HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, NETTLE AND EDELMAN JJ

MICHAEL AUBREY APPELLANT

AND

THE QUEEN RESPONDENT

Aubrey v The Queen
[2017] HCA 18
10 May 2017
S274/2016

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

G R James QC with P D Lange and M G Coroneos for the appellant (instructed by Murphy's Lawyers)

L A Babb SC with H Baker and B K Baker for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Aubrey v The Queen

Criminal law – Infliction of grievous bodily harm – Meaning of "inflicts" – Where appellant caused complainant to contract human immunodeficiency virus – Whether infliction requires force and immediate physical injury – Whether communication of infection or disease amounts to infliction – Consideration of *R v Clarence* (1888) 22 QBD 23 and *R v Dica* [2004] QB 1257.

Criminal law – Fault element – Recklessness – Foresight of risk – Where appellant diagnosed with human immunodeficiency virus – Where appellant knew of possibility of transmitting virus through unprotected sexual intercourse – Whether foresight of possibility of risk sufficient to establish recklessness.

Words and phrases – "always speaking", "contemporary ideas and understanding", "grievous bodily harm", "inflicts", "maliciously", "recklessly".

Crimes Act 1900 (NSW), ss 5, 35(1)(b), 36.

1 KIEFEL CJ, KEANE, NETTLE AND EDELMAN JJ. The appellant was presented in the District Court of New South Wales on an ex officio indictment alleging one count of maliciously causing the complainant to contract a grievous bodily disease (namely, the human immunodeficiency virus ("HIV")) with the intent of causing the complainant to contract that grievous bodily disease, contrary to s 36 of the *Crimes Act* 1900 (NSW) ("Count 1"), and, in the alternative, one count of maliciously inflicting grievous bodily harm upon the complainant, contrary to s 35(1)(b) of the *Crimes Act* ("Count 2").

2 The Crown case was, in broad terms, that the appellant engaged in unprotected anal sexual intercourse with the complainant between January and July 2004 in circumstances where the appellant had been diagnosed as, and therefore knew that he was, HIV positive. The Crown did not allege[1] "an application of direct and intentional violence" but rather that the appellant had inflicted grievous bodily harm upon the complainant by reason that "the complainant was infected with a grievous bodily disease (HIV) as the immediate consequence of the relevant act of intercourse".

3 On 5 March 2012, the appellant moved for an order that Count 2 be quashed on the basis that, on the acts alleged by the Crown, the appellant did not, at law, inflict grievous bodily harm on the complainant. Sorby DCJ, who heard the motion, ruled[2] that, because of the "uncertainty as to whether infecting another person with a serious disease constituted inflicting grievous bodily harm as proscribed in the offence of maliciously inflicting grievous bodily harm as it was defined under s 35(1)(b) in 2004", the proceedings in relation to Count 2 should be stayed.

4 On an appeal by the Crown pursuant to s 5F(2) of the *Criminal Appeal Act* 1912 (NSW) ("the interlocutory appeal"), the New South Wales Court of Criminal Appeal (Macfarlan JA, Johnson and Davies JJ agreeing) dissolved the stay. The Court accepted[3] the Crown's contention that:

> "the word 'inflicts' should not be given a limited and technical meaning which requires that the harm result from a violent act which creates an immediate result. That being so, the transmission of a disease which

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1 *R v Aubrey* (2012) 82 NSWLR 748 at 750 [4].

2 *R v Aubrey* unreported, District Court of New South Wales, 8 March 2012 at 6-7 [23], [25]-[26].

3 *Aubrey* (2012) 82 NSWLR 748 at 750 [9], 761 [62].

manifests itself after a period of time can amount to the infliction of grievous bodily harm."

The appellant's application for special leave to appeal to this Court against that order was refused[4].

5 Proceedings on the same two counts were reinstated by indictment dated 8 August 2013. Following a trial before Marien DCJ and a jury of 12, the appellant was acquitted of Count 1 (maliciously causing the complainant to contract a grievous bodily disease with intent to cause the complainant to contract that disease) but convicted of Count 2 (maliciously inflicting grievous bodily harm), and was sentenced therefor to a term of five years' imprisonment with a non-parole period of three years. The appellant appealed against that conviction on grounds including that Count 2 as alleged disclosed no offence known to law and that the trial judge erred in directing the jury that the element of malice was satisfied. A differently constituted Court of Criminal Appeal (Fagan J, Gleeson JA and Button J agreeing) dismissed the appeal, adopting, in relation to the first ground, the analysis of the Court which had heard the interlocutory appeal[5].

6 By grant of special leave, the appellant now appeals to this Court. The appeal raises two questions of principle for decision:

(1) Is an act of having sexual intercourse with another person and thereby causing the other person to contract a grievous bodily disease capable of amounting to the infliction of grievous bodily harm within the meaning of s 35(1)(b) of the *Crimes Act*?

(2) Is it sufficient to establish that an accused acted *recklessly* within the meaning of s 5 of the *Crimes Act*, and thus maliciously within the meaning of that section and s 35, for the Crown to establish that the accused foresaw the *possibility* (as opposed to the *probability*) that the act of sexual intercourse with the other person would result in the other person contracting the grievous bodily disease?

7 For the reasons which follow, both questions should be answered affirmatively, and the appeal should be dismissed.

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4 [2013] HCATrans 110.

5 *Aubrey v The Queen* [2015] NSWCCA 323 at [23]-[25].

Relevant statutory provisions

8 At the relevant times, and so far as is applicable, sections of the *Crimes Act* provided as follows:

"**4 Definitions**

(1) In this Act, unless the context or subject-matter otherwise indicates or requires:

...

Grievous bodily harm includes any permanent or serious disfiguring of the person.

...

5 Maliciously

Maliciously: Every act done of malice, whether against an individual or any corporate body or number of individuals, or done without malice but with indifference to human life or suffering, or with intent to injure some person or persons, or corporate body, in property or otherwise, and in any such case without lawful cause or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient in the crime.

...

18 Murder and manslaughter defined

(1)

(a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a

crime punishable by imprisonment for life or for 25 years.

(b) Every other punishable homicide shall be taken to be manslaughter.

(2)

(a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.

(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.

...

33 Wounding etc with intent to do bodily harm or resist arrest

Whosoever:

maliciously by any means wounds or inflicts grievous bodily harm upon any person, or

maliciously shoots at, or in any manner attempts to discharge any kind of loaded arms at any person,

with intent in any such case to do grievous bodily harm to any person, or with intent to resist, or prevent, the lawful apprehension or detainer either of himself or herself or any other person,

shall be liable to imprisonment for 25 years.

...

35 Malicious wounding or infliction of grievous bodily harm

(1) Whosoever maliciously by any means:

(a) wounds any person, or

(b) inflicts grievous bodily harm upon any person,

shall be liable to imprisonment for 7 years.

(2) A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in the company of another person or persons. A person convicted of an offence under this subsection is liable to imprisonment for 10 years.

...

36 Causing a grievous bodily disease

A person:

(a) who maliciously by any means causes another person to contract a grievous bodily disease, or

(b) who attempts maliciously by any means to cause another person to contract a grievous bodily disease,

with the intent in any such case of causing the other person to contract a grievous bodily disease, is liable to imprisonment for 25 years."

9 With effect from 15 February 2008, and so not until after the offences in this case were committed, the definition of grievous bodily harm in s 4(1) was amended[6] so as to include the following:

"(c) any grievous bodily disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease)."

Infliction of grievous bodily harm

The course of authority

10 With respect to the first question raised by this appeal, the course of authority begins with the decision of the Court for Crown Cases Reserved in *R v Clarence*[7]. Nine members of the Court of 13 who decided that case

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6 *Crimes Amendment Act* 2007 (NSW).

7 (1888) 22 QBD 23.

held[8] that a man who knew that he had gonorrhoea and foresaw that it was possible he could transmit the disease to his wife by having sexual intercourse with her, and yet proceeded to do so without informing her of his condition, could not be convicted of maliciously inflicting grievous bodily harm upon her. Stephen J, delivering the main majority judgment, held that proof of the offence of "unlawfully and maliciously ... inflict[ing] ... grievous bodily Harm" under s 20 of the *Offences against the Person Act* 1861 (UK) (24 & 25 Vict c 100) ("the 1861 Act") required proof of[9]:

> "the direct causing of some grievous injury to the body itself with a weapon, as by a cut with a knife, or without a weapon, as by a blow with the fist, or by pushing a person down. Indeed, though the word 'assault' is not used in the section, I think the words imply an assault and battery of which a wound or grievous bodily harm is the manifest immediate and obvious result."

That was to be contrasted, it was held, with the uncertain and delayed effect of an infection communicated by an act of sexual intercourse.

11 The decision in *Clarence* has been widely criticised, perhaps most notably by Dr Kenny in the first edition, published in 1902, of *Outlines of Criminal Law*[10], in which it was pointed out that the reasoning in *Clarence* was contrary to an important earlier decision of the Court for Crown Cases Reserved in *R v Martin*[11] and the 1889 decision in *R v Halliday*[12]. In *Martin*, it was held[13] that a man who turned out the lights in a theatre and put a bar on the door, thereby creating panic among the patrons which led to some of them suffering serious injuries in their attempts to escape, was guilty of recklessly inflicting grievous

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8 *Clarence* (1888) 22 QBD 23 at 36-37 per Wills J, 37-38 per A L Smith J, 41 per Stephen J (with whom Mathew J, Grantham J, Manisty J and Huddleston B agreed), 62 per Pollock B, 65-66 per Lord Coleridge CJ (who agreed with both Wills and Stephen JJ).

9 *Clarence* (1888) 22 QBD 23 at 41-42.

10 Kenny, *Outlines of Criminal Law*, (1902) at 149-150.

11 (1881) 8 QBD 54.

12 (1889) 61 LT 701.

13 (1881) 8 QBD 54 at 56-58.

bodily harm under s 20 of the 1861 Act. In *Halliday*, it was held that a man who, by his threats to his wife, caused her to fall and be injured as she attempted to escape from him, was properly convicted of maliciously inflicting grievous bodily harm upon her. The Court reasoned that, if an accused creates in another person's mind an immediate sense of danger which causes the person to try to escape, and, in attempting to escape, that person injures himself or herself, the accused is responsible for the injuries which result.

12 Eighty years after *Clarence*, the Full Court of the Supreme Court of Victoria in *R v Salisbury*[14] endeavoured to rationalise *Clarence* with *Halliday* and *Martin* as, in effect, two lines of authority that conduced to the conclusion that grievous bodily harm could be inflicted[15] either by an accused assaulting a victim or, without assaulting the victim, by the accused directly and violently inflicting grievous bodily harm by doing something intentionally which, though not itself a direct application of force to the body of the victim, directly results in force being applied violently to the body of the victim whereby grievous bodily harm is suffered[16]. It followed, it was held, that common assault was not necessarily a lesser included offence on a charge of recklessly inflicting grievous bodily harm within the meaning of s 19A of the *Crimes Act* 1958 (Vic) and, therefore, that the trial judge had not erred in failing to leave a charge of assault to the jury as an alternative count.

13 In *R v Wilson*, the House of Lords approved[17] the reasoning in *Salisbury*. Lord Roskill, with whom the other Law Lords agreed, concluded[18] that, although "inflicts" does not have as wide a meaning as "causes", it connotes a broader notion than inflicting grievous bodily harm by assaulting a victim. Consequently, it was held, consistently with *Salisbury*, that while an offence under s 20 of the 1861 Act may include an allegation of common assault, it need not necessarily do so. It would depend on the facts. An accused may be convicted of inflicting grievous bodily harm if shown either to have directly and

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14 [1976] VR 452.

15 In that case, within the meaning of s 19A of the *Crimes Act* 1958 (Vic): *Salisbury* [1976] VR 452 at 453.

16 *Salisbury* [1976] VR 452 at 458, 461.

17 [1984] AC 242 at 259-260 per Lord Roskill (Lords Fraser of Tullybelton, Elwyn-Jones, Edmund-Davies and Brightman agreeing at 253-254, 262).

18 *Wilson* [1984] AC 242 at 259-261.

violently inflicted grievous bodily harm by assaulting the victim or to have done something intentionally which, though it does not amount to the direct application of force, directly results in force being applied violently to the body of the victim[19].

14 The next development in the course of authority was the decision of the Court of Appeal of England and Wales in *R v Chan-Fook*[20], that "actual bodily harm" within the meaning of s 47 of the 1861 Act extends to psychiatric injury. In so concluding, Hobhouse LJ, who delivered the judgment of the Court, reasoned[21] that the body of a victim includes all parts of his or her body, including organs, nervous system and brain; that "harm" is a synonym for "injury"; and that bodily harm, therefore, includes injury to the parts of the victim's body which affect mental and other faculties. It followed that bodily harm may be caused to a victim by causing injury to his or her health. Accordingly, in the circumstances of that case, where the accused had assaulted the complainant without occasioning physical bodily injury but in a manner that so terrified the complainant as to result in a recognised psychiatric injury, it was open to the jury to convict the accused of assault occasioning actual bodily harm[22].

15 The development in *Chan-Fook* led next to the decision of the House of Lords in *R v Ireland*[23] that an accused who had caused a number of complainants to suffer severe depressive illness by his menacing and harassing behaviour[24] was properly convicted of unlawfully and maliciously inflicting grievous bodily harm and actual bodily harm contrary to ss 20 and 47 of the 1861 Act. Lord Steyn, who delivered the principal speech, referred[25] to the decision in *Chan-Fook* as a

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19 *Wilson* [1984] AC 242 at 259-260, quoting *Salisbury* [1976] VR 452 at 461.

20 [1994] 1 WLR 689; [1994] 2 All ER 552.

21 *Chan-Fook* [1994] 1 WLR 689 at 694-695; [1994] 2 All ER 552 at 558-559.

22 *Chan-Fook* [1994] 1 WLR 689 at 696; [1994] 2 All ER 552 at 559-560.

23 [1998] AC 147.

24 Including making silent telephone calls, distributing offensive cards and taking photographs of a complainant and her family.

25 *Ireland* [1998] AC 147 at 159 (Lords Goff of Chieveley and Slynn of Hadley agreeing at 152).

"sound and essential clarification of the law" relating to bodily harm. Whereas *Clarence* had confined "bodily harm" to physical injury and "inflict" to assault (in the sense of a battery involving the direct application of force), the reasoning in *Chan-Fook* "opened up the possibility" of applying ss 20 and 47 to new circumstances that do not involve the application of force. According to Lord Steyn, the 1861 Act is to be construed as "always speaking"[26]. As such, references to "bodily harm" in the 1861 Act may now be understood as including psychiatric injury because nowadays it is natural to speak of "inflicting" psychiatric injury and, although "inflict" and "cause" are not exact synonyms, one may naturally conceive of an accused's actions as having inflicted serious psychiatric injury (and, therefore, grievous bodily harm) on a victim[27]. Lord Hope of Craighead reasoned to similar effect, adding that the word "inflict" implies that the consequence of the act is something which the victim is likely to find "unpleasant or harmful", whereas "cause" is essentially neutral[28].

16 Finally, building on the observations in *Ireland* and *Chan-Fook*, in *R v Dica* the Court of Appeal held[29] that *Clarence* has "no continuing application" and that an accused who knows that he is suffering from a serious sexual disease and recklessly transmits it to a woman through consensual sexual intercourse, without informing her of the risk of contracting the disease, is liable to be convicted of inflicting grievous bodily harm contrary to s 20 of the 1861 Act. Judge LJ, who delivered the judgment of the Court, embraced Hobhouse LJ's reasoning in *Chan-Fook* that contemporary notions of harm include injury to one's health[30]. His Lordship reasoned further that, inasmuch as *Ireland* held that grievous bodily harm constituted of psychiatric injury may be "inflicted" without the application of physical violence, it logically follows that grievous bodily harm constituted of a serious sexual disease may be "inflicted" without the application of violence; and so, therefore, may be "inflicted" by an act of sexual intercourse without the complainant's informed consent to the risk of the disease[31]. Judge LJ concluded accordingly that, in light of contemporary

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26 *Ireland* [1998] AC 147 at 158-159.

27 *Ireland* [1998] AC 147 at 160-161.

28 *Ireland* [1998] AC 147 at 164.

29 [2004] QB 1257 at 1266 [30]-[31].

30 *Dica* [2004] QB 1257 at 1265 [27]-[28].

31 *Dica* [2004] QB 1257 at 1265-1266 [30]-[31].

conceptions of bodily injury and disease, it is no longer possible to discern the critical difference identified by the majority in *Clarence* between, on the one hand, an immediate and necessary connection between a blow and consequent physical harm and, on the other, the supposed uncertain and delayed effect of an act of sexual intercourse leading to the development of infection. As such, that reasoning in *Clarence* should no longer be followed.

The reasoning below

17 On the interlocutory appeal, Macfarlan JA surveyed the course of authority outlined above and concluded, in accordance with *Chan-Fook*, *Ireland* and *Dica*, that the infliction of harm does not require a direct or indirect application of force and that grievous bodily harm may be inflicted by the transmission of a sexual disease[32]. His Honour considered that the reasoning in *Salisbury* did not require a contrary conclusion because the Full Court of the Supreme Court of Victoria was there concerned only with "whether a charge of assault was encompassed within a charge of maliciously inflicting grievous bodily harm" and the subsequent conclusion that some act, other than an assault, that results in an application of force is required was obiter dicta[33]. On the appeal against conviction, the Court of Criminal Appeal upheld Macfarlan JA's earlier reasoning in that respect[34]. Their Honours were right to do so.

Infliction without the application of force

18 There are a number of reasons why *Clarence* should no longer be followed. First, as Dr Kenny observed in 1902, the decision in *Clarence* ran counter to contemporary authority[35]. As has been seen, the idea that the infliction of grievous bodily harm necessitated a battery productive of immediate physical injury was not reflected in the decisions of the Court for Crown Cases Reserved in *Halliday* and *Martin*.

19 Secondly, despite the eminence of the judges who comprised the majority in *Clarence* – Wills J, A L Smith J, Mathew J, Stephen J, Grantham J, Manisty J, Huddleston B, Pollock B and Lord Coleridge CJ – their Lordships did not all

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32 *Aubrey* (2012) 82 NSWLR 748 at 760-761 [56]-[61].

33 *Aubrey* (2012) 82 NSWLR 748 at 760 [57].

34 *Aubrey* [2015] NSWCCA 323 at [25].

35 Kenny, *Outlines of Criminal Law*, (1902) at 149-150.

speak with one voice. Stephen J, with whom A L Smith J, Mathew J, Grantham J, Manisty J and Huddleston B agreed, and Pollock B in a separate judgment, held[36] that the infliction of grievous bodily harm required an assault or battery productive of immediate physical injury. But Wills J rested his conclusion on what his Lordship considered to be the impossibility of viewing an act of consensual sexual intercourse as an assault, notwithstanding that the complainant had not consented to the risk of the disease[37]. Lord Coleridge CJ rested his conclusion on a concern that, if the conviction were upheld, it might logically follow that a conviction could be sustained against a father or relative for infecting a child with smallpox or other contagious disease[38].

20 Thirdly, Field J and Hawkins J each delivered forceful dissenting judgments[39] which suggest that, even as at 1888, the transmission of a sexual disease was not beyond the bounds of the ordinary acceptation of the phrase "inflicting grievous bodily harm".

21 Fourthly, as Hawkins J identified, although s 18 spoke in terms of conduct "causing" a consequence; s 20 of conduct "inflicting" a consequence; and s 47 of conduct "occasioning" a consequence, a more rigorous textual and contextual analysis leaves little doubt that the drafters of the legislation employed the words "inflicting", "causing" and "occasioning" essentially as synonyms[40].

22 Fifthly, as Hawkins J also reasoned[41], since the operation of s 47 was expressly predicated on proof of an assault[42], the absence of any reference to assault in ss 18 and 20 implied that the object of each of those sections was respectively to make the intentional infliction of grievous bodily harm by any

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36 *Clarence* (1888) 22 QBD 23 at 41 per Stephen J, 62 per Pollock B.

37 *Clarence* (1888) 22 QBD 23 at 34-36.

38 *Clarence* (1888) 22 QBD 23 at 65.

39 *Clarence* (1888) 22 QBD 23 at 48-49 per Hawkins J; see more generally at 58-59 per Field J.

40 See *Clarence* (1888) 22 QBD 23 at 48-49.

41 *Clarence* (1888) 22 QBD 23 at 49.

42 Section 47 provided: "Whosoever shall be convicted upon an Indictment of any Assault occasioning actual bodily Harm shall be liable ...".

means punishable as a felony and to make the malicious infliction of grievous bodily harm by any means punishable as a misdemeanour.

23 Sixthly, as Lord Steyn later noticed in *Ireland*[43], the likelihood of that being so is fortified by the caveat noted in the commentary on the Criminal Law Consolidation Acts 1861 that the various provisions of the 1861 Act had been taken from a miscellany of previous enactments without effort to standardise the language, with the result that the significance which might ordinarily be attributed to different forms of expression in different sections of one statute would be misplaced.

24 Seventhly, as was recognised in *Dica*[44], even if the reckless transmission of sexual diseases were not within the ordinary acceptation of "inflicting grievous bodily harm" in 1888, subsequent developments in knowledge of the aetiology and symptomology of infection have been such that it now accords with ordinary understanding to conceive of the reckless transmission of sexual disease by sexual intercourse without disclosure of the risk of infection as the infliction of grievous bodily injury. Viewed in hindsight, a deal of the majority's reasoning in *Clarence* presents as based on a necessarily more rudimentary understanding of infectious diseases, a consequent fear of the unpredictability of what might be the consequence of recognising the spread of infectious disease as the infliction of serious bodily harm and, ultimately, what now appears as an unwarranted concern that it may prove impossible to define the demarcation between culpable and non-culpable non-violent acts that transmit infectious diseases.

25 Eighthly, it is to be observed that, to a greater or lesser extent, each of the majority judgments in *Clarence* was overlaid with the then presumed consent of a married woman to sexual intercourse with her husband and an apparent inability or unwillingness on the part of some members of the majority to distinguish between consent to intercourse and consent to risk of infection[45]. As

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43 [1998] AC 147 at 159, quoting Greaves, *The Criminal Law Consolidation and Amendment Acts*, (1861) at 3-4.

44 [2004] QB 1257 at 1265 [28], 1273 [59].

45 See for example *Clarence* (1888) 22 QBD 23 at 30 per Wills J, 37 per A L Smith J, 43-44 per Stephen J.

Hawkins J observed[46], however, in effect that distinction had already been sanctioned by authority[47].

26 Lastly, there is, with great respect, no sufficient reason to disagree with the construction attributed to s 20 of the 1861 Act in subsequent decisions, including *Ireland* and *Dica*, or to fail to accept that that reasoning applies with at least equal force to s 35 of the *Crimes Act*.

27 Counsel for the appellant contended that the word "inflicts" connotes the production of an immediate consequence with the result that, because the symptoms of the HIV which the appellant transmitted to the complainant were not immediately apparent, it could not be said that there had been any *infliction* of disease or injury. Arguably, that idea derives some support from some of the observations of Stephen J in *Clarence*[48]. But it is misplaced. It rests on the kind of discredited logic that was rejected in *Alcan Gove Pty Ltd v Zabic*[49] that until and unless the symptoms of an insidious disease become manifest, no damage has been inflicted. As *Zabic* established, that is not so.

28 On the appellant's submission, the ordinary acceptation of the word "inflicts" does not, even now, extend to the communication of disease or infection. That contention must also be rejected. It is commonplace to speak of the infliction of suffering and thus, as counsel seemed to accept, it is now commonplace to speak of the infliction of psychiatric injury[50]. Semasiologically, it is just as commonplace and just as appropriate to speak of the infliction of physical disease.

29 In written submissions, the appellant asserted that the decision in *Ireland* did not accord with approaches to statutory construction in Australia. That does not appear to be the case. The approach in this country allows that, if things not known or understood at the time an Act came into force fall, on a fair

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46 *Clarence* (1888) 22 QBD 23 at 53.

47 See *R v Bennett* (1866) 4 F & F 1105 [176 ER 925]; *R v Lock* (1872) LR 2 CCR 10.

48 (1888) 22 QBD 23 at 41-42.

49 (2015) 257 CLR 1 at 15 [26], 18-19 [41]-[42], 20 [48]; [2015] HCA 33.

50 See for example *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35.

construction, within its words, those things should be held to be included[51]. Thus in *Lake Macquarie Shire Council v Aberdare County Council*[52], Barwick CJ considered whether the word "gas" in English legislation was confined to coal gas or whether it extended to liquefied petroleum gas. The only form of gas which was in common use for lighting and heating at the time the statutes were enacted was coal gas. Barwick CJ held that although the connotation of the word "gas" was fixed, its denotation could change with changing technology. A similar approach has been taken in England[53] and, with respect, Lord Steyn's approach in *Ireland* does not appear in principle to have been any different.

30 In *Ireland*, Lord Steyn expressly stated that the decision in *Chan-Fook* opened up the possibility of applying the provisions of the 1861 Act to new circumstances[54]. Having observed that the correct approach was not to consider the subjective intention of the draftsperson, but to consider whether the words of the 1861 Act extended to a recognisable psychiatric injury when considered in light of contemporary knowledge[55], his Lordship concluded[56] that the 1861 Act employed the preferred Victorian drafting technique. Thus, it was "always speaking". By that, his Lordship appears to have meant that the language of the 1861 Act was adaptable to new circumstances; and if so, his Lordship's approach accorded with the approach in this country. Granted, it has been suggested that his Lordship may have had something else in mind[57]. But that suggestion was not called in aid on this appeal. The appellant did not develop his argument on

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51 See generally Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 156-157 [4.9].

52 (1970) 123 CLR 327 at 331 (Menzies J agreeing at 332); [1970] HCA 32.

53 See for example *R v G* [2004] 1 AC 1034 at 1054 [29] per Lord Bingham of Cornhill (Lords Browne-Wilkinson, Hutton and Rodger of Earlsferry agreeing at 1057 [42], 1063 [62], 1066 [71]).

54 *Ireland* [1998] AC 147 at 159.

55 *Ireland* [1998] AC 147 at 158.

56 *Ireland* [1998] AC 147 at 158-159.

57 See for example *Yemshaw v Hounslow London Borough Council* [2011] 1 WLR 433 at 442-443 [26]-[27] per Baroness Hale of Richmond JSC, with whom Lords Hope of Craighead DPSC and Walker of Gestingthorpe JSC agreed (Lord Rodger of Earlsferry JSC agreeing at 446 [38]); [2011] 1 All ER 912 at 922-923, 926.

the always speaking approach to statutory construction and certainly did not develop it in accordance with any alternative view of what Lord Steyn intended.

31 Counsel for the appellant contended that, be that as it may, the use of "inflicts" in s 35 and "causes" in s 36 implies that the former is intended to operate as a term of narrower connotation than the latter, and that, if *Chan-Fook* and *Ireland* were followed in New South Wales, it would lead to the remarkable and most unsatisfactory result that an accused may be found guilty of maliciously inflicting grievous bodily harm merely on the basis of having contemplated that his or her non-violent, and possibly non-physical, conduct might cause a disease or infection which later results in harm to another's body.

32 Those contentions are not persuasive. As has been observed[58], the commentary on the Criminal Law Consolidation Acts 1861 reveals that the various provisions of the 1861 Act were taken from a miscellany of previous enactments without significant effort to standardise the language, and thus the significance that might ordinarily be attached to differences in language between different sections within one enactment would be inapposite. Offences against the person in the *Criminal Law Amendment Act* 1883 (NSW) were largely derived from the 1861 Act. Thus, if an accused, foreseeing the possibility that he or she may cause a victim to suffer psychiatric injury, so acts as to cause the victim to suffer a psychiatric injury, it is neither surprising nor in the least degree unsatisfactory that the accused should be liable to be convicted of recklessly inflicting serious injury.

33 Counsel for the appellant contended that it is to be presumed that the New South Wales Parliament was aware of *Clarence* when the *Crimes Act* was enacted in 1900 and so should be presumed to have enacted s 35 with the intention that it be applied in accordance with *Clarence*. Further, in counsel's submission, persons may be taken to have ordered their affairs in the belief that the operation of s 35 was as decided by *Clarence* and, in those circumstances, it would be wrong for this Court now to place any other construction on the section. To do so would amount to creating a new offence where none had previously existed.

34 Those submissions are equally unpersuasive. Admittedly, in cases where words used in an Act have acquired a legal meaning prior to enactment, it may be presumed that the legislature intends them to have that meaning unless a contrary

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58 See [23] above.

intention appears from the context[59]. But the words of s 20 of the 1861 Act had not acquired the meaning ascribed to them by *Clarence* at the time of their first enactment in New South Wales. What later became s 35 of the *Crimes Act* was first proposed in New South Wales in the form of cl 19 of the draft bill attached to the Law Reform Commissioners' Report of 1871. As so proposed, it differed from s 20 of the 1861 Act in that it included the words "by any means". Clause 19 of the draft bill formed the basis of s 24 of the *Criminal Law Amendment Act* 1883, which was then re-enacted as s 35 of the *Crimes Act* in 1900. As the Crown submitted, the presence of the words "by any means", particularly in the re-enactment of the provision in 1900, suggests a legislative intention that "inflicts" should not be read narrowly in the manner considered by the majority in *Clarence*, but rather in the natural and ordinary sense attributed to the word by Lord Hope in *Ireland*[60]: of causing an unwelcome consequence of some harm or detriment to the victim.

35 Granted, until this case, *Clarence* had not been distinguished or judicially doubted in New South Wales. It was assumed that proof of an offence against s 35 of the *Crimes Act* necessitated proof of a direct causing of some grievous physical injury with a weapon or blow, or proof of circumstances of the kind essayed in *Halliday* and *Martin* and later affirmed in *Salisbury* and *Wilson*[61]. It may also be accepted that the Court is ordinarily loath to overturn a long-standing decision about the meaning of a provision[62] unless there is doubt about it, or to depart from the view of judges who, because of proximity in time to the

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59 *R v Slator* (1881) 8 QBD 267 at 271-272 per Denman J; *Webb v McCracken* (1906) 3 CLR 1018 at 1027 per O'Connor J; [1906] HCA 45; *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 531-532 per O'Connor J; [1908] HCA 94; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 585-586 [44]-[45] per Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [1998] HCA 59.

60 [1998] AC 147 at 164.

61 See Watson and Purnell, *Criminal Law in New South Wales*, (1971), vol 1 at 68.

62 *Platz v Osborne* (1943) 68 CLR 133 at 137 per Latham CJ, 147 per Williams J; [1943] HCA 39; *Thompson v Nixon* [1966] 1 QB 103 at 109-110 per Sachs J (Browne J and Lord Parker CJ agreeing at 110).

passage of the legislation in question, were more aware of the reasons underlying the legislation[63]. But that is not this case.

36 As has been observed, the decision in *Clarence* has long been regarded as doubtful and, with the possible exception of Stephen J[64], it is not clear that the judges who comprised the majority had particular insight into the Parliament's purpose in enacting s 20 of the 1861 Act. Furthermore, although it may once have been assumed that *Clarence* would be followed in New South Wales, at least since *Salisbury*, *Wilson* and subsequent decisions of courts in the United Kingdom there has been cause for considerable doubt. In these circumstances, the idea that persons might have planned their sexual activities in the belief that they would be safe from liability under s 35 under cover of *Clarence* is hardly compelling.

37 Counsel for the appellant contended that, notwithstanding such doubts, it is apparent from the enactment of s 36 of the *Crimes Act* in 1990 that the Parliament were of the view that s 35 had the meaning attributed to its words by the majority in *Clarence* and that it is significant that Parliament acted to insert s 36 rather than to amend s 35 so as clearly to expand its meaning. By so proceeding, it was submitted, the Parliament signalled an intention that s 35 should continue to operate, as it had been supposed it would, in accordance with *Clarence*. For that reason, the appellant submitted, it would be quite wrong for this Court now to impose a different construction on the section.

38 That argument is rejected. As appears from the second reading speech relating to the Crimes (Injuries) Amendment Bill 1990 (NSW), the impetus for the enactment of s 36 was "a series of robberies [that had been] carried out recently by bandits armed with syringes that they [had] claimed contained blood infected with the [HIV] AIDS virus"[65]. The provision was enacted because it was considered that *Clarence* created "some doubt [as to] whether the contraction of a disease ... constitutes bodily harm" for the purposes of s 35 and therefore to ensure that "[a] person who intentionally inflicts a serious disease upon another

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63 See generally Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 157-158 [4.10].

64 See [42] below.

65 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 December 1990 at 11737.

[can] be convicted of an offence that reflects the gravity of the harm"[66]. That there was doubt about the effect of *Clarence* does not suggest that Parliament intended that s 35 be restricted in the manner suggested by *Clarence*, or that the section had, in fact, operated in that way previously. Rather, to the contrary, it is apparent that Parliament's concern that s 35 *might* be so restricted was the reason to enact s 36 to deal with the particular problem of offenders who, by any means, intentionally and maliciously cause or attempt to cause a person to contract a grievous bodily disease. Moreover, even if the Parliament that enacted s 36 contemplated that s 35 would be construed in accordance with *Clarence*, the meaning of s 35 is not thereby affected. The relevant question is whether, if the Parliament that enacted s 35 in 1900 were appraised of subsequent advances in the understanding of the aetiology and symptomology of infectious diseases, they would have intended that s 35 extend to the reckless transmission of HIV by consensual sexual intercourse with a complainant who is ignorant of the accused's infection[67].

39 Counsel for the appellant prayed in aid the general principle that where there is doubt about the meaning of a penal statute it should be resolved in favour of the subject. As Gibbs J stated in *Beckwith v The Queen*, however, that rule is one of last resort[68]. Penal statutes are to be construed in accordance with ordinary rules of construction and so, where, as here, it is apparent that a statute is to be construed as "always speaking"[69], it is not to the point that, at an earlier

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66 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 December 1990 at 11738.

67 See *R v Gee* (2003) 212 CLR 230 at 240-241 [6]-[7] per Gleeson CJ; [2003] HCA 12; *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113 at 144-145 [137]-[139] per Spigelman CJ (Handley and Hodgson JJA agreeing at 150 [171]-[172]); *Stingel v Clark* (2006) 226 CLR 442 at 458-459 [27] per Gleeson CJ, Callinan, Heydon and Crennan JJ; [2006] HCA 37.

68 (1976) 135 CLR 569 at 576-577; [1976] HCA 55. See also *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129 at 145 per Mason, Deane and Dawson JJ; [1983] HCA 44; *Waugh v Kippen* (1986) 160 CLR 156 at 164-165 per Gibbs CJ, Mason, Wilson and Dawson JJ; [1986] HCA 12.

69 See *Ireland* [1998] AC 147 at 158-159 per Lord Steyn.

time in the life of the statute, there may have been doubt about the reach of its provisions[70].

40 Given that the language of s 20 of the 1861 Act has been held to have a generality that attracts the operation of the always speaking approach[71], and so includes the reckless infliction of sexual disease, as was held in *Dica*, it is right to recognise that the same applies under s 35 of the *Crimes Act*. In light of contemporary ideas and understanding, any other result would be productive of considerable inconvenience[72].

The meaning of maliciously

41 At the time of enactment of s 5 of the *Crimes Act* in 1900, there was no clear uniform meaning of "malice" at common law. Stephen's *A Digest of the Criminal Law (Crimes and Punishments)*, which was first published in 1877, deployed the term in several different senses. For example, Art 279(5) of Stephen's draft code[73] provided that a violation of property rights may occur "[b]y wilful and malicious mischief done to property", thus implying that malice and wilfulness were conceived of as being different. At another point, Stephen noted[74] that one form of malice was "intent to bring any ship ... into danger", as was the injury of railway carriages. In a further passage, Stephen recorded that[75]:

> "[t]he word 'malicious' in reference to the offence of libel has been elaborated by the judges into a whole body of doctrine on the subject in the same sort of way as the words 'malice aforethought' in the definition of murder".

42 The confusion caused by the several senses in which malice was used in common law led in 1879 to the Commissioners appointed to consider the law

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70 *Lake Macquarie Shire Council* (1970) 123 CLR 327 at 331 per Barwick CJ (Menzies J agreeing at 332); *Taylor v Goodwin* (1879) 4 QBD 228 at 229.

71 *Ireland* [1998] AC 147 at 158-159 per Lord Steyn.

72 See *Lake Macquarie Shire Council* (1970) 123 CLR 327 at 333 per Windeyer J.

73 Stephen, *A Digest of the Criminal Law (Crimes and Punishments)*, (1877) at 195.

74 Stephen, *A Digest of the Criminal Law (Crimes and Punishments)*, (1877) at 301.

75 Stephen, *A Digest of the Criminal Law (Crimes and Punishments)*, (1877) at 375.

relating to indictable offences, of whom Stephen was one, recommending that, in relation to offences against property, the word "malice" be avoided and replaced with "wilful"[76]. Section 381 of the Commissioners' draft code, which drew heavily on Stephen's draft code of 1877, thus provided as follows:

> "Every one who causes any event by an act which he knew would probably cause it, being reckless whether such event happens or not, shall be deemed to have caused it wilfully for the purposes of this part of this Act.
>
> Nothing shall be an offence under any provision contained in this Part unless it is done without legal justification or excuse, and without colour of right: Provided that where the offence consists in an injury to anything in which the offender has an interest, the existence of such interest if partial shall not prevent his act being an offence, and the fact that the thing injured belonged wholly to the offender shall not prevent his act being an offence if done with an intention to defraud."

43 In that context, "reckless" appears to have meant "without reck" (scil, without care or not caring whether the event happened or not)[77] and "probable" to have meant what is usually called "possible"[78]. By contrast, s 5 of the *Crimes Act* was a re-enactment of s 7 of the *Criminal Law Amendment Act* 1883 and, in Stephen and Oliver's *Criminal Law Manual* of the same year, the authors observed that s 7 spoke of "malice" in its "proper, and ordinary, and only legitimate acceptation, and then expand[ed] its application for the purposes of the Act"[79].

44 It is not clear what Stephen and Oliver meant by "ordinary, and only legitimate acceptation". It may have been the ancient meaning of wickedly or wantonly, although, even by 1883, that had been superseded in England by the

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76 United Kingdom, Criminal Code Bill Commission, *Report of the Royal Commission Appointed to Consider The Law Relating to Indictable Offences: with an Appendix Containing a Draft Code Embodying the Suggestions of the Commissioners*, (1879) [C 2345] at 30, 146.

77 Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 54.

78 Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 55, 60.

79 Stephen and Oliver, *Criminal Law Manual Comprising the Criminal Law Amendment Act of 1883*, (1883) at 7.

course of common law development[80]. But it is at least clear that, by expanding on the "ordinary, and only legitimate acceptation" of the term, the definition was designed to embrace the notion of recklessness recognised in *R v Welch*[81], of foreseeing the possibility of consequences and proceeding nonetheless. Until relatively recently, it has been consistently so construed[82].

45 More recently, it has been held in jurisdictions other than New South Wales, in relation to like provisions, that an offence of reckless infliction of grievous bodily harm necessitates proof of foresight of the probability, or likelihood, as opposed to the possibility, of grievous bodily harm[83]. For example, in *R v Campbell*[84], the Victorian Court of Appeal overturned a line of previous authority[85] that it was sufficient to establish the mental element of an offence of reckless infliction of grievous bodily harm contrary to s 17 of the *Crimes Act* 1958 (Vic) to demonstrate foresight of the possibility of grievous bodily harm. Hayne JA and Crockett AJA invoked what they described as "[t]he spirit of the decision in *Crabbe*"[86] as a basis to conclude that proof of an offence of reckless infliction of grievous bodily harm requires proof of foresight of a probability of injury. In *R v Crabbe*, this Court held[87] that for an accused to be convicted of common law murder, it was necessary for the Crown to prove at least that the accused foresaw the probability, as opposed to the possibility, of death or

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80 See *R v Ward* (1872) LR 1 CCR 356; *R v Pembliton* (1874) LR 2 CCR 119. See generally *R v Cunningham* [1957] 2 QB 396 at 399-400.

81 (1875) 1 QBD 23.

82 See for example, in Victoria, *R v Smyth* [1963] VR 737 at 738-739; *R v Kane* [1974] VR 759 at 760; *R v Lovett* [1975] VR 488 at 493.

83 See and compare *R v Hoskin* (1974) 9 SASR 531 at 537-538; *Selig v Hayes* (1989) 52 SASR 169 at 174-176; *Laurie v Nixon* (1991) 55 SASR 46 at 51-53; *Gillan v Police (SA)* (2004) 149 A Crim R 354 at 358 [19]; *R v Barker* (2014) 287 FLR 249 at 252 [21].

84 [1997] 2 VR 585.

85 See for example *Smyth* [1963] VR 737 at 738-739; *Kane* [1974] VR 759 at 760; *Lovett* [1975] VR 488 at 493.

86 *Campbell* [1997] 2 VR 585 at 593, referring to *R v Crabbe* (1985) 156 CLR 464; [1985] HCA 22.

87 (1985) 156 CLR 464 at 468-470.

grievous bodily harm. In light of that, Hayne JA and Crockett AJA reasoned[88] that it could not be supposed that the legislature intended that the courts would interpret relevant sections as producing a different requirement of recklessness for offences other than murder.

46 In *R v Coleman*, however, the New South Wales Court of Criminal Appeal rejected that kind of reasoning in relation to s 35[89]. It had previously been held in *R v Annakin*[90] that, just as recklessness for the purpose of common law murder requires foresight of probability of serious bodily injury, "reckless indifference to human life" in the statutory definition of murder in s 18 of the *Crimes Act* requires foresight of the probability of serious bodily injury[91]. Equally, Hunt J observed in *Coleman*, reckless indifference to human life could not amount to murder unless it were malicious within the meaning of s 5. But it did not follow that an act done recklessly within the meaning of s 5 must amount to reckless indifference within the meaning of s 18. As Hunt J stated[92], malice was not an element of murder as defined by s 18. Rather, s 18(1) replaced the common law concept of malice aforethought with a list of matters that would previously have established malice aforethought. Consequently, if the Crown proved any of those matters, s 18(2)(a) (which excluded from the definition any act or omission which was not malicious) had no role to play. The only part of the definition of "maliciously" in s 5 which restated the common law was the first part: "Every act done of malice ... shall be taken to have been done maliciously". The remainder, which included the reference to an act done "recklessly or wantonly", went beyond that. At the time of *Crabbe*, the view taken in England[93] and generally in Australia[94] was that the degree of recklessness required to establish

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88 *Campbell* [1997] 2 VR 585 at 593.

89 (1990) 19 NSWLR 467.

90 (1988) 17 NSWLR 202(n).

91 *Coleman* (1990) 19 NSWLR 467 at 473, 475.

92 *Coleman* (1990) 19 NSWLR 467 at 473-474.

93 *Cunningham* [1957] 2 QB 396.

94 See for example *R v O'Connor* (1980) 146 CLR 64 at 85 per Barwick CJ; [1980] HCA 17; *Galasso* (1981) 4 A Crim R 454 at 456. See also *Vallance v The Queen* (1961) 108 CLR 56 at 69 per Taylor J, where recklessness was equated with foresight of a "not unlikely" consequence; [1961] HCA 42.

malice for the purpose of statutory offences other than murder was foresight of possibility of harm. Consequently, as Hunt J concluded[95], nothing said in *Crabbe* in relation to the degree of recklessness required any change to that.

47 The requirements in States other than New South Wales may vary according to the terms of each State's legislation. But, so far as ss 18 and 35 of the *Crimes Act* are concerned, the reasoning in *Coleman* was correct. As the Court emphasised in *Crabbe*, the reason for requiring foresight of probability in the case of common law murder was the near moral equivalence of intention to kill or cause grievous bodily harm and the foresight of the probability of death[96]. The same does not necessarily, if at all, apply to statutory offences other than murder.

48 Counsel for the appellant referred to some more recent decisions in England in which it has been held that, for an accused to be convicted of recklessly causing grievous bodily harm, it is necessary to show not only that the accused foresaw the possibility of harm and proceeded nonetheless, but also that it was unreasonable for the accused to take that risk in so proceeding[97]. It was submitted that this development represents an advance in the law relating to reckless conduct which should lead this Court to replace the requirement of foresight of possibility with a test of foresight of probability.

49 That submission should be rejected. Of course, the reasonableness of an act and the degree of foresight of harm required to constitute recklessness in so acting are logically connected. So much is implicit in the notion of an accused's willingness to "run the risk" or to proceed notwithstanding a risk[98]. As Glanville Williams observed[99], therefore, if the act in question is devoid of social utility, a jury might properly and more readily consider that foresight of a mere possibility

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95 *Coleman* (1990) 19 NSWLR 467 at 475-476.

96 *Crabbe* (1985) 156 CLR 464 at 469.

97 See for example Richardson, *Archbold Criminal Pleading, Evidence and Practice*, 2015 ed (2015) at 1969 §17-51, 2083 §19-262; *R v G* [2004] 1 AC 1034 at 1048-1049 [15]-[16] per Lord Bingham of Cornhill. See also *Attorney General's Reference (No 3 of 2003)* [2005] QB 73 at 83 [29].

98 See for example *Pemble v The Queen* (1971) 124 CLR 107 at 119-120 per Barwick CJ; [1971] HCA 20.

99 Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 60-62.

of harm is enough to amount to recklessness. But, if the act in question has a slight degree of social utility, a jury might properly consider that foresight of something more than a mere possibility of harm is required. Thus, for example, in *Welch*[100], where the accused thrust the handle of a hay fork into the body of a mare for no better reason than "the gratification of his own depraved tastes", foresight of the mere possibility that the mare might be killed was sufficient to render the accused's killing of her reckless and therefore malicious. Similarly, in *R v Cunningham*[101], where the accused ripped a gas meter from the mains in order to steal money from within, his foresight of the mere possibility that gas might escape from the mains into an adjacent room and injure the inhabitant was sufficient to render the consequent injury of the inhabitant reckless and therefore malicious. By contrast, as Glanville Williams posited[102], the act of driving a motor car will be foreseen by everyone who drives to be productive of a possibility that it could result in death or bodily injury. But, because driving is considered to be an activity of considerable social utility, a killing or injury which results from driving is not judged to be reckless by reason only of foresight of the mere possibility of injury. So also, anyone who plays a contact sport is likely to foresee the possibility that another player could be seriously injured in the course of the game. But, because of the social utility of the activity, the infliction of such injury is not judged to be reckless by reason only of the foresight of the mere possibility of it.

50 Experience to date suggests that juries are ordinarily able as a matter of common sense and experience, and so without the need for particular directions, to take the social utility of an act into account when determining whether it was reckless. Accordingly, so far in this country, it has not been standard practice for a trial judge to give the kind of explicit directions regarding reasonableness that are now required in England[103]. Possibly, cases will arise in future in which, to ensure that an accused receives a fair trial, it does prove necessary for the judge to invite the jury's attention to what they consider to be the social utility of the act in question and to direct them to bear it in mind when determining whether the act was reckless. It is also possible that, when and if such a case arises, the kind

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100 (1875) 1 QBD 23 at 23.

101 [1957] 2 QB 396 at 399-401.

102 Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 60.

103 *R v G* [2004] 1 AC 1034 at 1049 [16] per Lord Bingham of Cornhill; *R v Castle* [2004] EWCA Crim 2758 at [8]-[10]; Richardson, *Archbold Criminal Pleading, Evidence and Practice*, 2015 ed (2015) at 1969 §17-51.

of directions that are now given in England will prove to be of assistance. But none of that provides a basis to replace the requirement of foresight of possibility with a test of probability.

51 In any event, in this case there was never any question of the jury proceeding on the basis of foresight only of a bare possibility of harm. The appellant conceded at trial that he knew that there was a real possibility that he could infect the complainant by having unprotected sexual intercourse with him. Nor was there even the slightest suggestion by or on behalf of the appellant that having unprotected sexual intercourse with the complainant, without disclosing the risk of infection to the complainant, should be considered other than reckless as to the possibility of that risk. The sole basis of the defence was that the jury ought not to be satisfied beyond reasonable doubt that the appellant was the source of the complainant's infection.

Conclusion

52 It follows that the appeal should be dismissed.

53 BELL J. The facts and procedural history are set out in the joint reasons and need not be repeated save to the extent that is necessary to explain my reasons. I agree with their Honours' analysis and conclusion with respect to proof of recklessness for the offence of maliciously inflicting grievous bodily harm. In the view I take, however, that issue is not reached. I would uphold the appellant's first ground: in my opinion the Court of Criminal Appeal of New South Wales was wrong to hold that the transmission of the human immunodeficiency virus ("HIV") by sexual intercourse is capable of constituting the infliction of grievous bodily harm within the meaning of s 35(1)(b) of the *Crimes Act* 1900 (NSW) ("the Crimes Act") as that provision stood at the material time[104].

54 The capacity of the sexual transmission of a serious disease to constitute the infliction of grievous bodily harm was the question reserved for consideration in *R v Clarence*[105], and was determined adversely to the prosecution. The Court of Criminal Appeal considered the authority of *Clarence* had been undermined by later decisions holding that an assault is not an ingredient of the offence of unlawfully and maliciously inflicting grievous bodily harm. This was a reference to the decisions of the Full Court of the Supreme Court of Victoria in *R v Salisbury*[106] and the House of Lords in *R v Wilson*[107]. The Court of Criminal Appeal favoured the "commonsense approach" to the concept of the "infliction" of harm adopted by the Court of Appeal of England and Wales in *R v Dica*[108].

55 It is, of course, the responsibility of the court to give effect to the legislative intention expressed in s 35(1)(b) of the Crimes Act. Nonetheless, it is a large step to depart from a decision which has been understood to settle the construction of a provision, particularly where the effect of that departure is to extend the scope of criminal liability[109]. For more than a century *Clarence* has

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104 The material time was between January 2004 and July 2004. Section 35 as in force at that time was in substantially similar terms to s 35 as enacted in 1900, with only formatting changes, effected by the *Crimes (Amendment) Act* 1983 (NSW), Sched 1, item 1, having been made to the provision since its enactment.

105 (1888) 22 QBD 23.

106 [1976] VR 452.

107 [1984] AC 242.

108 *R v Aubrey* (2012) 82 NSWLR 748 at 761 [61] citing [2004] QB 1257.

109 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 531 per Deane J; [1987] HCA 12; *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 13 per Mason J, 22-23 per Wilson and Dawson JJ; [1987] HCA 19; *Hanau v Ehrlich* [1912] AC 39 at 41 per Earl Loreburn LC.

stood as an authoritative statement that the "uncertain and delayed operation of the act by which infection is communicated" does not constitute the infliction of grievous bodily harm[110]. If that settled understanding is ill-suited to the needs of modern society, the solution lies in the legislature addressing the deficiency, as it has done[111]. In my judgment it was an error to follow *Dica*.

56 At the outset there should be some reference to the respondent's contention that *Clarence* is not of moment because it was concerned with the construction of s 20 of the *Offences against the Person Act* 1861 (UK) ("the 1861 UK Act"), and s 35(1)(b) of the Crimes Act is in materially different terms.

57 Both s 20 of the 1861 UK Act and s 35(1)(b) of the Crimes Act can be traced to s 4 of the *Prevention of Offences Act* 1851 (UK) ("the 1851 UK Act"). Section 4 of the 1851 UK Act provided that "if any Person shall unlawfully and maliciously inflict upon any other Person, either with or without any Weapon or Instrument, any grievous bodily Harm, or unlawfully and maliciously cut, stab, or wound any other Person …". A provision in almost identical terms was enacted as s 4 of the *Offences better Prevention Act* 1852 (NSW).

58 Section 4 of the 1851 UK Act was replaced by s 20 of the 1861 UK Act, which combined the elements of the earlier provision, making it an offence to "maliciously wound or inflict any grievous bodily Harm upon any other Person, either with or without any Weapon or Instrument".

59 In 1870, in New South Wales, the Law Reform Commission ("the Commission") was established to inquire into the statute law of the colony and submit proposals for its consolidation and amendment[112]. In 1871, the Commission produced a report and a draft bill based on the 1861 English consolidation statutes[113]. Clause 19 of the draft bill was based on s 20 of the 1861 UK Act save that the words "either with or without any Weapon or

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110 *R v Clarence* (1888) 22 QBD 23 at 41-42 per Stephen J, with Huddleston B, Mathew, A L Smith and Grantham JJ agreeing. (Lord Coleridge CJ agreed with both Stephen and Wills JJ.)

111 *Crimes Amendment Act* 2007 (NSW), Sched 1 [1], which amended the definition of grievous bodily harm in s 4(1) of the Crimes Act to include "any grievous bodily disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease)".

112 See Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788–1900*, (2002) at 248.

113 The 1861 English consolidation statutes comprised six Acts, including the *Offences against the Person Act* 1861.

Instrument" were omitted in favour of the inclusion of the words "by any means whatsoever". The Commission's report does not suggest any reason for the change. The *Criminal Law Amendment Act* 1883 (NSW) ("the 1883 NSW Act") was largely based on the Commission's draft bill. Section 24 relevantly departed from cl 19 by omitting the word "whatsoever". As enacted, s 24 made it an offence for a person to "maliciously by any means wound[] or inflict[] grievous bodily harm upon any person".

60 Section 35 of the Crimes Act was enacted materially in the same terms as s 24 of the 1883 NSW Act. The Crimes Act was a consolidating Act and it may be accepted that there is no reason to presume that it was the legislature's intention in enacting s 35 to adopt the interpretation of the infliction of grievous bodily harm in *Clarence*[114]. Equally, there is no reason to conclude that it was the colonial legislature's intention in enacting s 24 of the 1883 NSW Act to provide any wider field of operation for the offence of unlawfully and maliciously inflicting grievous bodily harm than was provided under s 20 of the 1861 UK Act.

61 Section 19A of the *Crimes Act* 1958 (Vic), which was the provision considered in *Salisbury*, was framed in terms "[w]hosoever unlawfully and maliciously inflicts grievous bodily harm upon any other person ...". The Full Court did not consider this departure from the wording of s 20 of the 1861 UK Act to be material: the focus of their Honours' analysis was on the *infliction* of grievous bodily harm as explained by the majority in *Clarence*. The same issue is raised here and the submission that *Clarence* can be put to one side because it was concerned with the 1861 UK Act is not persuasive.

62 It is relevant to note that the scheme of the 1883 NSW Act followed the 1861 UK Act in providing separately for the offence of maliciously administering poison or other destructive or noxious thing so as to inflict grievous bodily harm[115]. The same scheme is found in Pt 3 of the Crimes Act, which deals with offences against the person and which makes separate provision for the offence of administering poison or other destructive or noxious thing so as to inflict grievous bodily harm[116]. As will appear, this feature of the statutory scheme was important to the majority's analysis in *Clarence*.

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114 *Williams v Dunn's Assignee* (1908) 6 CLR 425 at 441 per Griffith CJ; [1908] HCA 27; *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 188 per Isaacs J; [1922] HCA 56.

115 *Criminal Law Amendment Act* 1883 (NSW), s 27; *Offences against the Person Act* 1861 (UK), s 23.

116 *Crimes Act* 1900 (NSW), s 39.

63 Before turning to *Clarence*, it is convenient to refer to two earlier authorities dealing with s 20 of the 1861 UK Act. The first, *R v Taylor*[117], was concerned with whether it was open to return a verdict for the lesser offence of assault on an indictment charging the unlawful and malicious infliction of grievous bodily harm. Kelly CB had held that it was. The second, *R v Martin*[118], upheld the prisoner's conviction of two counts of inflicting grievous bodily harm notwithstanding that the actus reus did not involve the direct application of violence to the complainants. The prisoner caused a panic among the patrons of a theatre by extinguishing the gaslights on the stairway leading to the exit and by barring the exit door. The complainants' injuries were sustained in the crush as the patrons attempted to leave[119]. Lord Coleridge CJ gave the leading judgment. His Lordship's focus was on the element of malice and not the infliction of grievous bodily harm: the absence of personal malice against the particular individuals who suffered injury did not matter given that the prisoner's unlawful act was calculated to, and did, cause the injuries[120].

64 The facts in this appeal mirror those in *Clarence* in essential respects. Relevantly, the accused, Clarence, was charged under s 20 of the 1861 UK Act with the unlawful and malicious infliction of grievous bodily harm upon his wife. The wife contracted gonorrhoea from sexual intercourse with the accused in circumstances in which he knew of his condition and she did not. Following the accused's conviction, the Recorder stated a case for the consideration of the Court for Crown Cases Reserved asking whether it was open on these facts to find the offence made out[121]. The majority's conclusion, that it was not, did not depend on the concept of a wife's irrevocable consent to intercourse. The judges in the majority were at one in holding that the requirement of unlawfulness and malice was satisfied: engagement in sexual intercourse in the circumstances amounted to cruelty providing the wife with grounds for a judicial separation[122].

65 The principal majority judgments were those of Wills J and Stephen J. Wills J held that s 20 required the infliction of "direct and intentional violence", a concept which his Lordship made clear included the facts of *Martin*[123]. Stephen J

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117 (1869) LR 1 CCR 194.

118 (1881) 8 QBD 54.

119 *R v Martin* (1881) 8 QBD 54 at 55-56.

120 *R v Martin* (1881) 8 QBD 54 at 58.

121 *R v Clarence* (1888) 22 QBD 23 at 27.

122 *R v Clarence* (1888) 22 QBD 23 at 36 per Wills J, 41 per Stephen J.

123 *R v Clarence* (1888) 22 QBD 23 at 36.

said that the words of the provision implied an assault and battery of which either a wounding or grievous bodily harm is the immediate and obvious result[124]. Common to the analysis of each of the judges who formed the majority was the holding that the infliction of grievous bodily harm requires an act having an immediate relation to the harm, a requirement that was held to be inconsistent with the uncertain and delayed operation of the act by which infection is communicated[125]. This was by way of contrast with causing grievous bodily harm to another by the administration of poison, for which the 1861 UK Act made discrete provision[126]. Infection was likened to an "animal poison", and its communication by sexual intercourse, like the administration of poison, lacked the necessary immediacy of connection to amount to the "infliction of grievous bodily harm" within the meaning of s 20[127].

66 Wills J's analysis did not require an assault for the necessary immediacy of connection to constitute the infliction of grievous bodily harm. While Stephen J spoke of an implied assault, it is to be observed that Stephen J was a party to the decision in *Martin* and does not appear to have considered that decision to have been inconsistent with his analysis in *Clarence*. Lord Coleridge CJ saw no inconsistency between the judgments of Wills and Stephen JJ in *Clarence*: his Lordship agreed with both[128]. Plainly his Lordship did not see Stephen J's analysis as turning on proof of an assault as an element of the s 20 offence. Shortly after *Clarence* his Lordship gave the leading judgment in *R v Halliday*[129], upholding the prisoner's conviction for the infliction of grievous bodily harm in circumstances which did not involve an assault and battery. Halliday's wife had endeavoured to escape from his drunken threats of violence by climbing out of a window and she had suffered serious injuries in the resulting fall. The creation of an immediate sense of danger such as to cause a

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124 *R v Clarence* (1888) 22 QBD 23 at 41.

125 *R v Clarence* (1888) 22 QBD 23 at 41-42.

126 Section 23 of the 1861 UK Act provided: "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other Person any Poison or other destructive or noxious Thing, so as thereby to endanger the Life of such Person, or so as thereby to inflict upon such Person any grievous bodily Harm, shall be guilty of Felony ...".

127 *R v Clarence* (1888) 22 QBD 23 at 36 per Wills J, 41-42 per Stephen J, 55-56 per Manisty J.

128 *R v Clarence* (1888) 22 QBD 23 at 66.

129 (1889) 61 LT 701.

person to sustain injury in an attempt to escape from it was held to suffice to establish liability[130].

67 It remains that there is a tension between *Taylor* and Stephen J's reference to an implied assault in *Clarence* on the one hand and *Martin* and *Halliday* on the other. Resolution of this tension was the focus in *Salisbury*. It was argued in that case that the prisoner's conviction for the malicious infliction of grievous bodily harm should be set aside because the trial judge had not directed the jury of the availability of an alternative verdict of assault[131]. The Full Court observed that the Court for Crown Cases Reserved in *Clarence* had not been concerned with whether an assault was an element of the s 20 offence. Their Honours considered that Stephen J's statement of the implied requirement of an assault and battery was an obiter dictum and that the language of Wills J brought out the essential ingredient, namely, "the infliction of direct and intentional violence"[132]. The examples given by Wills J were said to show the width of the expression "inflicting grievous bodily harm"[133].

68 *Wilson* was also concerned with the availability of a verdict for the lesser offence of assault on an indictment charging the infliction of grievous bodily harm[134]. Lord Roskill, giving the leading judgment, saw little point in endeavouring to reconcile *Taylor*, *Martin*, *Clarence* and *Halliday*. His Lordship adopted the Full Court's analysis in *Salisbury*, holding that it is possible to inflict grievous bodily harm without the commission of an assault[135]. The conclusion in *Salisbury* that the trial judge did not err by failing to direct the jury of the availability of an alternative verdict of assault did not undermine the holding in *Clarence* that the sexual transmission of a disease is not the infliction of grievous bodily harm. Nor did the decision of the House of Lords in *Wilson*.

69 The House of Lords returned to a consideration of *Clarence* in *R v Ireland*[136]. The question was whether s 20 of the 1861 UK Act caught the unlawful and malicious infliction of psychiatric injury. Lord Steyn observed that

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130 *R v Halliday* (1889) 61 LT 701 at 702.

131 *R v Salisbury* [1976] VR 452 at 453.

132 *R v Salisbury* [1976] VR 452 at 457.

133 *R v Salisbury* [1976] VR 452 at 457.

134 [1984] AC 242.

135 *R v Wilson* [1984] AC 242 at 259-261.

136 [1998] AC 147.

Clarence is a troublesome authority but noted that it had not been overruled. His Lordship concluded that the obiter dicta in *Clarence* were not to be given weight in circumstances in which the judges had not had before them the possibility of psychiatric injury[137]. Lord Hope of Craighead also saw *Clarence* as an uncertain guide to the question of the infliction of psychiatric injury. His Lordship considered that *Wilson* had cast doubt on the weight to be attached to *Clarence* "when the facts are entirely different"[138]. It may be allowed that the words of the provision are susceptible of application to circumstances that were not within the contemplation of the judges who decided *Clarence*. My difficulty is with holding that *Clarence* is not authority with respect to the application of the provision to the very facts that it decided. This was the step taken by the Court of Appeal of England and Wales in *Dica*[139].

70 Dica was convicted of two counts of inflicting grievous bodily harm contrary to s 20 of the 1861 UK Act. The prosecution case was that Dica knew that he was HIV positive and with that knowledge he had sexual intercourse with each of the complainants without disclosing his HIV status. Each complainant contracted HIV as a result[140]. As in this appeal, it was the prosecution case that on each occasion the complainants' consent would not have been given had they known of Dica's condition[141]. Dica was convicted of both counts and he appealed, contending, as here, that the offence of inflicting grievous bodily harm is not made out by the sexual transmission of a harmful virus.

71 The analysis in *Dica* proceeded upon the footing that *Wilson* had "destroyed" one of the foundations of the majority's reasoning in *Clarence*. *Wilson* was said to represent "a major erosion of the authority of *Clarence* in relation to the ambit of section 20 in the context of sexually transmitted disease"[142]. The "erosion process" was completed by *Ireland*: the holding that a person may inflict psychiatric injury on another contrary to s 20 of the 1861 UK Act meant that it is no longer possible to discern the critical difference between, on the one hand, an "immediate and necessary connection" between the act and

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137 *R v Ireland* [1998] AC 147 at 160.

138 *R v Ireland* [1998] AC 147 at 163-164.

139 [2004] QB 1257.

140 *R v Dica* [2004] QB 1257 at 1260-1261 [4]-[10].

141 *R v Dica* [2004] QB 1257 at 1261 [12].

142 *R v Dica* [2004] QB 1257 at 1265 [26].

the injury, and, on the other, the "uncertain and delayed" effect of the act that leads to the eventual development of infection[143].

72 *Dica* may be thought to overlook the House of Lords' adoption, in *Wilson*, of *Salisbury*'s analysis of the ratio decidendi of *Clarence*. It is an analysis which does not undermine the conclusion that the sexual transmission of a disease is not within the expression "infliction of grievous bodily harm" in the 1861 UK Act and its analogues. And while *Ireland* confined *Clarence*, their Lordships did not overrule it.

73 *Clarence* has long stood as an authoritative statement that the sexual transmission of a disease does not amount to the infliction of grievous bodily harm within the meaning of s 35(1)(b) of the Crimes Act[144]. The construction is a plausible one in the context of the scheme of Pt 3 of the Crimes Act. In the circumstances I consider that the Court should not depart from it. Certainty is an important value in the criminal law. That importance is not lessened by asking whether it is likely that persons would have acted differently had they known that the law was not as it had been previously expounded.

74 For these reasons I would allow the appeal and set aside order 2 of the Court of Criminal Appeal entered on 18 December 2015 and in its place order that the appeal to that Court be allowed and a judgment and verdict of acquittal entered.

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143 *R v Dica* [2004] QB 1257 at 1266 [30].

144 See Mack, *The Criminal Law of New South Wales*, (1920) at 26, which cited *Clarence* with respect to the meaning of "inflict", and the first and successive editions of Watson and Purnell, *Criminal Law in New South Wales*, which cite *Clarence* for the proposition that the transmission of a venereal disease is not the infliction of grievous bodily harm (see eg 1st ed (1971), vol 1 at 68 [158]).