

Self-defence and intoxication in the Commonwealth Criminal Code

By Andrew Crawshaw¹, and Hyder Gulam²

This note is for practitioners and other interested parties who are keen to understand how the legal devices of self-defence and intoxication are dealt with in the Commonwealth Criminal Code 1995 ('the Code'). Unlike the position in some other States and Territories in Australia, NT criminal law does not incorporate a Code-style system as yet. This note suggests that the test for self-defence in the Code differs from that found in the common law, despite the assertion that the Code's test for self-defence is meant to be a codification of the common law. With regards to intoxication, this note briefly describes the law of criminal liability and intoxication in the Code, with particular emphasis on explaining the relevance of the distinction between offences of basic intent and those of specific intent.

SELF-DEFENCE:

Under the common law, the test for self-defence is that stated by the High Court in the case of *Zecevic v D.P.P.* (Vic)³: The accused would be entitled to a complete acquittal if the test for self-defence is satisfied. The crucial feature is that this test contains both a subjective and objective element. It must be first determined whether the accused believed, upon reasonable grounds, that it was necessary in self-defence to do what he or she did. If the accused did not hold such a belief, it is open to reject a claim for self-defence⁴. If this subjective element is made out, the defence will only be made out if that belief was founded upon reasonable grounds; this being the objective element: that there were reasonable grounds for the accused to have the belief. Deane J, in the minority, stated that the defence was in terms of the subjective test whether D believed that what he was doing was reasonable and necessary in his own defence against an unjustified attack⁵.

The provision for self-defence under the Code is found under section 10.4. This part states that:

10.4(2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary...and the conduct is a reasonable response in the circumstances as he or she perceives them.

Although both the common law and section 10.4 require that an accused believe that it is necessary to act in self-defence, section 10.4 appears to depart from the common law test by requiring the decision-maker determine whether the conduct of an accused is a reasonable response in the circumstances as he or she perceives them.

This is a subtle but significant difference from the *Zecevic* test. Under that test, once a jury was satisfied that the accused had a belief to do what he or she

did in self-defence they would then turn to examine whether there were any reasonable grounds for the accused to do what they did in self-defence in the circumstances.

*'In applying the standards of reasonableness, one asks not what a reasonable person would have believed, but what the accused might reasonably have believed in the circumstances'*⁶.

At all times, what constitutes the 'circumstances' in which the accused acted in self-defence is determined objectively by the jury. The evidence from various witnesses will paint the picture for the jury of what transpired at the relevant time the accused acted in self-defence.

Section 10.4 requires the 'circumstances' surrounding the use of self-defence to be determined by what the accused perceived the circumstances to be at the time. It is submitted that this change effects the determination of proportionality in assessing whether the accused's conduct was a reasonable response to the threat or attack. This is because the reasonableness of the accused's conduct is assessed in the 'circumstances' that he perceived the threat or attack to occur and not what the 'circumstances' might objectively have been. Therefore, it is arguable that the Criminal Code provides a definition of what constitutes self-defence more favourable for an accused person than the common law test in *Zecevic*.

Self-defence in South Australia is very similar to the Criminal Code test for self-defence. Section 15(1) of the South Australian criminal statute governs the law relating to self-defence. An accused may claim self-defence if:

- (a) *the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; and*
- (b) *the conduct was, in the circumstances as the*

defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

As it can be seen, this test also contains both a subjective and objective component. The subjective element is that the accused must genuinely believe that her or his conduct was both necessary and reasonable. The word ‘reasonable’ does not belie that the test is purely subjective⁷. The purpose is whether the accused subjectively believed that the use of force was both necessary and reasonable, not whether that the belief was objectively reasonable⁸. The objective standard is introduced via the words ‘reasonably proportionate’. However, this term is determined on the basis of the circumstances as the accused genuinely believed them to be, despite the reasonableness of the belief⁹. Thus, even the objective element of the self-defence test is heavily influenced with a great deal of subjectivity.

Bronitt and McSherry argue that the South Australian (and similar Tasmanian) legislation gives the defence a slightly more subjective emphasis¹⁰. It is the contention of the authors that the Commonwealth Criminal Code has revived the spectre of *Viro v R* (1978)¹¹, per Murphy and Jacobs JJ. This spectre was Murphy J’s twin conclusion that the objective test should be abandoned as being quite unrealistic, and the rejection of the suggestion that a purely subjective approach would unduly benefit the accused.¹²

INTOXICATION:

The presentation of the law concerning criminal liability and intoxication under the Code can be confusing even to sober people or those from common law jurisdictions because of the terminology used in the Code. The key to understanding the application of the Code is to appreciate that the general principles of criminal responsibility are centred around physical elements and fault elements. Broadly, a physical element can be equated to actus reus and a fault element to mens rea.

The Code provides for three physical elements: conduct; result of conduct; and circumstance, and five fault elements: intention; knowledge; recklessness, negligence; and a fault element specified in the provision that creates the offence. For each physical element, a particular fault element applies. For some offences, this applicable fault element is called the default fault element. As a guide, the following chart shows which fault element applies to which physical element.

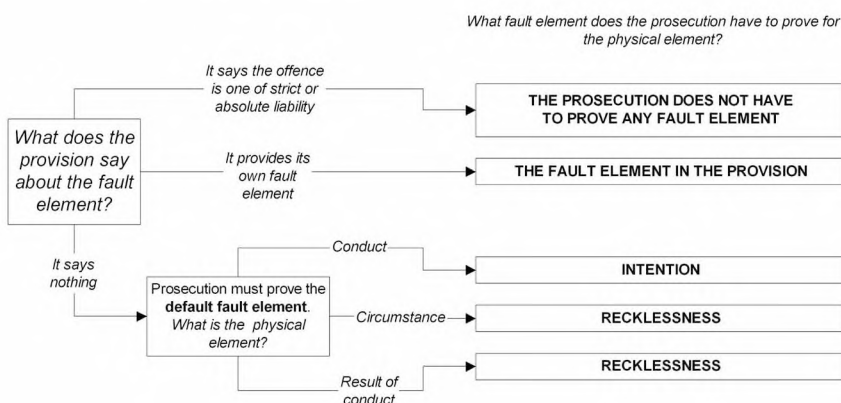
See the flowchart below showing How Fault Elements Attach to Physical Elements.

Generally, the Code provides that being intoxicated is no legal excuse for committing the majority of offences in the Code. This means that, while the prosecution must still prove the existence of physical elements and fault elements applicable to the particular offence, the existence of the fault element won’t be disproved simply by evidence of the accused’s self-induced intoxication at the time of committing the offence.

Specifically, evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed, which form the majority of offences in the Code. But it can be relevant for other offences. A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct. A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent¹³. What does this mean?

When the prosecution attempts to prove the fault element attaching to the physical element of conduct on the part of the person charged, it must prove that the person acted voluntarily, that is, that the person intended so to act. The defence may seek to introduce evidence that the person was intoxicated to such an extent as not to act voluntarily and accordingly show that this fault element — intention — of the offence is not made out. The Code prevents the defence

How Fault Elements Attach to Physical Elements



introducing evidence of self-induced intoxication of the person where the offence is one of basic intent. An offence of basic intent is one in which the fault element of intention relates simply to the conduct of the person and not to any circumstances or result of the conduct of the person.

For example, the common law offence of assault is an offence of basic intent whereas the offence of assault causing grievous bodily harm is not one of basic intent, but rather one of specific intent. (Although the Code doesn't use the term, an offence that isn't one of basic intent is one of specific intent.) Continuing this example, in the offence of assault, the physical element — the person hitting the victim — consists only of conduct. As it is conduct, the fault element is intention (see the chart above). In the offence of assault causing grievous bodily harm, the physical element can be split. First, there is the element of the person hitting the victim. This, like the offence of assault, consists of conduct and the fault element is intention. Second, there is the element of causing grievous bodily harm; the physical element of which is result of conduct, and being result of conduct, the fault element is recklessness. Accordingly, the offence of assault causing grievous bodily harm is not an offence whose physical element consists only of conduct with the fault element of intention (because it consists of both conduct and result of conduct the fault element for which is a mixture of intention and recklessness) and, consequentially, it is an offence of specific intent.

The effect of this is that the defence would be allowed to introduce evidence of the person's self-induced intoxication to disprove the voluntary nature of the person's acts when the person is charged with the offence of assault causing grievous bodily harm (an offence of specific intent) but would not be able to do so when the person is charged with the offence of assault (an offence of basic intent). However,

the defence may introduce evidence of self-induced intoxication concerning an offence of basic intent if the purpose of introducing it was to prove that the conduct the person is charged with was accidental or that it was done under a mistake of fact.

The statutory provisions relating to intoxication in the Code do not reflect the common law position in Australia (as set out by the High Court in *R v O'Connor* (1980)¹⁴) and apply instead the common law of England (as set out by the House of Lords in *DPP v Majewski*¹⁵).

Determining the legal ramifications of applying the intoxication rules under the Code is difficult. As a start, consult this flowchart.

See the flowchart below showing How the Intoxication Provisions Work.

ENDNOTES

1. LLB, LLM, Grad Dip Military Law, RAAFSR Legal Officer, Senior Policy Adviser, Department of Justice – Victoria. These views are our own, and do not represent those of the Australian Defence Force or the Victorian Department of Justice..
2. BA, BN, LLB, LLM, MBA, Grad Dip Military Law, GDLP, Registered Nurse (VIC, USA, UK), Barrister and Solicitor, Accredited Mediator, FRCNA. Currently engaged as Wing Legal Officer – HQ396CSW, RAAF Darwin, NT. We would like to thank the following persons for their assistance with this paper: WGCDR T.P. Burke, MAJ Jens Streit, Mr Bruce Oswald CSC and Mrs Jan MacGowan. All errors are Andrew's.
3. (1987) 162 CLR 645
4. Jonathan Clough and Carmel Mulhern, *Criminal Law*, (1999), Butterworths, p.265.
5. Brent Fisse, *Howard's Criminal Law – 5th Edition*, (1990), The Law Book Company, p.102.
6. D. O'Connor and P.A. Fairall, *Criminal Defences 3rd Edition*, (1996), Butterworths, p.178.
7. Clough and Mulhern, *op cit* 4, p.270
8. *Branson v South Australia Police Force* (1993) 60 SASR 325 per Prior J as cited in Clough and Mulhern, *op cit* 4, p.270.
9. *Police v Lloyd* (1998) 72 SASR 271
10. Simon Bronitt and Bernadette McSherry 2001, *Principles of Criminal Law*, LBC Information Services, p.294.
11. 18 ALR 257
12. 18 ALR 257 at 321.
13. See for example Criminal Code Division 8 Chapter 2
14. 146 CLR 64
15. [1977] AC 443

How the Intoxication Provisions Work

