in *Muldrock v The Queen* at [53]:

One purpose of sentencing is to deter others who might be minded to offend as the offender has done. Young CJ, [in *R v Mooney* in a passage that has been frequently cited, said this [(unrep, 21/6/78, Vic CCA) at p 5]:

> "General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others."

The High Court continued at [54]:

> "The principle is well recognised. It applies in sentencing offenders suffering from mental illness, and those with an intellectual handicap. A question will often arise as to the causal relation, if any, between an offender's mental illness and the commission of the offence. Such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community."
> [Footnotes excluded.]

Sentencing an offender who suffers from a mental disorder commonly calls for a "sensitive discretionary decision": *R v Engert* (1995) 84 A Crim R 67 at 67. This involves the application of the particular facts and circumstances of the case to the purposes of criminal punishment set out in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 488. The purposes overlap and often point in different directions. It is therefore erroneous in principle to approach sentencing, as Gleeson CJ put it in *R v Engert* at 68:

> "as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise."

Note: some of the types of mental conditions that offenders can have are described in Intellectual Disability and Rights Service, "Step by Step Guide to Making a Section 32 Application for a Person with an Intellectual Disability", October 2011.

The broad term “developmental disability” is used in the publication to cover “disability categories such as: intellectual disability, cerebral palsy, epilepsy, autism (including Asperger disorder) and some neurological conditions (at p 8, referencing Errol Cocks, *An Introduction to Intellectual Disability in Australia*, 3rd edn, Australian Institute on Intellectual Disability, 1998). Mental condition also includes a disability of mind resulting from acquired brain injury (at p 11).

It should not be assumed that all the mental conditions recognised by the *Diagnostic and Statistical Manual of Mental Disorders DSM (IV)*, 4th edn, American Psychiatric Association, 2000, Washington DC, attract the sentencing principle that less weight is given to general deterrence: *R v Lawrence* [2005] NSWCCA 91. Some conditions do no attract the principle. Spigelman CJ cited literature on the limitations of *DSM (IV)* at [23] and said at [24]:

> “Weight will need to be given to the protection of the public in any such case. Indeed, one would have thought that element would be of particular weight in the case of a person who is said to have what a psychiatrist may classify as an Antisocial Personality Disorder.”

As a factor relevant to the objective seriousness of the crime

After *Muldrock*, a person’s mental condition is not relevant to the assessment of objective circumstances for the purpose of applying the standard non parole period provisions. The basis of this view is that the High Court said in *Muldrock* at [27] that: “The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.” See also RA Hulme J in *Yang v R* [2012] NSWCCA 49 at [28].

Section 21A(3)(j) also refers to an offender not being aware of the consequences of his or her actions because of a disability, as a mitigating factor. Whatever it may mean, the terms of s 21A(3)(j) are restricted to the common law on the subject.

A causal relationship between the mental disorder or abnormality and the commission of the offence will not always result in a reduced sentence. In *R v Engert* (1996) 84 A Crim R 67 Gleeson CJ said at 71:

> “The existence of such a causal relationship in a particular case does not automatically produce the result that the offender will receive a lesser sentence, any more than the absence of such a causal connection produces the automatic result that an offender will not receive a lesser sentence in a particular case. For example, the existence of a causal connection between the mental disorder and the offence might reduce the importance of general deterrence, and increase the importance of particular deterrence or of the need to protect the public.”

Offender acts with knowledge of what she or he is doing

In *R v Wright* (1997) 93 A Crim R 48 at 51 the court held that it is an accepted principle of sentencing that general deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality, because such an offender is not an appropriate medium for making an example to others. However, if the offender acts with knowledge of what he or she is doing and with knowledge of the gravity of the actions, the moderation need not be great. In *R v Wright* the applicant's psychotic state was self-induced by a failure to take medication and a deliberate or reckless taking of drugs. Hunt CJ at CL stated at 52:

> "by his recklessness in bringing on these psychotic episodes, [the applicant] is a continuing danger to the community, a matter which would in any event reduce — if not eradicate — the mitigation which would otherwise be given for the respondent's mental condition."

R v Wright was referred to in passing by the High Court in *Muldrock* (at fn 68). *Wright* has been applied in a number of cases including, *R v Hilder* (1997) 97 A Crim R 70 at 84; *R v Mitchell* (1999) 108 A Crim R 85 at [42]–[45]; *Benitez v R* (2006) 160 A Crim R 166 at [41]–[42]; *Taylor v R* [2006] NSWCCA 7 at [30]; *Cole v R* [2010] NSWCCA 227 at [71]–[73]; *R v Burnett* [2011] NSWCCA 276. The Crown in *Adzioski v R* [2013] NSWCCA 69 submitted without success that the judge had failed to apply *R v Wright*.

In *Skelton v R* [2015] NSWCCA 320 at [138]–[139], the jury rejected the defence of mental illness, ie that the accused did not know his actions were wrong. The sentencing judge was found to err in concluding that the extent of the reduction in the offender's moral culpability was "not as great as might have been available if [he] did not fully appreciate his actions were wrong". The CCA held that, had the offender fully appreciated his actions were wrong, the defence of mental illness would have been established. The jury's verdict left open the possibility that the offender was impaired to some degree. The judge's conclusion that the impairment was "not great at all, or even significant" was contrary to the expert evidence on the subject: *Skelton v R* at [138]ff.

As a factor relevant to rehabilitation

In *R v Engert* (1995) 84 A Crim R 67 Gleeson CJ said at 71:

> "there may be a case in which there is an absence of connection between the mental disorder and the commission of the offence for which a person is being sentenced, but the mental disorder may be very important to considerations of rehabilitation, or the need for treatment outside the prison system."

In *Benitez v R* (2006) 160 A Crim R 166 the judge erred by finding that, although the applicant had good prospects of rehabilitation, his mental condition was not a mitigating factor because it was not the cause of the commission of the offence.

It is not necessary to show that it was the cause, or even a cause, of the commission of the crime: *Benitez v R* at [36], referred to in *R v Smart* [2013] NSWCCA 37 at [26], [30].

Custody more onerous

An offender's mental condition can be taken into account on the basis that it will make his or her time in custody more burdensome and therefore the length of the prison term or the conditions under which it is served may be reduced: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177].

Protection of society and dangerousness

In *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575 Gleeson CJ said at [20]:

> "As *Veen [No 2]* held, it is well settled that common law sentencing principles have long accepted protection of the community as a relevant sentencing consideration."

In *Veen v The Queen (No 2)* (1988) 164 CLR 465, the majority said at 476:

> "a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter."

In *R v Engert* (1995) 84 A Crim R 67 Gleeson CJ explained the problem that confronted the High Court in *Veen v The Queen (No 2)*. His Honour stated at 68:

> "in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance. That was the particular problem being examined by the court in the case of *Veen (No 2)*. Again, in a particular case, a feature which lessens what might otherwise be the importance of general deterrence, might, at the same time increase the importance of deterrence of the offender."

R v Whitehead (unrep, 15/6/93, NSWCCA) is an example of an application of the principle. Gleeson CJ stated that it would be incongruous to treat sexual sadism as a mitigating factor in sentencing for malicious wounding, explaining:

> "One reason for this is that the very condition that diminishes the offender's capacity for self-control at the same time increases the need for protection of the public referred to by the High Court in the case of *Veen v The Queen (No 2)* …"

Similarly, in *R v Adams* [2002] NSWCCA 448, a case where the offender had a fascination with knives and suffered from a severe personality disorder of an antisocial type, the court held that there was a "compelling need to have regard to the protection of the community". See *Cole v R* [2010] NSWCCA 227 at [73]–[75].

However, a consideration of the danger to society cannot lead to a heavier sentence than would be appropriate if the offender had not been suffering from a mental abnormality: *Veen v The Queen (No 2)* at 477; *R v Scognamiglio* (1991) 56 A Crim R 81 at 85. In *Veen v The Queen (No 2)*, the High Court put the principle in these terms at 473:

> "It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible."

Tips on Obtaining the Right Expert and how to Best Present that Evidence

1. Don't follow the crowd and brief a particular expert just because others do – scout around; check their background and expertise; enquire as to cases in which they have given evidence;
2. The letter of instructions must be clear and succinct – tell them all that they need to know but not more;
3. Engage in oral communication with the expert to further explain what you are looking for – explain where you are coming from, particularly, if you are relying on the expert evidence as a defence;
4. Travel to see the expert where required to ensure that you know precisely what the expert will say, particularly, when the expert is relied on to establish a defence: I have briefed and called evidence from interstate experts and travelled to see them; and
5. Engage your expert in potentially controversial topics so that neither they or you, will be taken by surprise when they are giving evidence – whether in chief or in cross examination.

MEDICAL USE OF CANNABIS

Background: Case Study (Brief and simplistic summary)

1. Child severely epileptic – Dravet Syndrome – diagnosed at age 6 months – seizures of up to 1,500 per day any one of which could kill her;
2. By definition, Dravet sufferers are resistant to prescription drugs;
3. By the age of about 3 ½ years, father discovered that a particular type of cannabis oil, very low in THC (which gives the high) – less than THC, significantly reduced the quantity and strength of the seizures such that after a few uses, the child had not fitted for about 6 months.
4. Specialists observed the very positive difference that the cannabis made to the child and supported the child's use of the cannabis [in writing];
5. Father began importing this particular cannabis oil from Europe, however, the supply was inconsistent and Customs could have intercepted package at any time - father was concerned that the supply would run out;
6. The treating specialist obtained a Commonwealth Import permit to import the cannabis from Europe, but due to conflict between Commonwealth and state legislation; although the cannabis was lawfully imported by the doctor, if the doctor gave the cannabis to the father or directly to the child, the doctor would have been committed the offence of "supply" under the NSW DMT Act.
7. By the age of 4 ½ years the child was diagnosed with brain damage as a result of the [violent] seizures;
8. There is indisputable medical evidence that any seizure could cause the child further brain damage and/or cause her death;
9. Some months prior to this father began growing cannabis and extracting the oil from the leaf and he would cause his daughter to ingest the cannabis by putting the oil on a cookie, for example;
10. Father was subsequently charged with various offences, including cultivation of cannabis plants and possession of cannabis.

The Defence of [Medical] Necessity

The possession, cultivation and trafficking of cannabis are offences in all Australian jurisdictions [although there are some interstate trials].[1] Only a few, very limited authorisations to possess cannabis are provided by legislation.[2] Medical practitioners cannot prescribe cannabis,[3] but they can obtain approval to prescribe the cannabis-

[1] *Criminal Code Act 1995* (Cth), ss 302.1-302.5, 303.1-303.6, 308.1. *Drug Misuse and Trafficking Act 1985* (NSW), ss 3(1), 4, 10(1), 23, 25. All States and Territories except Queensland have also criminalised the use of cannabis: *Drug Misuse and Trafficking Act 1985* (NSW), s 12

[2] *Drug Misuse and Trafficking Act 1985* (NSW), s 23(4)(b), (c).

[3] *NSW Drug Misuse and Trafficking Act 1985*": *Poisons and Therapeutic Goods Act 1966* (NSW), s 8; Department of Health (NSW), *New South Wales Poisons List* (1 September 2012) p 8.

derived synthetic drugs dronabinol and nabilone, and the botanical extract nabiximols.[4]

While no express legislative provision authorising the medical use of cannabis exists anywhere in Australia, the scope for defences based on the necessitous medical use of cannabis remains largely unexplored.[5]

Rationale

Necessity

The common law recognises that situations can occur whereby a person is justified in breaking the law to avoid a greater harm than that which would result from obeying it, or should be excused from breaking the law if compliance would impose an intolerable burden on him. This concession gives rise to the defence of necessity, which operates to absolve an accused of criminal responsibility for an act which would otherwise be a crime.

The leading authority on necessity in the Australian common law jurisdictions is the joint judgment of Young CJ and King J in *R v Loughnan* [1981] VR 443 (*Loughnan*), which formulated a test involving three elements:

> First, the criminal act or acts must have been done only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect … The [second] element is that the offender must have believed on reasonable grounds that it was necessary for him to do what he did to avoid the imminent peril [see below]. Put in another way, the test is: would a reasonable man in the position of the accused have considered that he had any [reasonable] alternative to doing what he did to avoid the peril?[6]

The only NSW authority dealing with the elements of necessity is *Mattar v R* [2012] NSWCCA 98 where at [7] Harrison J, with the concurrence of Beazley JA adopted the dictum of *Loughnan* at [448].

Elements of necessity and their application to cannabis offences

Element 1 – Irreparable evil/emergency

The criminal act of possessing cannabis must have been done to avoid certain consequences which would have inflicted "irreparable evil" upon the accused or other, whom he was bound to protect. The majority in *Loughnan* left the limits of "irreparable

[4] *Poisons and Therapeutic Goods Act 1966* (NSW), s 28A.

[5] A number of commentators have speculated "that possession or supply of a … drug … could be justified on the basis of medical necessity": Schloenhardt A, *Queensland Criminal Law* (Oxford University Press, Oxford, 2008) p 352. See, for example, Heilpern D and Rayner G, "Drug Law and Necessity" (1997) 22(4) *Alternative Law Journal* 188.

[6] *R v Loughnan* [1981] VR 443 at 448.

evil" undefined, but indicated that further refinement of that concept would be desirable:

> *"The limits of this element are at present ill-defined and where those limits should lie is a matter of debate. But we need not discuss this element further because the irreparable evil relied upon in the present case was the threat of death and if the law recognises the defence of necessity in any case it must surely do so where the consequence to be avoided was the death of the accused. We prefer to reserve for consideration, if it should arise, what other consequence might be sufficient to justify the defence."*[7]

The established medical uses of cannabis include the treatment of nausea, vomiting, appetite loss, wasting syndrome and spasticity. Rather than avoiding death or serious physical injury, these uses are intended to alleviate significant suffering resulting from symptoms of serious medical conditions. Thus, to insist that necessity be confined to cases involving death or serious physical injury would be to rule out the availability of the defence in cases involving the medical use of cannabis – which is exactly what the English Court of Appeal did in *Quayle*.[8]

Indeed, some abortion cases from Victoria and New South Wales – which draw upon the principles of necessity to determine whether an abortion is lawful – refer to types of threatened harm less than death or physical injury, such as danger to mental health.[9] It appears, therefore, that there is no need for danger of death or physical injury under Australian common law. "Irreparable evil" can encompass threats of less harm than death or physical injury, and may therefore apply to at least some forms of threatened harm which medical use of cannabis may be intended to avoid, such as the suffering which cancer or HIV/AIDS patients might endure if lawful medications prove ineffective.

Element 2 – Reasonable belief of imminent peril

The second element of necessity means that the accused must have reasonably believed that he was placed in a situation of imminent peril. This does not require that circumstances of imminent peril have existed in fact, however, the offender must have had reasonable grounds for his stated belief.

The majority in *Loughnan*, doubted that the defence could ever succeed without circumstances of imminence in fact:

> "*[A]ll the cases in which a plea of necessity has succeeded are cases which deal with an urgent situation of imminent peril. Thus if there is an interval of time between the threat and its expected execution it will be very rarely if ever that a defence of necessity can succeed.*"[10]

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[7] Ibid.

[8] *Quayle v The Queen; Attorney-General's Reference (No 2 of 2004)* [2005] 1 WLR 3642 at [77].

[9] See, for example, *R v Davidson* [1969] VR 667 at 672; *R v Wald* (1971) 3 NSWDCR 25 at 29; *CES v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47 at 59-60, 80.

[10] *R v Loughnan* [1981] VR 443 at 448.

Subsequent Australian cases continued to refer to "imminence" and related concepts such as "urgency" and "immediacy", sometimes even calling them "requirements"; in other contexts, "imminent peril" has been taken to mean that the criminal act must have been spontaneous, without any planning or deliberation.[11] In light of the High Court decision in *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, however, later Australian authorities have been more careful in referring to the elements described in *Loughnan*, treating them as relevant factors rather than strict requirements. In *R v Rogers* (1996) 86 A Crim R 542 (*Rogers*), for example, Gleeson CJ stated:

> *"[I]t is now more appropriate to treat those requirements, not as technical legal considerations, but as factual considerations relevant … to the issue of an accused person's belief as to the position in which he or she is placed, and as to the reasonableness and proportionality of the response."*[12]

In *Behrooz v Secretary of Department of Multicultural and Indigenous Affairs* (2004) 219 CLR 486, Gleeson CJ explained further that, in contrast to United States authorities, the court in *Loughnan* regarded imminence as evidentiary rather than a strict legal requirement:

> *"In … Loughnan … [and] … Rogers, consideration was given to the principles according to which a person, confronted in prison with some peril involving a threat to life or safety, may lawfully take steps, proportionate to the danger, to avoid the threat. Such steps do not ordinarily involve remaining at large in the community for an indefinite period. Thus, for example, there are United States authorities which make it a condition of pleading necessity as an excuse for escaping from prison that the prisoner, after escape, must report immediately to the proper authorities when he has attained a position of safety from the immediate threat. The Supreme Court of Victoria, in Loughnan, said this was a matter of evidentiary significance, rather than a legal condition."*[13]

The High Court considered Gleeson CJ's comments in *Rogers* again in 2009, citing with approval his rejection of "the view that the defence of necessity required proof of urgency and immediacy as technical elements".[14]

Australian common law therefore differs from that of England in this respect. There is no "requirement" of imminence per se. It may be the case that, as the majority said in *Loughnan*, "if there is an interval of time between the threat and its expected execution it will be very rarely if ever that a defence of necessity can succeed",[15] but it is

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[11] See, for example, Fletcher GP, *Rethinking Criminal Law* (Little Brown & Co, Boston, 1978) pp 811-812; Colvin E and McKechnie J, *Criminal Law in Queensland and Western Australia* (5th ed, LexisNexis, Chatswood, 2008) p 387. Compare *Pagawa v Matthew* [1986] PNGLR 154. See also *R v Dudley and Stephens* (1884) All ER 61.

[12] *R v Rogers* (1996) 86 A Crim R 542 at 546. See also *Bayley v Police* [2007] SASC 411 [37]; *Warnakulasuriya v The Queen* [2012] WASCA 10 at [129].

[13] *Behrooz v Secretary of Department of Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at [15] (Gleeson CJ).

[14] *Taiapa v The Queen* (2009) 240 CLR 95 at [37].

[15] *R v Loughnan* [1981] VR 443 at 448.

nevertheless possible that "[a]n action may be rendered necessary by circumstances that are not urgent or immediate".[16]

Element 3 – Proportionality

The third element of necessity – "*proportion*" – means that the criminal act done to avoid threatened harm must not be disproportionate to the harm avoided. It forms the second part of the objective standard which Australian common law imposes in relation to necessity. The test is whether the accused's response was reasonable, when measured against the reaction of an ordinary person in his position.

In the context of the medical use of cannabis, the test should be satisfied if a reasonable person in the accused's position – would have considered that he or she had no reasonable alternative. Whether that test is satisfied is a question of fact to be determined in each individual case.

It is instructive to note as Gleeson CJ emphasised in *Rogers*, *"[t]he relevant concept is of necessity, not expediency, or strong preference"*.[17] His Honour continued:

> *"If the [accused], or the jury, were free to consider and reject possible alternatives on the basis of value judgments different from those made by the law itself, then the rationale of the defence, and the condition of its acceptability as part of a coherent legal system, would be undermined … [T]he accused must have been afforded no reasonable opportunity for an alternative course of action which did not involve a breach of the law."*[18]

The Unites States Model

Although the United States Supreme Court has ruled that there is no medical necessity defence under federal law (at least for the time being),[19] a number of State courts have allowed medical necessity to absolve cannabis users of criminal responsibility under State law.[20] Medical necessity has been successfully raised by defendants in respect of cannabis possession offences in Florida,[21] Hawaii,[22] Idaho,[23] Washington[24] and Washington DC.[25]

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[16] *Warnakulasuriya v The Queen* [2012] WASCA 10 at [129].
[17] *R v Rogers* (1996) 86 A Crim R 542 at 546 (Gleeson CJ).
[18] Ibid.
[19] *United States v Oakland Cannabis Buyers' Cooperative* 532 US 483 (2001); *Gozales v Raich* 545 US 1 (2005).
[20] Other States have special legislative provisions securing the availability of medical necessity as a defence to cannabis offences or providing a separate "affirmative" defence to cannabis charges in addition to the statutory exemption provided under the State's medical cannabis regime.
[21] *State v Mussika* 14 FLW 1 (1988); *Jenks v State* 582 So 2d 676 (1991); *Sowell v State* 738 So 2d 333 (1998).
[22] *State v Bachman* 595 P 2d 287 (1979).
[23] *State v Tadlock* 34 P 3d 1096 (2001).
[24] *State v Diana* 604 P 2d 1312 (1979); *State v Cole* 874 P 2d 878 (1994).
[25] *United States v Randall* 104 Wash Daily L Rep 2249 (1976).

Mathre explains the failure of most American medical necessity cannabis cases by arguing that generally the defence has been struck out where the patient had not tried all legal avenues to obtain medical cannabis.[26] She also points to practical issues in raising the defence, such as the importance of medical and scientific witnesses and the court's perception of the defendant as an otherwise law-abiding citizen, and notes that defending the possession of large quantities of cannabis is difficult even if the defendant objectively needs such a quantity.[27]

More cynically, Bogdanoski argues:

> *"The decisions in these cases often hinged upon the personal biases of the judges hearing the matters rather than on the authenticity of the defendants' need to use marijuana or cannabis generally, all of whom were able to adduce evidence from their treating doctors that they were demonstrably deriving benefits from using the drug."*[28]

Where the defence has succeeded, it has generally been expressed as comprising three elements. In *State of Washington v Diana* 604 P 2d 1312 (1979), for example, adapting the general principles of necessity to the circumstances of an MS sufferer who argued that his use of cannabis was a medical necessity, the Washington Court of Appeals held that his conviction should be set aside if the evidence showed:

(1) he reasonably believed his use of marijuana was necessary to minimise the effects of MS;
(2) the benefits from its use are greater than the harm sought to be prevented by the controlled substances law; and
(3) No drug is as effective in minimising the effects of the disease.[29]

In Conclusion

The review of evidence for medical uses of cannabis, the analysis of criminal defences based on necessity under current Australian law, and the examination of the alternative model deployed in some US states for regulation of medical cannabis above, lead to three corresponding conclusions.

1. *Firstly*, cannabis does have legitimate medical uses. These include the well-established therapeutic benefit of THC in alleviating nausea in cancer and HIV/AIDS patients. The TGA implicitly recognises this by including dronabinol and nabilone in Sch 8 of the *Poisons Standard*. There is also growing evidence

[26] Mathre ML, *Cannabis in Medical Practice: A Legal, Historical and Pharmacological Overview of the Therapeutic Use of Marijuana* (McFarlane & Co, Jefferson, 1997) p 29, cited in Irvine G, "Legalisation of Medicinal Cannabis in New South Wales" (PhD Thesis, Southern Cross University, 2011) pp 216-217.
[27] Ibid..
[28] Bogdanoski T, "Accommodating the Medical Use of Marijuana: Surveying the Differing Legal Approaches in Australia, the United States and Canada" (2010) 17 *Journal of Law and Medicine* 508 at 523.
[29] *State of Washington v Diana* 604 P 2d 1312 (1979). See also, McGuire S, "Medical Marijuana State Law Undermines Federal Marijuana Policy: Is the Establishment Going to Pot?" (1997) 7 *San Joaquin Agricultural Law Review* 73 at 86.

supporting the claim that the composition of cannabinoids found in natural cannabis may provide a greater therapeutic benefit than dronabinol or nabilone in some cases, a fact the TGA implicitly recognised in 2010 when it added nabiximols to Schedule 8.

2. *Secondly*, there may be scope within existing Australian drug laws for defences against cannabis charges on the basis of necessitous medical use. Australian courts have taken a much less restrictive approach to the defence of necessity than have English courts. This becomes clear when the reasoning with respect to the three "specific requirements" of the defence referred to in *Quayle*[30] is compared with Australian authorities on the three elements in *Loughnan*. Two of the three specific requirements which prevented the defence from succeeding in *Quayle* – the need for extraneous circumstances and the need for danger of physical injury – do not exist under Australian common law. The third requirement – the need for imminence and immediacy – might be seen as equivalent to the element of "imminent peril" in *Loughnan*, but in light of more recent authorities, should be regarded as a factual consideration rather than a strict legal requirement. These defences may provide some legal protection to medical cannabis users in Australia, but have yet to be argued successfully before a court. In any event, the best they can provide is a shield against criminal punishment in individual cases, and the evidentiary burden of raising them falls on the accused in each case. Australian drug law should therefore be reformed to better accommodate medical use of cannabis by providing statutory authorisation.

3. *Thirdly*, the models provided by overseas medical cannabis regimes all have their flaws, but an imperfect model allowing the medical use of cannabis in at least some cases is still better than prohibiting its use outright. Currently, with cannabis as a Schedule 9 drug, a doctor who determines that cannabis is the best treatment for a patient is unable to prescribe it. That needs to change.

Furthermore, accommodating medical use of cannabis enjoys widespread support among Australians,[31] and conditional support from the nation's peak medical professional association and other non-government organisations.[32]

The status of the Court Proceedings – Case Study

The matter is still before the courts.

Footnote: Since the preparation of part of this paper on Medicinal Cannabis Use as a Necessity, the NSW parliament made legislative amendments. However, in my view, those amendments fall short of what is required: 60 minutes sought my advice as to these legislative changes and [relevantly] I advised the producers of the program as follows [redactions for privacy reasons]:

[30] *Quayle v The Queen; Attorney-General's Reference (No 2 of 2004)* [2005] 1 WLR 3642.

[31] Australian Institute of Health and Welfare, *2010 National Drug Strategy Household Survey Report* (2011) pp 170 - 177.

[32] Australian Medical Association, *Cannabis Use and Health – 2014*, https://ama.com.au/node/2556 viewed 8 June 2014. See generally Marijuana Policy Project, *State-By-State Medical Marijuana Laws* (2013) pp P1-P27.

The Advice to 60 minutes

1. *The permit under the Commonwealth Regulations allowed the medical practitioner to import a particular type of cannabidiol (+CBDa) from Denmark ("the Endoca Product") for use by [the child] in the treatment of her condition;*
2. ***IF**, the Endoca Product did <u>not</u> contain a detectable level of THC, then it would <u>not</u> have been an offence under the (NSW) DMT Act for the medical practitioner to have given the Endoca Product to, or to have administered it to [the child] [although it is assumed that the Endoca Product did not contain a detectable level of THC, we don't know that for sure because it was never tested];*
3. *Even if the Endoca Product did not contain detectable THC, then, prior to the August/September 2016 legislative changes, it would still have been an offence to give or to administer the Endoca Product to [the child] because it was a "restricted substance" under the NSW Regulations;*
4. *The legislative changes [relevantly], in combination with sections 10, 12 and 13 of the DMT Act, permit a medical practitioner to "prescribe" and "supply" a "medicinal cannabis* product" ["cannabis"], and for that medical practitioner to administer the cannabis to *his/her "patient", PROVIDED the medical practitioner has applied for and obtained a licence/permit under part 8 of the NSW Regulations to prescribe and/or supply (ETC);*
5. *There is however, legislative confusion as to whether the prescribed cannabis may be administered to the patient by someone other than the medical practitioner, such as a parent/carer; s13 (3) of the DMT Act would appear to allow that to occur without criminality, BUT clause 128 E od the NSW Regulations only authorises a medical practitioner to "supply" the cannabis to the patient; hence, arguably, if the parent/carer was to administer the cannabis, he or she would be committing an offence under [at least] the NSW Regulations with a potential maximum fine of $2,200;*
6. *It would appear that the "cannabis" would by definition in the NSW Regulations, include the Endoca Product;*
7. *It is not known how long it would take for the medical practitioner to obtain that licence/permit;*
8. *As to access to the cannabis, as there is not <u>now</u>, any manufacturer in Australia who either has or is able to supply the cannabis, any person seeking access to it under the scheme, would be forced to seek to have a medical practitioner apply for a licence under the Commonwealth Regulations to import the cannabis, such as the Endoca Product, from overseas and for many, this would likely prove cost prohibitive;*
9. *Until such time as the cannabis is able to be legally acquired in NSW (or elsewhere in Australia), from a practical perspective, access to the cannabis is particularly problematic and there is a gap in the legislation whereby cannabis cannot be legally cultivated in NSW for therapeutic purposes [only for research etc s23 (4) DMT Act]; and*
10. *Further, it would be a criminal offence and wrong to assume that once a medical practitioner "prescribes" the cannabis, that this would allow the patient or parents/carers of the patient to "grow their own" or to purchase the cannabis from a dealer [s22 and 23 DMTA].*

Accordingly, in my view there is still much more for the legislators to consider.

Do the Legislative Changes solve the Problem for Others in the position of [My clients]?

The short answer is no, because:

- *i) Assuming they get a doctor (likely a specialist) to prescribe the cannabis: Where do they get the cannabis from?*
- *ii) There is no manufacturer in Australia from where to purchase it; It would be an offence to grow it; and it would be an offence to purchase it from a dealer;*
- *iii) They could seek to import cannabidiol but consider the cost for [for the punter]: engaging a doctor; persuading him or her to apply for the Commonwealth permit; purchasing it on line (several hundred dollars each 2-3 months); having that doctor or another, then apply for a State licence under the NSW Regulations; and as it is not a PBS drug, there is no rebate; and*
- *vi) If the patient is a child or a person requiring a carer, their carer cannot:*
  - *a) give the cannabis to the child (person); or*
  - *b) even have the cannabis in his or her possession for the purpose and intent of giving it to their child without committing the offence of supply prohibited drug under the DMT Act.*

Consequently, as it is now, the "punter", would likely be forced to do what any other reasonable parent would do, grow their own cannabis or purchase it from a dealer.

COSTS IN CRIMINAL CASES

In criminal proceedings in NSW, costs do not follow the event and a successful accused is not entitled to an order for costs simply because he or she was acquitted: Latoudis v Casey (1990) 170 CLR 534 (20 December 1990).

There is however, statutory power for the courts to award costs:

1. Criminal Procedure Act [in respect of summary and indictable matters];
2. Costs in Criminal Cases Act; and
3. Suitors Fund Act 1951.

Criminal Procedure Act (Summary Matters)

1. The Local Court has jurisdiction to make an order for costs in summary proceedings in favour of the applicant [relevantly], when the proceedings are "*withdrawn and dismissed*": s.213 (1) Criminal Procedure Act 1986) ("CP Act").

2. S.213 (2) provides that the amount of the professional costs is to be the amount that the court considers to be **"just and reasonable"**.

3. S.213 (3) sets out two circumstances in which costs may be awarded but the sub section does not limit s.213 (1).

4. S.213 (5) provides that the court *must* specify the amount of professional costs payable.

5. Although "professional costs" is not defined in the CP Act, some guidance may be gleaned from s.116 (5) (Costs after Committal Hearing) which provides that professional costs include expenses and disbursements (including witnesses' expenses).

   Likely, "costs" would include reasonably incurred disbursements.

6. The Act is silent as to whether costs should be on indemnity or other basis, and it is to be inferred that it is entirely within the discretion of the court to determine that costs on an indemnity basis is "just and reasonable".

7. S.214 (1) (a) to (d) sets out the circumstances in which costs are to be awarded (pursuant to s.213).

8. The Applicant bears the onus on balance of probabilities, to show that the exception to the general rule [that costs are not to be awarded in favour of an accused person], is appropriate: *Fosse v DPP* [1999] NSWSC 367 at [16].

9. Any order for payment of costs is a different step to the order dismissing the matter and there is no requirement that there be any connection between the basis upon which an accused person was acquitted and the facts and circumstances about which the court must be satisfied under s 214 (1) before ordering costs: *R v Hunt* [1999] NSWCCA 375.

10. There is limited case authority concerning sections 212 – 214 of CPA Act.

11. It would be wrong for the court to read down words such as “unreasonable” and “improper” [in s214] and any impropriety or wrong doing on the part of police is to be considered objectively and the applicant does not need to satisfy the court that the conduct was deliberate: *Jd v DPP* [2000] NSWSC 1092 (30 November 2000) at [31] to [32] where Hidden J held that the magistrate applied the wrong test. Hidden J added, (at [31]):

> "*The test is purely objective. To find that the conduct of investigation of a particular case was unreasonable does not necessarily impugn the general competence, far less the integrity, of those responsible for it*."

12. Before leaving the CP Act, ss.116-117 deal with an application for costs in respect of a committal hearing. These sections are virtually identical to ss.213-214 of the CP Act and not much more needs to be said about them.

Costs in Criminal Cases Act 1967

13. However, there are authorities which have been determined under the Costs in Criminal Cases Act 1967 (NSW), which may inform consideration and interpretation of some of the costs provisions of the CP Act.

14. The relevant sections in the Costs in Criminal Cases Act (the CCC Act”) are ss. 2, 3, 3A and 4. There is a common misconception amongst lawyers that the CCC Act only applies to matters being dealt with on indictment.

15. However, section 2 of the CCC Act empowers the court in a summary matter or a matter dealt with on indictment to grant a costs certificate to the accused. Note also, that s.212(2) of the CP Act provides that that Act does not affect payment of costs under the CCC Act.

16. Section 3 of the CCC Act sets out the relevant test:

> "*3(1) A certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Magistrate granting the certificate:*
>
> *(a) if the prosecution had, before the proceedings were instituted, been in possession of evidence <u>of all the relevant facts</u>, it would not have been reasonable to institute the proceedings, and*

(b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances."

17. *R v Ahmad* [2002] NSWCCA 282 (19 July 2002) was a decision comprising a bench of Spigelman CJ, Simpson J and Blanch AJ. At [3], the Court cited with approval, the substantive appeal of *R v Manley* (2000) 49 NSWLR 203 at 205 when his Honour Wood CJ at CL said:

> "*. . . in the ordinary course of events a prosecution may be launched where there is evidence to establish a prima facie case but that does not mean it is reasonable to launch a prosecution simply because a prima facie case exists.* ***There may be cases where there is contradictory evidence and where it is reasonable to expect a prosecutor to make some evaluation of that evidence*** (bold emphasis added).
>
> *These observations have been cited with approval by this Court in Fejsa (supra) and Pavy (supra) . . .*"

Just and Reasonable

18. In *Caltex refining Co Pty Ltd v Maritime Services Board of NSW* (78 A Crim R 368 at 379) the CCA considered the meaning of the words "just and reasonable" in relation to an application for costs in the Land and Environment Court.

    His Honour Sully J gave the leading judgment and relevantly enunciated these principles:-

    - *"The requirement that such an order must be both just and reasonable entails both that there will be a fair hearing on the merits of the application for the order, and that the terms of the order finally made will be in themselves reasonable….*
    - *The judge, in dealing fairly with the application for the order, is both entitled and bound to receive any relevant evidence presented in admissible form by any party wishing to be heard as to the terms of a final costs order*"

Suitors Fund Act 1951

19. Under s.6A(1)(c) (ii), where criminal proceedings (in local or district court) are discontinued, and the discontinuance is not in any way attributable to the fault of the accused [or due to disagreement as to the verdict on the part of the jury, if a jury trial], then application may be made to the magistrate/judge for the issue of a certificate; the effect of which would be that the Director-General of the department of Attorney General and Justice, may pay an amount toward the costs of the accused, up to a maximum of $10,000.

20. Usually, applications for a “certificate” are made in respect of aborted district court trials, following either, an erroneous direction to the jury by a trial judge or some damning (inadmissible) evidence that the jury heard. Applications for a certificate are not common in the local court, where the magistrate sits as both the judge of the law and the facts.

21. Even when a certificate is granted, the lawyers will then “have to do battle” with the Director as to the amount to be paid.

UNDER AGE CONSENSUAL SEX – SHOULD EITHER PARTY BE CHARGED?

Background – Case Study – Client John

1. Initially, John was charged in relation to two complainants – Mary and Jane.
2. At the time of the *alleged* offences, Mary was about 16 years and some months and Jane about 15 years and 9 months; and John was about 6 months younger than Mary and 9 months younger than Jane.
3. John, Mary and Jane all attended the same high school and were in the same year/grade.
4. Initially, John was charged as follows:

   Mary
   - 2 counts of sexual assault under s61I Crimes Act (without consent) – maximum period of imprisonment – 14 years on indictment;

   Jane
   - 2 counts of aggravated sexual assault under s.61J Crimes Act (without consent and complainant under 16) - maximum period of imprisonment – 20 years on indictment;
   - In the alternative to the above, 2 counts of sexual intercourse with Jane who was under 16years under ss.66C(3) Crimes Act - maximum period of imprisonment – 10 years on indictment; and
   - 4 counts of aggravated (because complainant under 16) indecent assault with Jane who was under 16 years under s.61M(2) Crimes Act - maximum period of imprisonment – 10 years on indictment.

5. Upon conviction for ANY of these offences, John would be required to be listed on the Child Protection Register.
6. The police Facts in relation to Jane alleged that she had a learning disability (cognitive impairment) and sought to infer, without directly saying it, that John took advantage of that impairment to have “sex” with Jane.
7. John believed that Jane was “slow” in some subjects but was not aware that she had any learning disability and socially, John believed that Jane was “on par” with other students; and there was no evidence to contradict John.
8. It is important to note there are other provisions in the Crimes Act (for example – s.66F) under which John could have been charged if the Crown alleged that he took advantage of her disability BUT that direct allegation was not made.
9. The ODPP sought a joint hearing with both complainants and sought to rely on “tendency evidence”.
10. Detailed submissions were made on behalf of John (“YP” – Young Person) in the Children’s Court opposing the tendency application and the joint hearing and the defence succeeded in relation to both.
11. Following Representations to the ODPP – outlining many encounters of consensual sex between Mary and John, including when Mary was under 16 years of age, the ODPP withdrew *all* charges in relation to Mary.
12. Notwithstanding detailed Representations to the ODPP in relation to Jane, again outlining many consensual encounters with Jane and that the Facts did not disclose any sexual assault; and the submitted, perverse result, in the event that

the “under age” charges proceeded, the ODPP refused to withdraw any of the counts.

13. The defence gave serious consideration to filing a Motion for a permanent stay of proceedings, potentially arguing that for the charges to proceed was perverse, however, concluded that the Motion would fail because as a matter of law, perverse or not, the offences relating to “under age sex” was committed.
14. The charges concerning Jane were given a hearing date and the working day before, the ODPP put a proposal – offering to withdraw the sexual assault counts on the basis that the YP pleaded guilty to some of the “under age sex” counts, which proposal, begrudgingly, the YP accepted – because the fact of the matter was that, according to law, BOTH the YP and Jane committed the same offence(s), namely, engaging in “sex” with one another, when the other was under 16 years of age; that the ODPP sought only to prosecute the YP was [incredibly, in the circumstances] within prosecutorial discretion. It should be further noted that in relation to at least one of the counts, the YP was 14 years of age!

A Perverse Result?

15. In my view, in a word – yes!
16. There was a lengthy sentence hearing and various witnesses including a school teacher were called to give evidence, and contrary to earlier comments of the magistrate, and notwithstanding the ODPP lawyer pressed for a conviction; fortunately, the YP avoided a conviction and the matter was finalised so that the YP was not required to be placed on the Child Protection Register (S. s33 (1) (a) Children (Criminal Proceedings) Act 1987). The magistrate referred to the YP’s case on sentence, as “overwhelming”.
17. Victoria, Tasmania, Western Australia and the Australian Capital Territory all have what is referred to as “similar age” defence which allows consent to be used as a defence when the victim and the accused are certain ages: see s45 of the Crimes Act 1958 (Vic); s124 of the Criminal Code Act 1924 (Tas); s55 of the Crimes Act 1900 (ACT); s321 of the Criminal Code Compilation Act 1913 (WA).
18. An authority on what is just and reasonable (in context) may be gleaned, from the South African case of *Teddy Bear Clinic for Abused Children v Minister for Justice and Constitutional Development* [2013] ZACC 35 (3 October 2013), where the Constitutional Court found that laws criminalising consensual sex between young people were unreasonable, and consequently, were unconstitutional; the Court held the laws unjustifiably violate the *dignity and privacy of young people* and are not in *the best interests of the child* (under the South African Constitution any limitation on these must be reasonable).

NSW Bureau of Crime Statistics – 2010 – 2015

19. The NSW Bureau of Crime Statistics and Research (“BOCSAR”: Reference: sr15-13587) records between July 2010 and June 2015, that of 707 s66C(3) *charges* (not 707 offenders) only two charges related to an accused person who was *under* 16 years of age, namely 0.28%. The BOCSAR also reveals that, of

163 offenders (in respect of s66C(3)), only 1 offender (0.61%) was under 16 years of age.

20. The cumulative effect of these statistics strongly evidence that the ODPP decision to proceed to prosecute the YP in respect of the s66C(3) and 61M(2) charges is a rarity, and in my view, truly regrettable.

21. It is particularly instructive to consider the second reading speeches in parliament when s.66C was enacted. *The second reading speeches*, tendered to the court on sentence for the YP, make no mention whatsoever, of any intention for s66C(3) to "capture" consensual sex between two 15 year olds. The references in the second reading speeches to offenders is exclusively, to adult offenders. It is therefore not surprising that the BOCSAR statistics reflect that the prosecution of the YP was a rarity.

22. It is reasonable to accept it is very likely that police/prosecutors would be aware of a substantial number of other allegations of young persons under the age of 16 years having had sex with someone also under 16 years of age. If that is a reasonable proposition, then, the prosecution of the YP demonstrates an instance of a very unusual use of prosecutorial discretion. In the circumstances, the prosecution of the YP was in my view, perverse.

Although, the court cannot interfere with prosecutorial discretion to prosecute, the court's acceptance of the rarity of a prosecution where the YP is younger than or at about the same age as the complainant and where the "sex" was consensual, is a relevant matter on sentence.

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