

Drug Law and Necessity

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Can necessity be a defence to possession or self-administration of cannabis?

For some years I have considered running a defence of necessity in a possession or self-administration charge relating to cannabis in New South Wales courts. I have prepared such a case on three occasions only to have the rug pulled out from under me by winning the cases on other grounds or, in one case, a change of plea. This article is written in the hope that other defence lawyers with similar cases will run such a defence, thus opening up the possibility of change in the way the law is applied.

This article starts by presenting a hypothetical defendant suffering from glaucoma. There are several other conditions that could be chosen, such as nausea as a side effect of chemotherapy, migraine headache and epilepsy, where there is also a wealth of scientific evidence of the medical effectiveness of marijuana. The article then considers the application of the defence of necessity to a use or possession charge. The situation in the United States is considered briefly, examining the successful application of the defence of necessity which has been accompanied by legislative change.

The defendant

P is a 30-year-old woman residing in New South Wales who is diagnosed with glaucoma, and her doctor informs her that if untreated it leads to the progressive loss of vision. Once vision is lost there is no way of restoring it. The only accepted treatment is medication and laser surgery. The medication leads to side effects that render her unable to work. Her condition is inoperable. P undertakes her own research and discovers that cannabis has been used successfully to stop the progression of glaucoma. P decides to use cannabis and it works. Her doctor does not dissuade P from continuing with this treatment. P is arrested and charged with possession and self-administration of cannabis. Possession of cannabis is a summary offence created by s.10 of the *Drug Misuse and Trafficking Act 1986* (NSW). It states:

- (1) A person who has a prohibited drug in his or her possession is guilty of an offence.

The offence of self-administration is created by s.12 of the *Drug Misuse and Trafficking Act 1986* (NSW). It states:

- (1) A person who administers or attempts to administer a prohibited drug to himself or herself, is guilty of an offence.

The maximum penalty for either offence is at present a \$2000 fine or two years' imprisonment. There is currently a Bill being introduced by the government in New South Wales to reduce the maximum penalty for both offences to \$500 with no imprisonment option.

Glaucoma

Glaucoma is a progressive disease of the eye and is caused by high fluid pressure inside the eye. Fluid pressure builds as a result of inadequate drainage of fluid in the eye. The pressure on the optic

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nerve from this fluid can cause irreversible loss of vision.¹ Glaucoma is one of the most common causes of blindness and is the second leading cause of blindness in the United States.²

Glaucoma is conventionally treated with eyedrops, ointments, pills and surgery.³ Side effects can occur with all of these treatments except surgery. Some of the side effects are blurred vision, impaired night vision, cataracts, nausea, diarrhoea, headaches, depression, fatigue, kidney stones and, in rare situations, a fatal blood disorder. Ultimately the treatments for glaucoma can cause further damage to the eye.⁴ Fifty per cent of glaucoma patients can't tolerate the treatments.⁵ Surgery is not a viable option in many cases.⁶ Unfortunately, the side effects of glaucoma treatment can lead patients to fail in complying with treatment regimes. This has been seen as the principal reason for the failure to achieve control of the disease.⁷

Cannabis has been well documented as an effective means of lowering eye pressure in glaucoma patients.⁸ Cannabis has also been effective in preventing blindness when conventional means of treatment were exhausted.⁹ The medical journal *The Lancet* maintains that 'The smoking of cannabis, even long term, is not harmful to health'.¹⁰ In New South Wales a recent study of long term heavy cannabis users found 'few differences between the sample and the Australian population in health status'.¹¹

Common law defence of necessity

The common law criminal defence of necessity comprises three elements as found in the case of *R v Loughman* [1981] VR 443. In that case the Supreme Court of Victoria was concerned with an appellant who was convicted of escaping from lawful custody. He claimed that he escaped out of fear that other prisoners would carry out threats to kill him on the night of the escape. The trial judge refused to leave the question of necessity to the jury. On appeal the requirements of the defence were laid down as follows:

- (a) the criminal act must have been done only in order to avoid certain consequences which would have inflicted irreparable harm upon the accused or upon others whom he was bound to protect;
- (b) the accused must honestly believe on reasonable grounds that he was placed in a situation of imminent peril;
- (c) the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided.

In *R v Rogers* (1996) A Crim R 542 the Court of Criminal Appeal in New South Wales dealt with another prison escape case and approved the three-part test from *Loughman*. However, the New South Wales Court stressed that the test is one of necessity, not expediency or strong preference. In a prison escape context this meant that the defendant must not have been afforded a reasonable opportunity for an alternative course of action that was not unlawful. On the three tests from *Loughman* the court accepted the defendant's submission that, consistent with the High Court's decision in *Zecevic v DPP (Vic)* (1987) 162 CLR 645:

It is now more appropriate to treat those 'requirements', not as technical legal conditions for the existence of necessity, but as factual considerations relevant, and often critically relevant to the issues of an accused person's belief as to the position in which he or she is placed, and as to the reasonableness and proportionality of the response. [at 546]

Conduct otherwise unlawful would be excused if the accused:

acted as he did, honestly believing on reasonable grounds, that escape from prison was necessary in order to avoid threatened death or serious injury... [at 547]

In *Re the Appeal of White* (1987) 9 NSWLR 427 the defence of necessity was applied in allowing an appeal and quashing a conviction for the strict liability offence of speeding under the *Motor Traffic Act 1909* (NSW). Justice Shadbolt commented:

If honest and reasonable belief in circumstances which, if true, would be exculpatory is a defence to a crime of strict liability, I can see no reason why, in appropriate circumstances, a choice made to commit an offence of strict liability in order to avoid a greater evil would not also be a defence. Public policy has required a sparing use of the defence and certainly in murder it has never been sustained ... The balance in crimes of such gravity can never fall to the side of the killer. But as the offence becomes less serious, the balance more readily falls to the side of one who commits such an offence.

After considering *R v Loughman* [1981] VR 443, Shadbolt concluded:

It would appear to be a defence in search of the perfect circumstances. They were, of course, to be found in *R v Bourne* [1939] 1 KB 687 and in my view they are to be found here. That the appellant did not tell the police officer of his plight has, in my view, been satisfactorily explained. It might have caused further delay. I consider his only concern was to get his gravely ill son to hospital. I do not think that he concerned himself particularly with the speed. I do not think his breach was so gross as to create another danger together with the existing one. It was a choice that he made and he made it in order to avert, as he saw it, a real danger and a real possibility of death but I am not of the view that the public would and society's cohesion would be placed in such jeopardy by the choice, that the defence of necessity should not be available.

Medical necessity and abortion

Sections 82 to 84 of the *Crimes Act 1900* (NSW) are concerned with attempts to procure abortion. In particular, s. 83 provides:

Whosoever unlawfully administers to, or causes to be taken by, any woman, whether with child or not, any drug or noxious thing; or unlawfully uses any instrument or other means, with intent in any such case to procure her miscarriage, shall be liable to penal servitude for ten years.

There are two things immediately apparent about this section. Firstly, the use of the word 'unlawfully' seems to allow that there are some attempts to procure abortion which are not unlawful; the significance of this word will be discussed below. The second aspect to note is the penalty — penal servitude for ten years. This places this indictable offence in a serious category when compared to malicious wounding, which carries a maximum penalty of seven years, use of a weapon to resist arrest, which carries a maximum penalty of ten years or assaulting police, which carries a maximum penalty of five years.

The leading case on abortion in Australia is *Davidson* [1969] VR 667, a decision of Menhennitt J of the Supreme Court of Victoria. Davidson was charged with four counts, pursuant to s.65 of *Crimes Act 1958* (Vic.), which is in almost identical terms to s.83 of the *Crimes Act 1900* (NSW). In this decision, Menhennitt J considered in detail the effect of the word 'unlawfully' in the section. He concluded:

the use of word 'unlawfully' in the section implies that in certain circumstances the use of an instrument or other means to procure a miscarriage may be lawful. [at 668]

It would have been open to the judge to simply find that the word 'unlawfully' permits an abortion in certain medical circumstances even in the absence of any consideration of the common law defence of necessity. Previous decisions such as *Bourne* [1939] 1 KB 687 concluded that the word 'unlawfully' permits the termination of pregnancy for the preserving of the life of the mother. Menhennitt J refers to Professor Glanville Williams' consideration of *Bourne*, stating:

... the defence of necessity applies not only to common law but even to statutory crimes. It is true that the direction proceeded in some slight degree on the analogy of the child destruction statute, which contains an express exemption for the preservation of the life of the mother; but the exception in the one statute was not in itself a ground for reading a similar exception into the other. The only legal principle upon which the exception could be based was the defence of necessity. It is true, also, that Mr Justice MacNaghten proceeded in part on the ground that the abortion statute contained the word 'unlawfully', which he regarded as implying that some abortions are lawful. The word does not, however, specify which abortions are lawful, and again the only principle indicating the extent of legality is the defence of necessity. [at 670]

Menhennitt J concluded his review of authorities by stating:

Having regard to the deliberate and repeated use of the word 'unlawfully' in s.65 of the Crimes Act 1958 and the nature of the offence created and the history thereof and in the light of the authorities and views of learned authors to which I have referred, it appears to me that necessity is the appropriate principle to apply to determine whether a therapeutic abortion is lawful or unlawful within the meaning of s.65 ... The principle of necessity imported by the use of the word 'unlawfully' in s.65 of the Crimes Act 1958, in my view imports, the two elements of necessity and proportion. [at 670-671]

In reading *Davidson* as a whole and in particular Menhennitt J's quotation from Glanville Williams, the word 'unlawfully' does little more than confirm that necessity is available as a defence to abortion. In the absence of the word 'unlawfully' the defence would have still been available. The word 'unlawful' in the legislation can at best be read as drawing in previous statutory provisions relating to preserving the life of the mother.

To quote Menhennitt J:

Accordingly, to establish that the use of an instrument with intent to procure a miscarriage was unlawful, the Crown must establish either (a) that the accused did not honestly believe on reasonable grounds that the act done by him was necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; or (b) that the accused did not honestly believe on reasonable grounds that the act done by him was in the circumstances proportionate to the need to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail. [at 672]

This position was adopted in New South Wales in the case of *R v Wald* (1971) 3 NSWDCR 25 and again restated in the Supreme Court in the Case of *K v Minister for YACS* [1982] 1 NSWLR 311:

There is no legal wrong doing of a miscarriage as procured by a person who has an honest belief on reasonable grounds that the termination of pregnancy was necessary to preserve the woman involved from serious danger to her life or physical or mental health and that in the circumstances the danger of the operation was not out of proportion to the danger intended to be averted.

Reasonable grounds can stem from social, economic or medical bases. [at 318]

It is clear from the examination of these authorities that necessity as applied in abortion cases is separate from necessity as applied in other cases. The *Loughman* factors of 'irreparable harm' and 'imminent peril' were not required in *Davidson*. It is unsatisfactory to analyse this distinction simply by reliance on the use of the word 'unlawful'. The distinction gains some support from the House of Lords decision of *In Re F* [1990] 2 AC 1. This was a case where the court was considering an application for a declaration that a doctor may sterilise a 30-year-old woman who suffered from a serious mental disability, without her consent.

Lord Brandon found that a doctor can lawfully operate on, or give other treatment to, adult patients incapable of consenting if it is in the best interests of such patients. The 'best interests' test is passed if the operation is:

either to save their lives, or to ensure improvement or prevent deterioration in their physical or mental health. [at 55]

Lord Goff came to the same conclusion, based upon a consideration of necessity:

That there exists in the common law a principle of necessity which may justify action which would otherwise be unlawful is not in doubt. But historically the principle has been seen to be restricted to two groups of cases, which have been called cases of public necessity and cases of private necessity. The former occurred when a man interfered with another man's property in the public interest — for example (in the days before we could dial 999 for the fire brigade) the destruction of another man's house to prevent the spread of a catastrophic fire, as indeed occurred in the Great Fire of London in 1666. The latter cases occurred when a man interfered with another's property to save his own person or property from imminent danger — for example, when he entered upon his neighbour's land without his consent, in order to prevent the spread of fire onto his land.

There is, however, a third group of cases, which is also properly described as founded upon the principle of necessity and which is more pertinent to the resolution of the problem in the present case. These cases are concerned with action taken as a matter of necessity to assist another person without his consent. To give a simple example, a man who seizes another and forcibly drags him from the path of an oncoming vehicle, thereby saving him from injury or even death, commits no wrong ... [at 74]

It should be noted that each of the situations discussed immediately above involve imminent peril or emergency rather than some existing condition, as was the case before the House of Lords. However, Lord Goff leaps this hurdle with a single bound:

Emergency is however not the criterion or even a pre-requisite; it is simply a frequent origin of the necessity which impels intervention. The principle is one of necessity, not of emergency. ... The distinction I have drawn between cases of emergency, and cases where the state of affairs is (more or less) permanent, is relevant in another respect. We are here concerned with medical treatment, and I limit myself to cases of that kind. [at 75-6]

Thus it is submitted that medical cases are distinct, and that in such cases the defence of necessity should apply, and that the correct test is the same as for abortion. A typical abortion case may not pass the *Loughman/Rogers* test. Even if there is 'irreparable evil' in having an unwanted baby, it would be almost impossible to establish 'immediate peril'. There is nothing inherently perilous in a normal pregnancy. With most abortions it is a case of expediency or strong preference as opposed to necessity — after all, there is an

alternative course of action that does not result in a breach of any law.

Application of the defence to P

The hypothetical defendant suffering from glaucoma would be able to mount a defence of necessity based on the narrower *Loughman/Rogers* test. The success of this defence would depend largely on the strength of medical evidence. The evidence would need to show that it was beyond a choice of equal medical alternatives, with cannabis being preferred for a variety of reasons. The evidence would need to show that the choice to use cannabis was done in the face of immediate peril — in this case impending further illness or blindness. There would seem to be little difficulty with showing proportionality given the summary nature of the offence, and that the other elements are satisfied.

However, an easier road for the defence will be encountered if the courts accept that the use of cannabis falls within the realm of medical necessity/abortion cases. The defendant would need to show that she acted with an honestly held belief on reasonable grounds that the use of cannabis was necessary to preserve her from serious danger to her life or physical or mental health and that in the circumstances the use of cannabis was not out of proportion to the danger intended to be averted. In abortion cases these reasonable grounds can stem from social, economic or medical bases. Of course the 'best interests' test from *In re F* would pose even less of a problem.

As to proportionality, there is no doubt that cannabis use is less harmful than glaucoma. The cannabis offences in question are minor offences, usually dealt with in the courts by the imposition of small fines.

The United States

In 1976 Randall, a Washington, D.C. man afflicted by glaucoma, used the doctrine of necessity to defend himself against criminal charges of marijuana cultivation. On 24 November 1976, federal Judge James Washington ruled that Randall's use of marijuana constituted a 'medical necessity.' In part, Judge Washington found:

While blindness was shown by competent medical testimony to be the otherwise inevitable result of defendant's disease, no adverse effects from the smoking of marijuana have been demonstrated ... Medical evidence suggests that the medical prohibition is not well-founded.¹²

Judge Washington dismissed criminal charges against Randall. Concurrent with this judicial determination, federal agencies responding to a petition filed by Randall in May 1976, began providing him with licit, FDA-approved access to government supplies of marijuana. Randall was the first American to receive marijuana for the treatment of a medical disorder.

In the *State of Florida v Musikka* (1989) 4 *Florida Law Weekly* 1 a middle-aged woman afflicted with glaucoma was arrested for growing six marijuana plants. At trial, Musikka, who had already lost sight in one eye as a result of failed surgical interventions, argued that her use of marijuana was a 'medical necessity'. Musikka's treating physician, an ophthalmic researcher at Miami's Bascom-Palmer Eye Institute, testified that 'if marijuana were legal I would have prescribed it for Elvy Musikka's medical use in the treatment of glaucoma'. He further testified that, without marijuana, Musikka would go blind.

The Court, after hearing from other medical experts, concluded that Musikka's use of marijuana was protected by the

common law defence of 'medical necessity' and found Ms Musikka not guilty. In reaching this verdict, Judge Mark E. Pollin wrote:

This is an intolerable, untenable legal situation. Unless legislators and regulators heed these urgent human needs and rapidly move to correct the anomaly arising from the absolute prohibition of marijuana which forces law abiding citizens into the streets — and criminality — to meet their legitimate medical needs, cases of this type will become increasingly common in coming years. There is a pressing need for a more compassionate, humane law which clearly discriminates between the criminal conduct of those who socially abuse chemicals and the legitimate medical needs of seriously ill patients whose welfare and very lives may depend on the prudent therapeutic use of those very same chemical substances.

In *State of Washington v Diana* 24 Wash.App.908, 915-916, 604 P.2d 1312 (1979), a man afflicted by multiple sclerosis was arrested and charged with possession of marijuana. At trial, Sam Diana argued that his use of marijuana was a 'medical necessity'. The court refused to hear medical evidence and convicted Diana. The Washington Court of Appeals overturned the verdict and returned the case to the lower court for retrial. The Appeals Court ruled that 'medical necessity' was a valid defence and instructed the lower court to consider evidence of Diana's medical need. On retrial Diana presented testimony from numerous medical experts, his treating physicians, his family and other multiple sclerosis patients who endorsed marijuana's medical value in relieving severe muscle spasms. The Court concluded that Diana was 'not guilty by reason of medical necessity'.

In *State of Idaho v Hastings* 118 Idaho 854, 806, 801 P.2d 563 (1990), a woman succeeded in having charges withdrawn for cultivating cannabis to treat her arthritis after the Idaho Supreme Court ordered the trial judge to admit medical evidence.

In *Jenks v State of Florida* 582 So.2d 676 (Fla. Dist. Ct. App. 1991) a haemophilic patient had medically acquired AIDS by a blood transfusion and had passed the disease on to his wife before he was diagnosed. Both were arrested for cultivating two cannabis plants. At trial they were convicted; however, on appeal the Florida Court of Appeals reversed their convictions, ruling that their use of marijuana was a 'medical necessity'.

In the past 20 years, 37 States have passed legislation recognising marijuana's therapeutic values, the best known being Proposition 215 in 1995 in California. Patients, or their immediate carers, with a doctor's recommendation to use marijuana in medical treatment have a statutory defence available to them, rendering the reliance on a common law defence of necessity, unnecessary.

Conclusion

Cannabis use for medical reasons may well be found to be legal in New South Wales, if the right case is run to test the limits of the defence of necessity. If the courts accept that cannabis use for medical purposes should be dealt with under the same strand as the medical necessity/abortion cases then this is a likely outcome. If the hurdles of non-medical necessity need to be jumped, then the defence task will be more difficult, although not impossible. This is not drug law reform by the back door. It is applying established principles of common law in an innovative way in an effort to remedy injustice.

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treatment to determine the problem and propose solutions. Without local knowledge his solutions included flushing partially treated effluent from lagoons into the Gulf of St Vincent, a fish breeding nursery, already under stress from an earlier accidental discharge.

In addition, water is too important to be subject to economically driven management. Formerly the E&WS, a government department, managed Adelaide's water within economic resources available. The Government envisioned savings by appointing United Water, but instead gained the additional factor of a business operating for profit. The quest to make savings and profit has resulted in the reduction of staff operating the plant, and the use of fewer chemicals to treat sewage at Bolivar. There also appears to be an unwillingness to pay for essential operating costs. The failed operation of Gate A, which allowed partially treated effluent to flow into lagoons, emerged as a central reason for the problem, and United Water disputed responsibility for paying for its repair.

Privatisation of management is driven by economic determinism, and a desire by government to maintain power. Analysis of issues surrounding the pong suggests serious problems with the development. In South Australia water is a precarious resource. The Government needs to reconsider its policy, and engage in open debate that ensures quality of water for Adelaidians. ● MC

[It's amazing how far the Conservative stink spreads. Ed]

Victoria

CROWNLAND

Down here in Crownland, the former Council for Civil Liberties (now known as *Liberty Victoria*) has been holding meetings across Victoria in support of the independence of the Auditor-General. Starting with a 2000 strong meeting in May, organisers have been thrilled with the number of Victorians who have turned out to show their support for Ches Baragwanath since a government-appointed panel recommended the sizing down of the Auditor-General's powers. Support has been particularly strong in traditionally Liberal seats in the inner eastern suburbs.

Joseph O'Reilly, Executive Director of *Liberty Victoria*, suggests that the Auditor-General's independence represents a line in the sand for many people who would not normally become involved in protests or public meetings. A final decision on the panel's recommendations will go before the Parliament in spring. While Premier Kennett maintains that at the moment he has no position on the issue, it seems that 'Audit Victoria' is fairly well established in the minds of a government unlikely to be swayed by the 30,000 signatures of 'un-Victorian's' on a petition submitted by *Liberty Victoria*.

Meanwhile, more and more restaurants and entertainment venues on 'the other side of the river' are reporting a loss in trade — some estimating a 50% drop on weekends. Any visitor to Melbourne will notice that all roads do in fact lead to Crown, and it has certainly become increasingly difficult for Victorians to resist the tractor beams of the

affectionately dubbed Death Star — so much so that word of mouth from officials at the County Court reports that one in three criminal matters before it in the last few months have been gambling related. Who says the Casino can't provide Victorians with gainful occupation?

PRESSURE POINT

On a different, but equally Victorian, note, a woman has lodged a Writ in the County Court against Victoria Police over their use of upper body pressure point tactics. In an investigation of the matter, which involved a protest outside the Department of Conservation and Natural Resources, the Deputy Ombudsman said that the tactics had the potential to cause serious injury or sudden death. He expressed similar concern over the use of the tactics in the Richmond Secondary College protests, describing the tactics as 'excessive force' used 'out of all proportion'. The matter will be a test case for other Victorians injured by the severe tactics adopted by police in recent years and police have now admitted that the use of pressure point strategies has been a mistake, particularly when used against protesters. ● EC

DownUnderAllOver was compiled by Margaret Cameron, Elena Campbell, Jeff Giddings, Russell Goldflam, Helen Grützner, Peter Wilmshurst and Kirsty Windeyer.

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References

1. Matzen, G. D., 'Glaucoma' in *Magill's Medical Guide: Health and Illness*, Vol II, Salem Press Inc, USA, 1995, p.335.
2. Grinspoon, L. (MD) and Bakalar, J.B., *Marijuana, The Forbidden Medicine*, Yale University Press, New Haven, 1993, p.40.
3. Matzen, above, p.337.
4. Van Buskirk, E.M. (MD), 'Side Effects From Glaucoma Therapy' (1980) *Annals of Ophthalmology*, pp.964-65.
5. Grinspoon and Bakalar, above, p.40.
6. Matzen, above, p.337.
7. Van Buskirk, above, pp.964-65.
8. See Hepler, R.S. and Frank, I.M., 'Marijuana Smoking and Intraocular Pressure' *JAMA* 217 (1971): 1392; Caswell, A., 'Marijuana as Medicine' (1992) 156 *The Medical Journal of Australia* 497; and Grinspoon and Bakalar, above, pp.40-57.
9. Grinspoon and Bakalar, above, pp.42-52, espec. p.51.
10. Editorial, 'Deglamorising Cannabis', (1995) 346 *The Lancet* 1241.
11. Didcott, P. et al, 'Long Term Cannabis Users on the NSW North Coast', NDARC Monograph No. 30, 1997, pp.viii, 69.
12. *US v Randall*, D.C. Superior Court, D.C. Crim. No. 65923-75, 'Criminal Law and Procedure: Medical Necessity', *The Daily Washington Law Reporter*, (1976) Vol. 104, No. 250, p.2253.