

Legal Studies

Criminal Trial Process– Lesson 3

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Syllabus Dot Points:

- Defences to criminal charges – complete defences; partial defences to murder
- The role of juries, including verdicts

You learn to:

- Describe the **role of the courts** in the criminal justice process
 - Discuss the use of the **adversary system** as a means of achieving justice
 - Examine the **role of legal representation** in the criminal trial
- Assess the use of **defences** to criminal charges in achieving justice
 - Evaluate the **effectiveness of the jury system** in the criminal trial
 - Assess the **effectiveness of the criminal trial process** as a means of achieving justice

Defenses to Criminal Charges



- Used by accused to **justify or excuse** their criminal actions
- **Fair and just** = takes account of the circumstances surrounding the crime e.g. provocation
- **Range** available
 - Complete e.g. mental illness
 - Partial (for murder only) e.g. self defence
 - Most focus on mens rea element:
- Accused must prove the defence on the **balance of probabilities**
- **Jury** decides whether the evidence supports the defence claimed

Achieving a balance of rights

Characteristic	To gain a conviction to a charge	To reduce a charge by using a defence
Standard/Burden of Proof	Beyond reasonable doubt	Balance of probabilities
Onus of Proof/Responsibility for proving	Prosecution	Defence

Defenses to Criminal Charges

Focus on 2 categories:

1. Complete

- absolute justification for the accused's criminal actions
- If accepted by jury = acquittal
- E.g. mental illness, self defence, compulsion, consent

2. Partial

- only available for murder charges
- excuse for the accused's action that justifies reducing the charge and/or punishment e.g. charged with manslaughter not murder
- E.g. provocation, substantial impairment of responsibility

1. Complete Defences

6 complete defences:

- a. Mental illness
- b. Mistake/accident
- c. Automatism
- d. Self-defence
- e. Compulsion – necessity and duress
- f. Consent

If **proven** by defence = accused **acquitted**
of all charges/not guilty



<http://www.patelins.info/wp-content/uploads/2013/10/mal-de-t%C3%AAta.jpg>

a. Mental Illness

- People with mental illness/insanity do commit crimes
- By providing a defence = law recognises these vulnerable people and treats them with compassion; *it is a mechanism for balancing their rights*
- Defence burden to prove:
 - on the balance of probabilities
 - at the time of the criminal act
 - accused did not understand the consequences of their acts due to unsound mind = lacked the requisite mens rea
- If defence accepted by judge/jury = acquittal
- Accused not released but treated = placed in a mental health facility with regular review by Mental Health Review Tribunal.
- Usually raised only for serious crimes

Case Study - Anthony Waterlow

- Charged with murdering sister and father in 2009
- Main issue = was he mentally ill at the time of the crime and so not capable of being legally responsible for his actions
- Common law test applied came from a High Court R v Porter (1933)

"... The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong?"

- Found = not guilty by reason of mental illness; secured in Long Bay Prison hospital and receiving treatment



<http://www.abc.net.au/news/2014-01-10/coroner-recommends-mental-health-law-changes/5194846>

b. Mistake/Accident and c. Automatism

Accused **admits** committing the criminal **act** but claims they did so because they made a **mistake**

e.g. charge of intercourse with a minor but mistakenly believed they were an adult

- Involuntary or unwilled act of accused when unconscious e.g. sleepwalking, epilepsy, hypoglycemia
- Body movements **without conscious mental intention** to act
- Criminal responsibility does not attach to an act done in a state of automatism = *R v Falconer* (1990) and *R v Brown* (2010)



<http://smashingtops.com/weird/10-weird-things-people-did-while-sleepwalking/>

d. Self Defence

- Controversial
- **Mechanism** allows people to defend themselves but use of force must be reasonable = can't use more force than is necessary and proportionate to harm/threatened harm
- Overriding questions
 - was the level of force used believed to be genuinely **necessary** by the accused; and
 - would a **reasonable person** in that situation have **used a similar level of force**
- Available only where accused **admits the offence** = an '*all or nothing*' defence
- Jury either acquits or finds accused guilty; is possible that they convict on a lesser charge e.g. manslaughter not murder

Case Study - *R v Silva* (2015)



Source:
<http://resources0.news.com.au/images/2014/11/17/1227125/756864-1b414552-6e03-11e4-b2e3-ff776def1d7c.jpg>

- Abusive domestic relationship; victim punched accused when he came around to her parent's house threatening to harm/kill her; during scuffle accused's father and brother, Silva got a knife and fatally stabbed victim.
- Not disputed that she inflicted the fatal wound but whether it was murder or manslaughter
- Plead not guilty to murder; jury found guilty of manslaughter on grounds of excessive self-defence
- Extensive evidence used at trial on ongoing abuse and violence in relationship
- Sentenced to 2 years imprisonment; suspended sentence and good behaviour bond

e. Compulsion

Accused admits

- committing the criminal act
- Knowing it was wrong

But argues did so because was forced to

2 forms:

1. Necessity
2. Duress



http://i.dailymail.co.uk/i/pix/2013/05/26/article-0-1A004179000005DC-967_634x808.jpg

i. Necessity

Rarely used

Relevant when committing the crime is better than not

e.g. *US v. Holmes* 26 (1842)

- Holmes threw 8 people out of life raft after the shipwreck
- Argued not everyone was going to survive due to lack of food and water
- Found = guilty of manslaughter, 6 months jail



ii. Duress

- Accused claims that they **were forced to commit the crime** against their will
- Must be able to demonstrate that they strongly **believed threat** to them of death or serious injury was **genuine**
- Never used in Australia as a total defence for murder



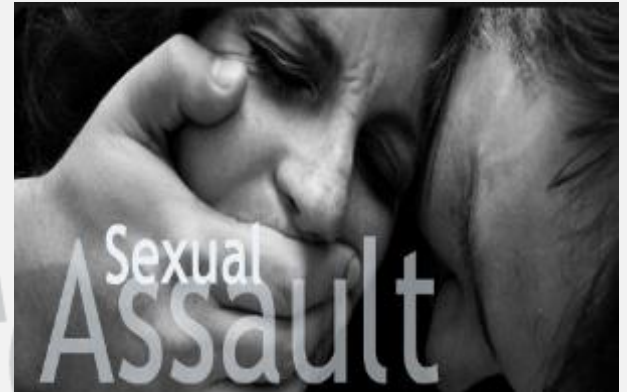
<http://www.smh.com.au/content/dam/images/1/0/5/d/9/5/image.related.articleLeadwide.620x349.105b4m.png/1408336245271.jpg>

Case Study – Woman set alight with petrol in Chippendale

- Attacker claimed his cousin forced him to do it b threatening him with a gun
- Victim = 45% body burns
- Plead guilty to charge of grievous bodily harm with intent
- Explanation not relevant as defence to verdict but sentencing

f. Consent

- Not an absolute defence to murder e.g. euthanasia
- Commonly used in sexual assault cases
- Effectiveness of law criticised as failing victims of sexual assault = low reporting and conviction rates
- Law Reform
 - Improve court processes for giving evidence
 - 'consent' now defined in statute for purposes of sexual assault offences as '*free and voluntary agreement to sexual intercourse*' = *Crimes Amendment (Consent - Sexual Assault Offences) Act 2007 (NSW)*
 - Onus now on defence to prove consent; prosecution not required to prove that consent wasn't given



http://cl-sh.org/wp-content/uploads/2013/03/sexual_assault.jpg?1438331808951

Case Study – Diane Brimble Case



<http://www.smh.com.au/national/frustration-as-brimble-jurors-agree-to-disagree-20091020-h6yu.html>

- Brimble went on cruise, found unconscious within 24 hours in cabin of accused
- Autopsy = alcohol, toxic levels of GHB/ date rape drug
- Coroner = victim had been 'unknowingly drugged' by someone for their sexual gratification
- Mark Wilhelm charged with manslaughter; argued that victim voluntarily took the drug
- Hung jury = no verdict; DPP withdrew manslaughter charge
- Judge commented that evidence suggested victim took the drug

2013 Law Reform – Evidence of Silence & Mandatory Disclosure Amendments

- Government introduced new mandatory pre-trial disclosure rules aimed at helping police break through the '*wall of silence*' in combatting organised gang crimes
- *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013*
- Require **more extensive prosecution disclosure** and making it **mandatory for the defence to disclose its case** ahead of trial. Failure to give proper notice of defence may result in being prevented from raising it at trial
- Focus on improving case management and efficiencies
- Complements the '**right to silence**' amendments = *Evidence Amendment (Evidence of Silence) Act 2013*
- Aims to **avoid 'trial by ambush'** = offender can't put up last minute defence or risks having judge allow jury to draw an unfavorable inference against the accused who refused to speak with police at investigation stage but now relies on something at trial that reasonably could have been mentioned earlier

(*Source: David Harman, Alternative Law Journal (2013) 38(2) AltLJ 129; Rule of Law Institute*)

Criticisms of Reforms

Reforms criticised as:

- Removing the presumption of innocence = balance of rights
- Increases demands on prosecution and defence
 - disproportionately impacts poor/marginalised groups who may find meeting demands difficult
 - failure to comply can have serious consequences.
- One of the chief functions of the presumption of innocence and right to silence is to redress the imbalance in power and resources between the state-sponsored prosecution and the individual defendant. These reforms tilt the playing field of NSW criminal justice.

(Source: David Harman, Alternative Law Journal (2013) 38(2) AltLJ 129)

2. Partial Defences

- *S 23 Crimes Act 1900 (NSW)* allows 2 partial defences:
 1. provocation
 2. substantial impairment of responsibility
- Mitigating circumstances cause the offender to carry out the act
- Can reduce sentence/charge e.g. murder reduced to manslaughter



a. Provocation

- Actions of one person (victim) causing another (accused) to lose control; not just really angry
- **Controversial** = implies fault of victim in provoking the accused
- Can only be used in NSW for a **murder** charge and if defence proven, will reduce charge to manslaughter
- Not available as a defence in Tasmania or Victoria but is considered to be a mitigating factor
- Only available once prosecution has proven beyond a reasonable doubt **accused is guilty of murder**
- Prosecution **bears onus** to prove beyond reasonable doubt that the offender did not act under provocation
- 1990-1993 = 7.3% of cases used provocation and 70% were successful; penalty range 4 year bond to 10.5 years jail
- Law reformed 2014 following community concerns

R v Filippou (2011) – Defence Failed



<http://www.theherald.com.au/story/3079610/double-murder-case-centres-on-weapon/>

- Filippou shot Luke and Sam Willis, noisy neighbours he had a long-standing dispute with
- Tried to rely on provocation defence to reduce murder charge = claimed temporarily lost self-control when one brother pulled a gun
- **Guilty** of murder = offender's conduct during and after the shooting inconsistent with proposition he temporarily lost his self-control

R v Singh (2012) – Defence Succeeded

- Singh charged with murdering his wife Kaur
 - plead not guilty to murder but guilty to manslaughter on the grounds of provocation
 - Crown rejected plea
 - Trial - jury acquitted of murder but convicted manslaughter, accepting the partial defence of provocation
 - Sentenced 6 years
- Singh claimed **lost his self-control** and killed his wife after she **provoked him** by saying she didn't love him, was in love with someone else and threatened to have him deported
- Due to the **ferocious nature** and manner of the death, accused clearly had lost control when he killed his wife
- Trial focused on Crown's ability to prove beyond reasonable doubt offender did **not act under provocation** i.e. whether or not an ordinary person, in the position of the offender, would have formed an intention to kill in the circumstances.
- Jury - not satisfied an ordinary person would not have reacted in the same way to such provocation

(Source: LIAC State Library)



<http://www.abc.net.au/7.30/content/2012/s3549458.htm>

Community Outrage

- Community and media outrage at how a partial defence to murder could be available to a man killing his wife so violently
- Government **responded** by establishing a Legislative Council Select Committee on the **Partial Defence of Provocation** to consider whether the defence needs reforming
- **2013 Report recommended** a new partial defence of gross provocation, focusing on the **nature of the provocative conduct** rather than the defendant's loss of control
- **Conditions** giving rise to **need for reform** –

This is a question of importance and in which there is keen interest across the community. The use of the partial defence of provocation has attracted widespread public debate in recent years. It has been brought into focus by cases where men who killed their wives upon discovering their partner had been unfaithful or wished to end the relationship subsequently escaped a conviction of murder by using a defence of provocation. Concerns have been raised about the inappropriate use of the partial defence of provocation for homicides committed in response to a non-violent sexual advance, and in some cases a homosexual advance.

(Source: NSW Parliamentary Debates, Question without notice, 17 October 2013)

Crimes Amendment (Provocation) Act 2014 (NSW)

- Enacted in **response** to Report recommendations
- Extreme provocation **still available** as a partial defence but in reduced circumstances = where conduct of deceased:
 - Would be a serious indictable offence and
 - Caused the accused to lose self-control and
 - Could have caused an ordinary person to the extent of intending to kill or inflict grievous bodily harm
- **Sexual component** of defence been **removed** = no longer available to use where victim made a non-violent sexual advance to accused or believed partner was going to leave them/cheating
- Too early to tell if reform has been **effective** in reducing men who kill their wives taking advantage of this defence.

b. Substantial Impairment of Responsibility

- Sometimes called '*diminished responsibility*',
- When an accused suffers an abnormality of mind that **impairs** their mental responsibility e.g. low IQ
- Easier to prove than insanity - mental disorder can be less severe,
- Used when the accused is not consistently insane e.g. drug psychosis
- Accused bears onus of proof = balance of probabilities
- Statistics 1990-2004:
 - 24 defendants successfully used this plea
 - 17 men killed women; 4 who killed sexual rivals
 - 8 women killed male partners



<http://admin.5cc.com.au/images/illicit-drugs.jpg>

Fact Check

In New South Wales, which of the following is a partial defence that can be used to reduce an offence from murder to manslaughter?

- A. Accident
- B. Compulsion
- C. Insanity
- D. Provocation

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**(BOSTES 2011 Specimen Exam Paper Q7
Multiple Choice)**

Fact Check

Which of the following is a complete defence to a crime?

- A. Necessity
- B. Provocation
- C. Ignorance of the law
- D. Diminished responsibility

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(BOSTES 2013 Exam Q13 Multiple Choice)

Fact Check

Use the following information to answer the question

25-year-old Jordan and 23-year-old Darcy stole cigarettes from a shop. As they were leaving the shop, Jordan and Darcy forced 18-year-old Ariel to hide the cigarettes under her shirt. They were then apprehended by police, taken to the local police station and charged.

Which of the following would be the most appropriate defence for Ariel to claim?

- (A) Automatism
- (B) Consent
- (C) Duress
- (D) Provocation

The role of juries, verdicts



http://www.americanbar.org/content/dam/aba/images/jury_hero.jpg

The Jury

- Used in less than 1% of District and Supreme Court trials
- **Role**
 - hear evidence
 - decide verdict/make determinations of fact = accused innocent or guilty beyond reasonable doubt
 - remain fair and open minded
 - must not discuss the case outside of the court
- No role in determining the sentence = judge.
- Consists of 12 members, selected from wider group of people
- Aim to represent a **cross-section of society**
- Right to be **judged by your peers** expressly protected in Constitution
- Randomly selected from jury roll, which is based on electoral roll; administered by NSW Sheriff.

Jury Selection

- *Jury Act 1977 (NSW)* = **eligibility** for jury duty e.g. ineligible if convicted certain crimes, can't read or speak English but tightened exemptions in 2010 following NSW Law Reform Commission recommendation
- **Compulsory** but are exemptions (e.g. doctors, carers)
- Once at the court:
 - jury assembled and sworn in
 - prosecution and defence can **challenge** juror's suitability
 - each side can challenge three peremptory challenges (no reason) and unlimited challenges for cause (reason)
- Recent **amendments** to *Jury Act 1977 (NSW)* allowing:
 - judges to remove jurors without aborting trial
 - jurors to report inappropriate conduct of other jurors
 - Increased workplace protections for employees
 - Increased payments for service

Verdicts

- Federal juries = unanimous verdict required
- NSW
 - unanimous until 2006
 - *Jury Amendment (Verdicts) Act 2006 NSW* amended the *Jury Act 1977 NSW* to allow 11-1 or 10-1 verdicts
 - reform aim = reduce number hung juries; increase efficiencies
 - controversial = better to have retrials than risk innocent people being convicted

Law Reform - *R v Burrell* (2006)



http://www.smh.com.au/ffximage/2006/08/09/bruce_burrell470,0.jpg

- Kerry Whelan went missing from a car park in 1997
- Burrell found guilty of murder following:
 - extensive police investigations
 - a coronial inquest (2002)
 - 2005 trial ending with a 'hung jury'
 - 2006 retrial gaining conviction
- Government responded to publicity surrounding aborted trial by **introducing legislation allowing majority verdicts in criminal cases**

(Source: LIAC State Library)

Case Study – Recent Majority Verdict

Convicted 11-1 for murdering his wife by throwing her off a cliff

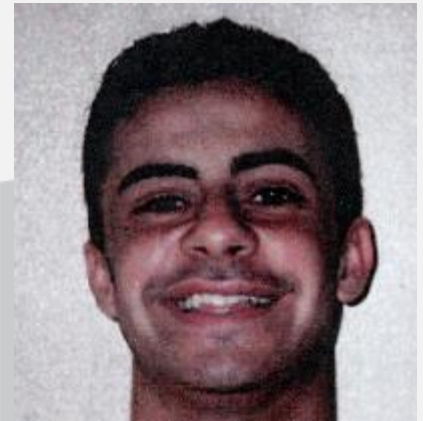
Sentenced to 43 years (34 years non-parole)



<http://www.abc.net.au/news/2007-07-06/guilty--des-campbell/831350>

R v Bilal Skaf; Mohammed Skaf (2004) NSWCA

- Following **significant media attention** of cases concerning different gang rapes, government responded to community concerns reforming the criminal law for sex offences
- During 2000, the Skaf brothers were in a Sydney gang that took girls to remote locations and sexually assaulted them
- Both found guilty of new offence of aggravated sexual assault, introduced following community outrage at decisions in an earlier gang rape case (*R v AEM*, *R v KEM*, *R v MM*)
- Bilal as ringleader = 55 years; Mohammed = 18 years. Appealed
- Two appeal hearings as in first appeal case, retrial ordered because **two jury members visited the scene of the crime** to look at the lighting in the park at night. The victim refused to testify at yet another trial.
- *Criminal Procedure Amendment (Evidence) Act 2005* amended the *Criminal Procedure Act 1986* = allowed transcript evidence to be used in certain types of trials
- Enabled the retrial to occur = convicted = justice achieved
- Sentences reduced on appeal
 - Bilal - 55 to 35 years
 - Mohammed - 18 to 12 years



http://resources2_news.com.au/images/2014/01/22/1226807/686334-80c9b3e8-8301-11e3-9ce1-b10e1a59eb0c.jpg

Are juries still relevant?



<http://resources3.news.com.au/images/2013/01/15/1226553/868631-simon-gittany.jpg>



<http://seoconsultingexpert.com/wp-content/uploads/2013/07/>

- 2008 BOSCAR report = 55.4% jurors thought 'beyond reasonable doubt' means 'sure' they were guilty while 22.8% thought it meant 'almost sure'
- Judge alone trials
 - Until Nov 2011, needed consent of DPP
 - Increasingly used e.g. *R v Gittany 2013* - sentenced to 26 years for murder
 - Under amendments to the *Crimes (Sentencing Procedures) Act 1999*, judge can determine to grant application if in 'interest of justice' e.g. highly publicised trials
 - BOSCAR 2013 research = more acquittals than juries
- Social media = complex; fast evolving
 - Poses threats to juries impartiality
 - Pace of technological development outstripping law's ability to reform

The role of victims

- Victims can feel **disenfranchised** and let down by the justice process due to lack of involvement and loss of control in the trial process
- **Nicholas Cowdery** 'Forgotten Victims: Criminal Justice Remembers' speech

'failure to enforce the rights of victims does not have consequences for the criminal process itself, unlike failure to enforce the rights of the accused However, a failure to enforce victims' rights is nevertheless a failure of the system'

- **SMH 'Justice for Whom'**

But arguably, the plaintive response of the Kelly family to Loveridge's guilty manslaughter plea indicate the DPP is not above reproach in its handling of the prosecution. Those familiar with the negotiations that take place in the background of criminal trials say the family's reaction is suggestive of a failure by the DPP to manage adequately their expectations.

Raising hopes of a murder conviction left the Kelly family destined for disappointment and the community with a perception of the DPP as weak at best and underhand at worst.



<http://www.abc.net.au/news/2013-11-08/thomas-kelly-at-party/5078752>

Fact Check

The NSW Parliament changes an indictable offence to a summary offence. A defendant is now charged with that summary offence.

What right is no longer guaranteed?

- A. The right to a lawyer
- B. The right to a hearing
- C. The right to apply for bail
- D. The right to be judged by peers

Fact Check

In the criminal justice system, decisions of higher courts are binding on lower courts.

Which of the following terms is this statement describing?

- A. Adjournment
- B. Adjudication
- C. Jurisdiction
- D. Precedent

(BOSTES 2012 Exam Q5 Multiple choice)



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