

HOMICIDE

Murder (s18(1))

- **S4 Grievous bodily harm**: permanent or serious disfiguring & includes damaging a pregnant woman's foetus + any GB disease
- AR - A **voluntary** (conscious) **act or omission** (need legal duty to act) that **causes the death** of **another** person
- MR
 - Intent to kill
 - Intent to inflict GBH
 - Reckless indifference to human life
 - Foresaw the **probability** of his actions resulting in death & continued anyway (**Crabbe, Royall**)
 - Expects it to happen, but not certain **La Fontaine**
 - Foreseeability of probability of GBH = MS **Solomon; La Fontaine**
- (2)(a) acts with lawful excuse allow (surgery) (b) No punishment for any person who kills another by misfortune only
- Method causing death irrelevant so long as the one of the mental states was present **Royall**
- Suicide - no longer an offence to attempt suicide under s31A CA, may be guilty of an offence under s31C (aid/abet)
- Attempt
 - MR – only intent **Knight**

Constructive Murder (s18(1))

- D committed or attempted to commit the base crime (AR & MR) **Ryan; Munro**
 - Only needed to prove voluntary act that wounds for s 98 (Robbery with arms & wounding) (**Ryan**)
- Base crime must carry a maximum penalty of at least 25 years imprisonment (**ss 96, 98, 33/A 36, 61JA, 97(2)**)
- Act causing death must be voluntary
 - Can be any act that was done in the course of committing the base offence. There need not be a causal connection between act & death required. **Munro**
- The act only needs to be a substantial & operating cause of death (i.e. not a direct cause) **Munro**
- The act causing death **must have been done during or immediately after the commission**, or in an attempt to commit or during or during or immediately after an attempt to commit the relevant crime (**Ryan**)
- There is no additional MR requirement for murder
 - P does not need to prove D realised any possibility of death or that RP would have appreciated such risk **Munro**

Manslaughter

- S 18(1)(b) – every other punishable homicide but murder is taken to be MS
- Voluntary
 - Murder with mitigating circumstances – provocation, SI, ESD, Infanticide
- Involuntary – MS ULDA, MS CN

MS by ULDA

- AR → D does an unlawful act that causes death that carried with it an appreciable risk of serious injury to another
 - Act must have been criminal (**Lamb**) – must have satisfied AR & MR – not merely regulatory.
 - Acts with a lawful excuse are not unlawful
 - Omissions and breaching driving laws excluded
 - Breaching driving laws excluded
 - No conviction of administration of drugs was due to a voluntary & informed decision by the accused (Wilhelm)
- MR → a **reasonable person** would have known that he was exposing others to an **appreciable risk** of **serious injury** (**Wilson**)
 - Same age as accused (**Ty**), same position as accused (**Cornelissen**) & healthy & reasonable mind.
 - Do not consider idiosyncrasies & effects of intoxication & the emotional state of D

MS by CN (AR & MR?)

- The defendant owed the victim a legal DOC (not moral)
 - The circumstances in which a person owed another a legal duty of care will be discussed in more detail...
- The defendant voluntarily/deliberately (**Nydam**) acted or omitted to act in such a way as to constitute a breach of that DOC
 - Breach was a particularly high level of negligence = criminal negligence
- The act or omission caused the death of the victim
- MR → The circumstances involved such a great falling short of the standard of care which a reasonable man would have exercised & which involved such a high risk that death or GBH would follow & that the doing of the act merited criminal punishment (**Nydam**)
 - Whether the conduct was 'wickedly negligent' (**Lavender**) – falling so short of the SOC that a reasonable person would have appreciated a high risk that death or serious bodily harm would result (**Lavendar; Nydam**) → negligence of such a high degree it merits criminal punishment

- RP has same personal attributes – age, experience, and knowledge - & the circumstances. However must have ordinary fortitude & strength of mind that a RP would have (**Lavender**)

Causation (Homicide Offences)

- **Royall** Tests
 - Was act of escape or self- preservation a natural consequence? E.g. conduct = apprehension of physical harm = escape = injured = causation
 - **RF** – responsible for all consequences of his acts that are RF
 - **Substantial & Operating Cause of Death** (Smith) - Only if it can be seen said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound
 - **Unreasonable actions (overreactions)** will break the chain
- Means of escape must be reasonable in the circumstances (**Rik**)
- Intervening acts
 - If D causes a situation which puts victim in danger of injury & injury occurs, chain is unbroken (**Hallet**)
 - Operation of natural causes won't break the chain
 - Act of god breaks the chain of causation even if was going to die (**Hallet**)
 - Conscious/voluntary acts will break chain of causation e.g. walked into the water (**Hallet**)
 - Involuntary acts by a 3rd party will not break chain. (**Pagett**) *used victim as human shield & police fired back* (SD).
- ESSR – take the victim as you find them (**Blau**). Special vulnerabilities won't break the chain.
- Medical Treatment
 - Negligent medical treatment does not break causation (Smith)
 - Only reckless treatment can break causation (Jordan) “palpably wrong”

Homicide by Omission (Applicable to AR for Murder & MS by CN)

- The defendant must have owed the deceased a LEGAL **duty of care** (**Taktak; Stone; Beardsley**)
- A duty of care is owed in one of the following scenarios (**People v Beardsley; Jones v USA**) where:
 - statute **imposes a duty of care**
 - one stands in a **certain status relationship to another** (legal protector e.g. parent/child **Russell**)
 - one has assumed a **contractual duty to care** for another
 - one has **voluntarily assumed the care of another** and so secluded the helpless person as to prevent others from rendering aid ((**Taktak; R v Nicholls**))
 - voluntarily assumed – try to get doctor, try to wash, try to get food – even if extremely inadequate **Stone and Dobinson**
 - If an adult chooses to undertake the charge of a human, helpless from infancy, lunacy or infirmity etc. he is bound to execute that charge without wicked negligence

Protecting the Foetus

- **Beginning of life** – has breathed & wholly been or into the world whether it has an independent circulation or not CA s 20
- **End of life** – Human Tissue Act s 33- Irreversible cessation of all the function of the person's brain or circulation of blood
- Children born alive but dying due to earlier violence (in womb) can amount to criminal homicide & Death

Deaths on the Road

- S 52A, CA – less grave offence to get convictions on drivers causing death or GBH
 - AR = driving was a danger to the public as a matter of objective fact (**Jiminez**)
 - MR = strict liability (AHRMF) – negate the HRMF
 - May have honestly believed on RG that it was safe for him to drive (i.e. his driving was not dangerous)
- Increasing concern of the # of MV accidents causing serious injury & failure of existing offences as deterrents →
 - Offence of culpable driving – driver causes the death (0.15g) + under the influence or dangerous speed or dangerous manner (11 & 14)
 - Aggravated dangerous driving occasioning death (circumstances under s 52A(7))
 - Dangerous driving occasioning GBH + aggravated version (7 & 11)
 - Defences – death of GBH not attributable to the dangerous driving (NB: car doesn't have to be in impact...merely has to cause)

Corporate Homicide – M & MS + Industrial Homicide

- Identification doctrine (Tesco) – those representing the directing mind & will of the corporation
 - Harder to identify in larger corporations where responsibility is diffused – could be BOD or another individual
- Cannot aggregate fault (MR)
- Industrial Homicide – minimal penalties, tend not to be used, tiered approach according to recklessness

Liability of the Medical Profession

- Except where treating a victim of an attack the rule is that if D hastens death they are responsible for causing it (Dyson)

- Except if terminally ill they are allowed to reduce pain even if it shortens life
- Individuals of sound mind may refuse medical treatment (Hunter) – may lead to battery charges
- If a person contrary to the victims wishes turns off life sustaining machines prematurely with intention of terminating life = murder (Burke)
- Where a patient is incapable of making own decision, the SC of NSW can do what is in their best interest (Northridge)
- Euthanasia is illegal. Consent is no defence
 - S 31C – aiding or abetting suicide is liable for 10 years

DEFENCES

Usually D raises the defence on an evidentiary burden. The P will then must disprove it BRD (except Insanity & SI).

Defence	Full Defence	Partial Defence	P prove absence of defence BRD	Evidentiary Burden On Def?	D to prove on BOP	Negative core element Actus Reus Voluntariness	Mens Rea Intent
Provocation: ↓ to manslaughter if sufficiently provoked. Tests are: ○ Lost control (subjective)? ○ Ordinary person <i>could</i> lose control?	x	✓	✓	✓	x	x	x
Infanticide (offence & defence): mum kills child >1 yr; disturbed due to birth	x	✓	✓	✓	x	x	x
Self-defence: absolves of criminal liability. Tests are: ○ Necessity (subjective)? ○ Reasonable response (objective)?	✓	x	✓	✓	x	x	x
Necessity: act done to avoid worse consequences; in peril; acted in proportion to peril (rarely raised)	✓	x	✓	✓	x	x	x
Insanity: ¹ can be raised by D or P on Balance of Probability. The Tests are: ○ Disease of the mind meant that; ≠ know nature & quality of act ≠ recognise wrongfulness of act	✓ ¹	x	x	✓ (D or P)	✓ (D or P)	x	x
Substantial Impairment: ↓ to manslaughter if suffering mental abnormality short of disease of mind. ○ Suffering from abnormality of mind ○ Caused by underlying condition ○ Substantial impairment	x	✓	x	✓	✓	x	x
Automatism: ² unaware/without control of muscles – denial that actus reus performed voluntarily	✓	x	✓	✓	x	✓	x
Intoxication: ² can –ve core element ○ Consideration for voluntariness if not self-induced ○ Considered for specific intent regardless of self-induced or not	✓	Or ✓	✓	✓	x	✓	✓

¹ This operates differently because a verdict of 'not guilty by mental illness' has potential for indefinite detainment – rarely used

² These offences negative positive/core elements of the offence – still a defence as there is an evidentiary burden on the defendant

Insanity (Full)

1. Whichever party raises insanity must prove on BOP (**Ayoub**)
2. At the **time of committing the act (Porter)**, the accused:
 - a. Was labouring under a **defect of reason due to a disease of the mind (M'Naghten's)**
 - i. **Disease of the mind** – mental disorder that manifests itself in violence & **prone to recur (Bratty)** [schizophrenia]
 1. Irresistible impulses do not count (**Sodeman**), anything transitory & of an external nature excluded (**Quick**)
 - ii. External influence excluded (**Quick**), high emotional state of the normal man (passion/impulse) excluded (**Porter**)
 - b. **Due to the disease of the mind the accused (M'Naghten's)**
 - i. **Did not know the nature & quality of their act.** i.e. didn't understand what they were doing (**Porter**)
 - ii. **Did not know what they were doing was wrong (M'Naghten's).** i.e. incapable of appreciating the wrongness (**Porter**)
3. S 38 of Mental Health Act – special verdict of not guilty by reason of mental illness
4. S 39 – detained in a manner which the court sees fit
5. Fitness to plead – Unless a person is fit to plead, there can be no trial **R v Dashwood**

- a. Requirements to stand trial (*Presser*) – understand the charge, general nature of proceedings, communicate for purposes of defence, understand effects of evidence against him, sufficient capacity to decide what defence to rely upon & make their own version of the facts known to the CT
- b. “So long as the accused can understand & follow proceedings in each of its facets, can give appropriate instructions, & can present a proper defence to the charge, he or she is to be regarded as fit to be tried” (*Rivkin*)
- c. Can be raised by either parties (s 5 of MH); on BOP (s6); judge decides (s11)

Sane Automatism (Full) – state of acting without being aware/without control over one's muscles (*Bratty v AG*) e.g. *spasm, reflex, convulsion, not conscious. Cannot be that person could not control their impulse* (*AG for SA v Brown*) it is not from a disease of the mind (major mental diseases & physical – e.g. psychomotor epilepsy (affect mind)) or drunkenness (*Bratty v AG*)...also see **Porter**. It is the *denial that the AR was performed voluntarily*:

1. Evidentiary burden on the accused (Bratty) – usually need medical evidence
 - a. Evidence which allows an inference that there is at least a reasonable possibility that act not voluntary (Woolbridge)
 - b. Usual causes: (reaction of sound mine to external stimuli)
 - i. Dissociative (fugue) state - person with **sound mind** enters a **dissociative state following trauma** or an external 'psychological blow' will be considered as in a state of automatism and thus **acting involuntarily** (*Falconer*)
 - ii. Cannot be a disease of mind (recur, internal not external, reaction of unsound mine to own delusion) (*F*) (*Woodbridge*)
 - iii. Disassociation (Donyadideh), hyperglycaemia, epilepsy (insane), sleepwalking (insanity), concussion
2. P must then prove automatism (voluntariness) BRD (Bratty), otherwise acquittal
3. Insane automatism has a disease of the mind → insanity defence

Substantial Impairment (Partial)

1. S23A(4) – D must prove on BOP
2. S23A(1)(a) – at time of act/omission D suffering from abnormality of mind arising from underlying condition affecting capacity to understand evens, wrong v right or control himself
 - a. Abnormality of mind - so different from ordinary person that reasonable person would term it abnormal (*Byrne*)
 - b. (8) Underlying condition – pre-existing mental or physiological condition, other than that of a transitory kind
 - i. Need not be permanent (can be curable e.g. severe depression)
3. (1)(b) – impairment was so substantial
 - a. i.e. accused could not rather than did not stop himself (*Byrne*), matter for the jury
4. (3) – self-induced intoxication is disregarded

Infanticide

1. Both an offence & defence under s 22A, CA
2. Offence **s 22A (1)**
 - a. Where a woman causes the death (due to act or omission) of a child <12 mths old, where at the time of the offence she was **disturbed** by reason of her **not having recovered from the effect of the birth or lactation** as a consequence of the birth of the child, she will be guilty of infanticide and treated as if she had been **guilty of the offence of manslaughter**:
3. Defence s22A(2)
 - a. D if able to satisfy above test may have M reduced to MS
 - b. Must raise evidentiary burden which P must disprove BRD

Intoxication

- Murder is a specific intent offence (even R12HL **Grant**) & intoxication will affect MR. not considered for MS
 - Was intent formed? (Makiksi)
- S428G(2) a person is not criminally responsible for an offence if the relevant conduct resulted from intoxication that was not self-induced”
- Objective tests are not based on a drunk person...the only exception is MS (if NSI)
- Often if acquitted for murder can be charged for MS as it won't be considered if SI for MR

Element or test?	Part 11 A of Crimes Act	Not self-induced intoxication	Self-induced intoxication
Considered for voluntariness (AR)?	S 428G	✓	✗
Considered for specific intent offence (MR)? <ul style="list-style-type: none"> • Specific intent:¹ intent to cause particular consequence (ie, intent to kill/cause GBH; offence has phrase “with intent to”) Unless if accused: <ol style="list-style-type: none"> Already decided to act Used intoxication to strengthen his resolve 	S428C	✓	✓
Considered for basic intent offence (MR)? <ul style="list-style-type: none"> • Basic intent: intent to perform an act (e.g. rape or assault) 	S428D	✓	✗
Considered for reasonable person test?	S428F	✗	✗
Considered for manslaughter?	S428E	✓	✗

¹ **S428B** defines specific intent offences and includes a list: murder, attempted murder, kidnapping, child abduction, larceny etc. s428A self-induced = anything but involuntary, fraud, reasonable mistake, accident, medical needs

Extreme Provocation

1. S23(2) – extreme provocation only if
 - (a) act of the accused **in response** to conduct of the deceased **towards or affecting the accused**
 - Provoking circumstances
 - Must be within sight or hearing (Davis)
 - Words cannot constitute provocation unless sufficiently inflammatory, violent, aggressive (Lees)
 - (b) conduct of deceased was a **SIO** (>5)
 - (c) conduct of deceased caused accused to lose **self-control**
 - Subjective limb
 - (d) conduct of deceased could have caused an **ordinary person to lose self-control** to extent of intending to kill or inflict GBH
 - Objective limb - Designed to act as a barrier, representing the standard of control to be expected (**Loughnan**)
2. (3) not EP if (a) conduct was a non-violent sexual advance (b) accused incited conduct in order to provide an excuse to use violence
 - Edwards: if a hostile response is a predictable & foreseeable consequence of your own actions cannot be provoked (OLD)
3. (4) response can be delayed
4. (5) SI intoxication ignored

WEEK 5B – SELF DEFENCE

Self Defence: absolves an accused from criminal liability if his otherwise criminal actions were done in self defence

1. The accused raises self-defence by establishing an **evidentiary burden**. To satisfy the evidentiary burden, the accused must show **sufficient nexus** between the potentially criminal act and the threat. There must be relationship of (perceived) attack & a reasonable defence to it (proximity relevant) **Burgess, Saunders**
2. The prosecution must **disprove beyond all reasonable doubt**, the **possibility** of the defence(s419). In order for self-defence to occur, the following requirements must be satisfied (s418):
 1. **Necessity** of response (**subjective test (Katarzynski)**): accused believed conduct was necessary to:
 - a) Defend oneself or another person ;or
 - b) Stop/escape unlawful deprivation of liberty; or
 - c) Protect property from being taken/damaged with (not available if response result in death s420); or
 - d) Prevent criminal trespass (not available if response resulted in death s420);
 2. **Reasonableness** of response(**objective test**): the response of the accused was a reasonable response to the circumstances as the accused perceived them (**objective test: intoxication is IRRELEVANT**)
 - a) **Lawfulness of conduct is irrelevant**: the lawfulness of the conduct of the accused, or of the person to whom the accused was responding is irrelevant (s422)
 3. **Complete defence**: if the prosecution cannot disprove the above elements beyond a reasonable doubt, the actions done by the accused bear no criminal responsibility (s418(1)).

COMMON LAW DOCTRINE

The Defence of self-defence is based on the notion that to act in self-defence is to act lawfully. Therefore, the defence is a complete defence to criminal liability.

The Common Law Evolution of Self Defence (now enshrined in Pt 11 of Crimes Act)	
Howe (1958)	HC ruled that where accused used an excessive amount of force in SD which resulted in the death of the other party, the accused was guilty of manslaughter rather than murder. This created the partial defence of excessive self-defence
Palmer (1971) Privy Council	Partial defence was rejected by the PC on the basis that proportionality was an essential element in self-defence
Viro (1978)	The majority declined to follow Palmer : <ul style="list-style-type: none"> • Leading judgement of Mason J confirmed partial defence of excessive self-defence • Contained a 6-point statement to explain the jury's role Note: trial judges & appellate courts found the 6-points difficult to explain to juries & apply in practice. Some confusion arose from the fact that Mason J had taken into account that the onus of proof lies on the prosecution & phrased some of the propositions in negatives & double negatives
Zezevic (1987)	High Court took opportunity to give major reconsideration to self-defence & excessive self-defence: <ol style="list-style-type: none"> 1) Mason J acknowledged that his phrasing in Viro was overly complex & that he had been mistaken to take the onus of proof in account in his expression 2) Wilson, Dawson & Toohey JJ followed Palmer & abolished the partial defence of excessive self-defence & formulated the test for normal self-defence as: <p><i>'whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal'</i></p> Dissent (Deane J) (strongly dissented): abolition of partial defence was unjust & that it would be wrong to retrospectively abolish a defence. He cited Mason J in Viro : <p><i>'the moral culpability of a person who kills another in defending himself [or another person] but who fails in a plea of self-defence only because [of excessive force] falls short of the moral culpability ordinarily associated with murder'</i></p> Procedural fairness – neither party sought to overturn Viro – shouldn't change law until parties make arguments F&G

STATUTORY BASIS OF SELF DEFENCE

- 3) P bears legal burden to disprove the defence BRD (just need to disprove 1 element of it)
- 4) D bears evidentiary burden – to judge that there is a reasonable possibility that they acted in self-defence
 - o Judge is gatekeeper (to facts most favourable to the D) → then left to jury if reasonable possibility
- 5) Consequences
 - o Complete acquittal
 - o Excessive self-defence is a partial defence to murder
- 6) For

- Self-defence
 - Violent offences (general) – offences with the use of force – assault & homicide
- Excessive self-defence
 - Partial defence to murder

Crimes Act 1900 (NSW)

s 418: availability of the defence

- 1) Actions done in self defence bear no criminal responsibility (complete defence)
- 2) Actions are considered self defence if the conduct was a reasonable response in the circumstances, and was necessary to:
 - a) defend oneself or another person or
 - b) stop/escape unlawful deprivation of liberty, or
 - c) protect property from being taken/damaged/interfered with, or
 - d) prevent criminal trespass or to remove a trespasser

s 419: burden of proof.

- 3) Prosecution must disprove self-defence beyond all reasonable doubt.

s 420: not available if death inflicted to protect property or trespass to property. Self defence is not available if it resulted in the intentional or reckless infliction of death and was necessary to merely to (as opposed to the other options above):

- a) protect property, or
- b) prevent trespass or to remove a trespasser.

s 422: response to lawful conduct. Self-Defence is not excluded (ie, still applies) even if:

- a) the conduct to which the person responds is lawful, or
- b) the person to whom the defendant is responding to is not criminally responsible himself.

s 421 deals with **excessive self-defence**. It is extracted below:

1. This section applies if:
 - a) the person uses force that involves the infliction of death, and
 - b) the conduct **is not a reasonable response** in the circumstances as he or she perceives them, but the person believes the conduct is necessary:
 - c) to defend himself or herself or another person, or
 - d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.
2. The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

SECONDARY SPEECH COMMENTARY - PURPOSE OF THE BILL IS TO CLARIFY & SIMPLIFY SELF-DEFENCE

- The amendment **removes the objective element of the test** as to what the defendant perceived the danger to be, potentially allowing a person who really thought he was in danger (even if he was mistaken about that perception), to rely on the defence. This reflects the common law before **Zecevic**
- The bill follows the general approach laid down by the **Model Criminal Code** except for:
 - **Reintroducing the law of excessive self-defence** (this was considered appropriate because Australian law does not contain degrees of murder as separate offences and therefore manslaughter should apply)
 - **Allowing for serious harm to be occasioned in the defence of property or criminal trespass** (the Code did not permit either serious bodily harm or death in these circumstances)

REFORM PROPOSALS – UNDER COMMON LAW BOTH ARMS OF THE LAW WERE SUBJECTIVE

- **1991: Victorian Law Reform Commission considered restoring excessive self-defence** through legislation after **Zecevic**; **instead concluded the objective element of self-defence test should be dropped** (consistent with a focus on the accused's actual state of mind and subjective culpability) and a new offence of culpable homicide introduced
- **1991:** South Australia codified self-defence & created a variant of excessive self-defence which was 'entirely unworkable' and thus subsequently amended in 1997
- **1993: Final Report of the Criminal Law Officers Committee** recommended against re-introducing excessive self-defence, calling the partial defence 'inherently vague'
- **1998:** discussion paper was published arguing that no partial defences to murder should be available in Australia
- **2005:** the **Victorian Parliament created a new offence of defensive homicide**, which was broadly similar to excessive self-defence

THE OBJECTIVE TEST IN SELF-DEFENCE – STATUTE INTRODUCED DIFFERENT SUBJECTIVE TEST

The new statutory defence in NSW imposes a **different version of the objective test (s 418 (2))** to that imposed under the common law. The difference between the common law test as set out in **Zecevic** and the test under **s 418 (2)** was described by **Howie J** in **Katarzynski**:

- Under the common law both limbs of the test were subjective:

- Belief of the accused that he was called upon to defend himself (SUBJECTIVE TEST)
- Belief the conduct used was required to be reasonable (SUBJECTIVE TEST)

Under s 418 (2): Katarzynski

'the first issue is determined from a **completely subjective point of view** considering all the personal characteristics of the accused at the time' and the 'second issue is determined by an entirely objective assessment of the proportionality of the accused's response...'

- Reasonable possibility that D believed that his conduct was necessary to defend himself (SUBJECTIVE TEST) (genuine belief sufficient)
 - Prove BRD that the accused did not genuinely believe that it was necessary to act as he did in his defence
- Is there a reasonable possibility that was the accused did was a reasonable response to the circumstances as he perceived them (OBJECTIVE TEST)
 - Prove BRD that there was no reasonable possibility that D's response was reasonable in the circumstances as he perceived them to be

INTOXICATION FOR THE REASONABLE PERSON TEST (2ND LIMB OF TEST) – INTOXICATION IS IGNORED

Conlon (1993) – predates modern test; intoxication should be taken into account

Argument: there was a possibility that the accused's perceptions of his situation were influenced by his intoxication from alcohol and marijuana. P argued that the test was **analogous to that of provocation** and that intoxication should not be taken into account (subjective feature of the D).

Judgement: Intoxication should be taken into account so far as it affected appreciation of the gravity of the threat and the reasonableness of the response to that danger, in determining whether the Crown had established that there were no reasonable grounds for either proposition

Katarzynski (Howie J) – intoxication **should NOT be taken into account (MORE MODERN VIEW)**

It is for the jury to decide which circumstances they take into account 'Some of the personal attributes of the accused will be relevant just as will be some of the surrounding physical circumstances'

- However, he **rejected intoxication as a factor**. He cited McCullough; it is *illogical 'to contemplate the proposition that a person's exercise of judgement might be unreasonable if he was sober, but reasonable because he was drunk'*
- It would go against the principles of criminal responsibility to consider intoxication

THE NEXUS BETWEEN THE OFFENCE AND THE THREAT (1ST ELEMENT + EFFECTS CIRCUMSTANCES EFFECTING REASONABLENESS)

Burgess; Saunders [2005] – threat needs to be imminent

Background facts: the appellants had been convicted of malicious damage of property after painting the words "No War" on one of the sails of the Sydney Opera House and submitted that they were entitled to have the jury consider self-defence.



Judgement:

- Needs to be a r/ship of (perceived) attack & a reasonable defence to it in order to raise SD ('nexus').
 - Must be a response to the threat...must be imminence between threat & response (threat must be imminent (about to occur))
 - If the judge determines that the evidence cannot establish that there was a reasonable defence to a perceived attack, **defence should be prevented from going to the jury** (evidentiary burden).
 - No r/ship between conduct & AUS GOV entering war with the possibility of casualties to permit a conclusion that it was a reasonable response – no effect on the conduct they were protesting about
- Requirement of 'imminence' in that nexus (defence was proximate to attack)
- Was it a reasonable response by way of self-defence, defending who? When? Circumstances? It was speculative
- Must be directly against the person threatening a person or ones property (outrageous results otherwise)

DEFENCE OF PROPERTY

The common law traditionally regarded defence of property as legitimate grounds for the use of reasonable force

McKay (1957) VR – man receives light penalty for defending his chickens

Accused, a poultry farmer who had been victim of theft over a period of time, discovered intruder in the act of stealing his chickens. He shot at the fleeing intruder, who died from the resulting wounds. McKay was charged with murder but a jury convicted him of manslaughter, with a strong recommendation for mercy. He received three years imprisonment

SELF-DEFENCE & THE BATTERED WOMAN (RELAXED REQUIREMENT FOR SUDDENNESS)