

Semaan v Poidevin and classification of offences in Australia

Time to nail the colours to the mast?

“If Justice Dixon says its fundamental, as far as I am concerned unless somebody can show me it is not fundamental, it is fundamental” - Justice Kirby *CTM* [2008] HCA Trans 117

1. A woman walks into a bar. She notices a bag of drugs on the ground. She picks it up. She intends to take it to the police station. She is arrested. In NSW is she guilty of possession (assuming that there is no immediate risk of harm to anyone)?
2. In *Semaan v Poidevin* [2013] NSWSC 226 Rothman J, in a thought provoking opening to a judgment, raises a scenario of a woman who walks into a bar. She is an undercover agent. She is on sting for drugs. If the bartender unknowingly tells her to leave during a deal is the bar tender guilty of hindering police¹?
3. The easiest answer to His Honour’s bar scenario, and the one His Honour would have otherwise favoured (at [53] – [54]), would be for *mens rea* to apply to all the elements of the offence. However against this is the binding High Court authority of *R v Reynhoudt* (1962) 107 CLR 381.
4. In *Reynhoudt* the majority of the High Court held that in a prosecution for an assault police offence the Crown did not have to prove that the Accused knew that the person was a police officer or that they were acting in the execution of their duty.
5. *Reynhoudt*, in its historical context, was at a time where the common-law was experiencing significant tensions between objective and subjective theories of criminal liability. It still is. In England the House of Lords had just decided *DPP v Smith* [1961] AC 290 where they had held a person intends the natural and probable consequences of their actions. This doctrine was soon afterwards empathetically rejected in Australia in *Parker v R* (1963) 111 CLR 610 (and everywhere else it seems).
6. Dixon CJ, in the minority in *Reynhoudt*, thought that “the intent of the supposed offender must go to all the ingredients of the offence” (at page 386). This shows a subjective approach. However the majority effectively held the offence to be a subjective/objective hybrid; while *mens rea* was required in relation to the assault, *mens rea* (in the sense that I will set out below) was not required to the other elements of the offence; although a *Proudman v Dayman* (1941) 67 CLR 536 defence of honest and reasonable mistake was available to these elements.
7. If the High Court were to ever reconsider *Reynhoudt*, and impose a more subjective basis for criminal liability, it is submitted that other decisions of the Court such as *R v Coventry* (1938) 59 CLR 633 (dangerous driving requires no *mens rea*), *Zecevic* (self-defence), (1987) 162 CLR 645 and perhaps even *Proudman v Dayman* itself, could be reconsidered.

The categorisation of offences in Australia

8. In Australia offences can be categorised in three ways². These are:

¹ This paper will not go into the facts of *Semaan* or the decision itself. *Semaan* is very important decision in relation to what it has to say about the retrospective effect of non-compliance with s201 of LEPR; see for instance [107] – [108].

² *R v Wampfler* [1987] 1 NSWLR 541 at 546

- i. *Mens rea* offences where a subjective state of mind, such as intent, recklessness or advertence is required [“category one”].
 - ii. *Proudman and Dayman* offences (often referred to as the “half way house”) where, on the Crown proving the actus reus, it will normally be up to the defendant to point to some evidence of an honest and reasonable mistake of fact before the persuasive onus goes back onto the Crown. [“category two”]³.
 - iii. Absolute liability offences, where on proof of the actus reus, the Defendant is liable (sometimes called “strict liability” in England) [category three].
9. Almost all offences in Australia are contained in statute. The categories set out above are only useful labels as to how offences can be categorised, but need not be, for the purposes of statutory interpretation. At the end of the day (or more correctly as Gummow said in *CTM* [2008] HCA Trans 117; the beginning of the day) the question is one of statutory interpretation. However statutory interpretation occurs within known rules of construction; often referred to as fundamental values; which Parliament is taken to be fully aware of when enacting legislation.
 10. The known rule of construction is that *mens rea* is assumed to attach to any “truly” criminal offence⁴.
 11. Many modern statutes today make it perfectly clear where the persuasive or evidential onus lies. The trouble normally begins where the statute is either silent on the matter or specifically raises or excludes a “defence”⁵. For instance in *CTM* (2008) 236 CLR 440 consent in a “statutory rape” case was specifically excluded from the offence but the offence was otherwise silent as to other possible “defences” (or ingredients) such as knowledge as to age. As a matter of construction simply because Parliament might exclude a “defence” does not mean Parliament has taken away other matters that must be proved.
 12. There is controversy in the labelling of category two. On present authority, it may be more correct to call category two as “presumed *mens rea*” (i.e. see *R v Wampfler* (1987) 11 NSWLR 541). However, in Canada and New Zealand, and some other countries, this half way house is known as “strict liability”⁶. The Canadian and New Zealand approach has on the Crown proving the actus reus, the Defendant having to show, on the balance of probabilities, total absence of fault⁷. As in Australia a pure mistake of law does not provide a defence⁸.

³ Two points need to be made clear. Firstly the issue only needs to be “raised” in the evidence (often termed as an “evidentiary onus”). It does not need to be raised on the balance of probabilities. The second point is that the Prosecution case itself can raise the issue and the evidence need not necessarily come from the Defendant (although often it will).

⁴ See *He Kaw Teh* (1985) 157 CLR 523 at pages 528-529

⁵ I place “defence” in inverted commas as distinguishing between “ingredients” of an offence and “defences” can be an exercise in little more than sophistry. See Gerald Orcher “The Golden Thread – Somewhat Frayed” (1988) *Otago Law Review* Vol 6 No 4 615 at 624., *Dowling v Bowie* (1952) 86 CLR 136, at 140 per Dixon CJ

⁶ Not to be confused with how this term is known in England.

⁷ See *R v City of Sault Ste Marie* (1978) 85 DLR (3d) 161, *Millar v MOT* [1986] 1 NZLR 660. Total absence of fault essentially means that the Defendant took reasonable care.

⁸ Although the Canadians seem to have developed a defence of officially induced error; see *R v Jorgensen* [1995] 4 SCR 55. In Australia, this would be impossible, due to the decision of *Ostrowski v Palmer* (2004) 218 CLR 493. Mistakes of law are a paper in themselves. However a test that works in most cases (except for claims

13. In England there is no half way house⁹.
14. In NSW in *Australian Iron & Steel v EPA* (1992) 29 NSWLR 497, Abadee J giving the judgment of the Court of Appeal, (Carruthers agreeing; Badgery-Parker concurring in the result) was at pains to declare category two as a *mens rea* category. Abadee J in fact was quite forcefully in rejecting the Canadian approach of *R v City of Sault Ste Marie* (1978) 85 DLR (3d) 161, which thought *Proudman* was part of a wider defence of lack of fault. Abadee J thought this was a Canadian misinterpretation of *Proudman v Dayman*¹⁰.
15. Quite frankly, there is much to be said that Abadee J's was the one who made a mistake.
16. To classify *Proudman v Dayman* as a form of *mens rea*, while perhaps historically accurate¹¹, is nowadays questionable.
17. If a person makes an unreasonable mistake in a common-law rape case we would say they lacked the necessary *mens rea*. Why should this be any different in a *Proudman* case? The same could be said in cases of intoxication and intent (see *R v O'Connor* (1980) 146 CLR 64). There is little, if any reason, in policy or otherwise, to distinguish between a lack of intent because of intoxication and an unreasonable mistaken drunken intent.
18. It makes little sense to say that one has "presumed *mens rea*" in unreasonable mistake cases, where there is a reasonable doubt about a state of mind, but the defence fails for "unreasonableness".
19. *Proudman v Dayman* is nowadays applied to all types of offences, which are clearly regulatory (such as driving an unregistered vehicle, speeding offences, and driving with an overweight load; see *Binskin v Watson* (1990) 48 A Crim R 33). *Binskin* was not even cited in *Australian Iron*. *Proudman v Dayman* itself (a case about permitting an unlicensed driver to drive) might be seen as a regulatory case. To say that *mens rea* is "presumed" in such cases seems a bit of a non-sense.
20. As a label, it is submitted, it would be better to categorise *Proudman* as an objective fault category (as the Canadians have done) rather than link it with a state of mind, which by definition would seem to have to be subjective.
21. Furthermore it might be noted that an unreasonable mistake may or may be particularly blameworthy. We all from time to time make unreasonable mistakes. We can't all be on the Clapton omnibus.

Possible Criticism of *Proudman v Dayman*

of right in property case) is to assume the accused with divine legal knowledge (including knowing whether present authorities have been wrongly decided). If he goes to the law. can he tell by the law itself, despite what he may have been told, or has previously thought, whether he is in fact breaching the law. If he can it is clearly a mistake of law; otherwise I think it is a mistake of fact. Take *Millar v MOT* [1986] 1 NZLR 660. In that case the Accused misheard the judge who imposed a disqualification period. It was assumed to be a mistake of fact. If the Accused had gone to the law he would not have known, by that fact alone, that he had made a mistake (in circumstances where there didn't seem to be a mandatory disqualification period). Contrast this with *Ostrowski* where the lobster fisherman would have realised he had been misled if he had gone to the legally correct plans.

⁹ *Sweet v Parsley* [1970] AC 132

¹⁰ In *He Kaw Teh* Chief Justice Gibbs thought categorisation of *Proudman v Dayman* as "*mens rea*" or "strict liability" was "largely one of words" (at 210) but it is hard to see that words didn't have an effect on Abadee J in *Australian Iron & Steel*.

¹¹ See *R v Tolson* (1889) 23 QBD 168, *Bank of NSW v Piper* (1897) AC 383

22. A modern criticism of *Proudman v Dayman* is this. The trouble with *Proudman* is that it may now be easier in Australia, as compared to other countries, to default down from full *mens rea*¹². This appears to have in fact occurred in *Reynhoudt*. Courts like people make decisions based on the choices that they have. In Australia's case it might be though that nowadays *Proudman* is too close to full *mens rea* in a real *mens rea* case.
23. Arguably another example of a default down is what happened in the courts below in *He Kaw Teh* (1985) 157 CLR 523. *He Kaw Teh* was a drug case. Before the High Court decision in drug cases various state Courts of Appeals had reached different conclusions as to how to classify possession charges, but none of them seem to have classified the offence as full *mens rea*.
24. Before *He Kaw Teh*, the prosecution, prima facie, did not have to prove a person had actual knowledge that they even possessed a drug that was found on them. Prima facie it was good enough that they in fact possessed it. From a modern perspective this just seems wrong. The High Court in *He Kaw Teh* (3 to 2) decided that the Prosecution had to prove *mens rea* in the sense of a subjective state of mind towards the possession of the drug¹³. However this was still a matter of statutory interpretation (in *Tabe* (2005) 225 CLR 418, for instance, it was held, in relation to a different statute, that it did in fact created a situation much like pre *He Kaw Teh* cases).
25. The irony is, that despite the reverse onus approach in Canadian/New Zealand, that approach may be seen as closer to the ideals of the famous "golden thread" case of *Woolmington v DPP* [1935] AC 462 because of the starker choice required¹⁴. It is much harder in countries following the Canadian approach to default down in non-regulatory cases. In fact, it might be noted, the reverse onus approach was initially the law in Australia (see *Maher v Musson* (1934) 52 CLR 100). Even in *Proudman* Dixon J was only willing to say that the burden "possibly may not finally rest" upon the defendant and this comment seems to have been influenced by *Woolmington*.
26. Despite *Australian Iron*, it might be thought that the Canadians were right to think that honest and reasonable mistake is simply a subset of a wider defence of lack of fault. Take the possession case of the woman at the beginning of this paper. Until the High Court decided *He Kaw Teh* this was basically a *Proudman* offence. But it might be asked what mistake has the woman made? None. Also in environmental offences, to the extent *Proudman* applies, it may be debatable that proving a reasonable system of control, if it fails, can naturally be termed as a "mistake". To call it a mistake is with hindsight after the event. It is more natural to simply classify the situation as a lack of fault. That what it seems to me is the essence of a *Proudman* defence.

¹² In New Zealand, which follows the Canadian approach to categorisation, *Reynhoudt* has been rejected and *mens rea* is required on all elements (see *Waaka v Police* unreported NZCA 21 July 1987).

¹³ Wilson J essentially adopted a New Zealand decision in *Strawbridge* [1970] NZLR 909 (at page 553) which "presumed mens rea". However this approach was essentially killed off in NZ in *Millar v MOT* at page 668 and was "not settled" even at the time Wilson J gave his decision; see *Civil Aviation v MacKenzie* [1983] NZLR 78 at pages 84 – 85.

¹⁴ A good example of this is disqualified driving. In New Zealand driving while disqualified is classified as a *mens rea* offence; see *Millar v MOT*. This is because, faced with the starker choice of how to classify the offence it has been held that the gist of the offence is a disobedience to a court order. In NSW it is a *Proudman* offence; see *R v Vlahos* [1975] 2 NSWLR 580.

27. It is submitted a more recent example of a default down might in fact be seen in *CTM* (2008) 236 CLR 440 which will be discussed below.

The Subjective Approach

28. To return to Sir Owen Dixon. In 1935 His Honour Justice Dixon, wrote an article entitled “*The Development of the Law of Homicide*” (1935) 9 Australian Law Journal. His Honour, in that article, noted a progression in homicide over eight centuries from “an “almost exclusive concern with the external act” to “a primary concern with the mind of the man who did it”.
29. Anyone he knows the history of the common-law will know the myth of *stare decisis*. If we went back to the 13/14th Century basically most of the defences we have now to murder would simply not exist.
30. The 20th Century’s progression towards “subjectivism”¹⁵ is best seen in cases such as *DPP v Morgan* [1976] AC 182 (in England) and *O’Connor* in Australia.
31. The facts of *Morgan* were that a number of men had sex with the wife of the first defendant who, he said, liked it rough and liked to complain. While the House of Lords by 3 to 2 held that if the Defendants’ truly did believe she was consenting, no matter how unreasonable, then they lacked the *mens rea*, they had no difficulty applying the proviso¹⁶.
32. His Honour Justice Dixon can be turned as to why acceptance of the principles of “subjectivism” need not make a great change to conviction rates (as can be seen in the proof of nearly forty years since *Morgan*)

The truth appears to be that a reluctance on the part of courts has repeatedly appeared to allow a prisoner to avail himself of a defence depending simply on his own state of knowledge and belief. The reluctance is due in great measure, if not entirely, to a mistrust of the tribunal of fact—the jury. Through a feeling that, if the law allows such a defence to be submitted to the jury, prisoners may too readily escape by deposing to conditions of mind and describing sources of information, matters upon which their evidence cannot be adequately tested and contradicted, judges have been misled into a failure steadily to adhere to principle. It is not difficult to understand such tendencies, but a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code¹⁷.

Subjectivism – Time to nail the colours to the mast?

33. During oral argument in *CTM* [2008] HCA Trans 117 Chief Gleeson, made this oblique statement to the Crown about counsel for the Appellant:

¹⁵ Lord Rodger in *R v G* [2004] 1 AC 1034 termed its followers as “subjectivists” and noted that “It is no secret that, for a long time, many of the leading academic writers on English criminal law have been “subjectivists”; at [65].

¹⁶ *Morgan* is in an interestingly case also because the first defendant was charged only as an accessory to rape. This was due to the thought, not now accepted in Australia, that a husband cannot rape his wife at common-law. (*PGA v The Queen* [2012] HCA 21 (30 May 2012).

¹⁷ *Thomas v R* (1937) 59 CLR 279

Although he was less than anxious to nail his colours to the mast, I do not think your opponent submitted that this is an offence in which the prosecution has to prove knowledge of the age of the Victim.

34. *CTM* was a classic example of the categorisation of offences and the corresponding difficulties in statutory interpretation. In that case the Accused who was 17, had sex with a 15 year old. He was charged with aggravated rape under s61J and with an alternative of “statutory rape” under s66C(4). He was actually acquitted of both of those offences but convicted of a less aggravated statutory alternative to the s66C(4) charge.
35. Offences under s66C expressly do not require any element as to lack of consent to be proved by the Prosecution. The question in *CTM*’s case was whether the statutory offence, being otherwise silent as to any other defences, could be said to be an absolute offence; in the sense that the Crown only had to prove the actus reus; i.e. that the victim was in fact below 16.
36. By a 6 to 1 majority (Heydon J dissenting) the court held that the offence was a *Proudman* offence and that the accused could raise an evidentiary onus of honest and reasonable mistake as to age (which on the facts somewhat controversially the majority held he hadn’t done).
37. In *CTM* Hayne J, at page 492 [176] – [178] noted that neither party had asked the Court to reconsider its decision in *He Kaw Teh* and that there had been no argument in *CTM* as to unreasonable mistakes. His Honour appears to have thought that the common-law of Australia might be somewhat different to the common-law of England in this regards; but His Honour seems to have been confusing category one offences to category two offences and; failing to account for *Banditt* (2005) 224 CLR 262, where the fundamental correctness of *Morgan*, at least in relation to mistakes, seems to have been assumed (at pages 275 and 293)¹⁸.
38. In their joint reasons in *CTM* Gleeson CJ, Gummow, Crennan and Kiefel JJ set out why they eventually rejected what was termed a “powerful” (at page 456 [34]) historical argument pointing against a defence of honest and reasonable mistake of age under s66(C). It was said that the answer was found in the “relationship between the courts and Parliament”.

The common-law principle reflects fundamental values as to criminal responsibility. The Court should expect that if Parliament intends to abrogate that principle, it will make its intention plain by express language or necessary implication; at page 456 [34] – [35].

39. This echoes Lord Hoffman’s often cited comments in *Reg. v. Secretary of State for the Home Department, Ex parte Simms* [1999] 3 WLR 328 (at 341F-G):

"But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the

¹⁸ And His Honour was a member of the Court that decided *Banditt*

democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

40. The "colours to the mast" comment must be understood in context that in England; it has been held that *mens rea* is required on the issue, as to whether the victim was under 16, for reasonably similar offences (*R v K* [2002] 1 AC 462; *B v DPP* [2000] 1 All ER 833). While the issue in England is complicated by the fact that they have no half way house, the basis of the decision was said to be based in acceptance that "the honest belief approach must be preferable. By definition the mental element in a crime is concerned with a subjective state of mind, such as intent or belief. To the extent that an overriding objective limit ("on reasonable grounds") is introduced, the subjective element is displaced" (at page 837).
41. In England a progression from *Morgan* has also taken place in relation to self-defence (*R v Beckford* [1988] AC 130). The English common law position of is now similar to s418 of the Crimes Act (NSW); basically the circumstances are judged from what the accused believed them to be and a reasonableness/proportionality test applied to that belief.
42. However in this regard Australia has not caught up. The leading common law decision in Australia is *Zecevic*. In that case, decided before *Beckford*, it was determined specifically not to make self-defence more subjective at common law in Australia. Part of the reasoning in *Zecevic* appears to have been due to a seriously unattractive argument put to the Court to make the test entirely subjective¹⁹.
43. The second reason in *Zecevic*, for the rejection of a more subjective test, was based in history. Essentially the majority went back in time and reasoned that self-defence, was normally only an "excuse" at common-law (i.e. you had to originally obtain a pardon). They specifically refused to read the word "unlawfully" into the definitional elements of the offence in relation to self-defence (as has been done in England).
44. To be honest the reasoning in *Zecevic* is archaic and involves slightly more than a tinge of sophistry. Again while historically accurate, why does self-defence, a fundamental right in human nature, have to stand still when everything else has moved on? *Beckford* treated self-defence as if "unlawfully" was read into the definition. If it is acceptable that the common-law has moved to a modern approach in other areas, such as marital rape²⁰, and in relation to "mistakes" why should self-defence be held back? If we wanted the common-law to be stuck in history we would not have many of the fundamental "defences" that have evolved since the 13/ 14th century. Didn't the Court read Dixon's article?
45. The troublemaking Canadians can also be turned to. The Canadian namesake of Kirby's oracle, Dickson CJC, (who incidentally was the author of *Sault Ste*) in *R v Whyte* (1988) 51 DLR 4th 481, made these apposite comments in rejecting an argument that as a matter of principle a constitutional presumption of innocence only applies to elements of the offence and not excuses. Giving the judgment of the court Dickson CJC observed

The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is

¹⁹ Arguably the proportionality test in self-defence does not offend against "subjectivism" as it can be argued it is simply an extension of the maxim that ignorance or a mistake of the law is no defence.

²⁰ *R v L* (1991) 174 CLR 379

required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused."

46. Dickson's comments, relevant to statutory interpretation, are just as apposite to *Proudman* cases.
47. I return to the possession example. Section 10 of the Drugs Misuse and Trafficking Act 1985 provides:

Possession of prohibited drugs

- (1) A person who has a prohibited drug in his or her possession is guilty of an offence.
- (2) Nothing in this section renders unlawful the possession of a prohibited drug by:
 - (a) a person licensed or authorised to have possession of the prohibited drug under the *Poisons and Therapeutic Goods Act 1966* ,
 - (b) a person acting in accordance with an authority granted by the Secretary of the Department of Health where the Secretary is satisfied that the possession of the prohibited drug is for the purpose of scientific research, instruction, analysis or study,
 - (b1) a person acting in accordance with a direction given by the Commissioner of Police under section 39RA,
 - (c) a person for or to whom the prohibited drug has been lawfully prescribed or supplied, or
 - (d) a person who:
 - (i) has the care of, or is assisting in the care of, another person for or to whom the prohibited drug has been lawfully prescribed or supplied, and
 - (ii) has the prohibited drug in his or her possession for the sole purpose of administering, or assisting in the self-administration of, the prohibited drug to the other person in accordance with the prescription or supply.

48. It might be noted that s10 purports to provide defences in certain circumstances. However as a matter of statutory interpretation, in my opinion, not only are other potential defences available, but also, in my opinion, the defences that are available do not cover the field.
49. For instance what defence does the police officer have who takes the drugs from the woman in my example? Section 10(b1) only applies to controlled operations and integrity testing; so what defence does the police officer have?
50. Is the answer to be found in what is meant by "possession"? Is the answer to be found by historical analysis that the modern police force is a 19th century invention or somehow in the distinction between felonies and misdemeanours? Those do not seem very satisfactory to me. Despite the act providing for certain defences, fundamentally, I think, the word *unlawful* has to be read into the definition before the word possession. In that way to possess something for a public justice reason would not contravene the section.

Conclusion

51. Much of the 20th Century was concerned with tensions from the evolution from objective liability to more subjective liability. These tensions are readily apparent in the cases in relation to the categorisation of offences.
52. The ultimate question, if the High Court were asked to re-determine cases such as *Reynhoudt* would be how far to go? How much of objective based liability are we willing to sacrifice on the high alter of subjectivism. For instance too high a standard and *Coventry*, a case involving dangerous driving, which is objective, would seem to be at risk. What then do we do with manslaughter by criminal negligence (especially in motor vehicle cases) and other objective based liability? Counsel in *CTM* may have been wise not to mail his colours to the mast, but arguably, this is a furtive area if the High Court decides to go there.

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Note please feel free to contact me if you have any thoughts/opinions/questions in relation to what I have written.