Blacker v The Queen [2011] NTCCA 10

PARTIES:	BLACKER, Christopher v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CCA 2 of 2011 (20937234)
DELIVERED:	1 September 2011
HEARING DATES:	8 August 2011
JUDGMENT OF:	RILEY CJ, KELLY & BLOKLAND JJ
APPEALED FROM:	MILDREN J

CATCHWORDS:

CRIMINAL LAW – Appeal against conviction – that the learned trial Judge erred in directing the jury that the Crown did not have to prove that the appellant knew he had the glass in his hand – jury must be satisfied beyond reasonable doubt that the appellant's conduct with the glass was intentional – they must determine whether the act was a voluntary willed act – must be conscious he had the glass in his hand for it to be a voluntary willed act – appeal allowed – new trial ordered.

Criminal Code (NT) s 31(1), s 42AD(2), s 43AB, s 43AC, s 43AE, s 43AF, s 43AF(1), s 43AF(2), s 43AF(5), s 43AI, s 43AI(1), s 43AL, s 43AM, s 43AM(1), s 43AS, s 160, s 160(a), s 174E, s 174E(1), s 174E(a), s 174E(c), s 181, s 318,

Explanatory Statement, *Criminal Code Amendment (Criminal Responsibility) Reform Bill (No 2)* 2005.

Ladd v The Queen (2009) 27 NTLR 1; applied

Murray v The Queen (2002) 211 CLR 193; *R v Falconer* (1990) 171 CLR 30; *R v Shields* [1981] VR 717; *R v Williamson* (1996) 67 SASR 428; *Ugle v The Queen* (2002) 211 CLR 171; followed

Alfred v Magee (1952) 85 CLR 437; *DPP (NT) v WJI* (2004) 219 CLR 43; *Duffy v R* (1980) 3 A Crim R 1; *Hoessinger v The Queen* (1992) 62 A Crim R 146; *Kaporonovski v R* (1973) 133 CLR 209; *Kruger v Kidson* [2004] NTSC 24; *Mamote-Kulang v R* (1964) 111 CLR 62; *McMaster v R* (1994) 4 NTLR 92; *Nydam v R* [1977] VR 430; *Pregelj v Manison* (1987) 88 FLR 346; *R v Krosel* (1986) 41 NTR 34; *Sanby v The Queen* (1993) 117 FLR 218; *Timbu Kolian v R* (1968) 119 CLR 47; *Vallance v R* (1961) 108 CLR 56; referred to

R v Martyn, SC File No 210000456, 14/06/2011, Directions of Barr J.

Odgers, *Principles of Federal Criminal Law*, (2010), second edition, Lawbook Co.

MCCOC, *General Principles of Criminal Responsibility*, Chapter 2.

L Armitage, paper Criminal Lawyers Conference (NT) 2011, *Bad Luck and Manslaughter* …

REPRESENTATION:

Counsel:

Appellant:	Suzan Cox QC
Respondent:	Dr Nanette Rogers SC

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Blacker v The Queen [2011] NTCCA 10
No. CCA 2 of 2011 (20937234)

BETWEEN:

CHRISTOPHER BLACKER
Appellant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, KELLY & BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 1 September 2011)

Riley CJ

[1] The factual background to this appeal and the issues to be addressed are set out in the reasons for decision of Blokland J. I agree with the reasoning of her Honour and the conclusion that the appeal must be allowed and a new trial ordered.

[2] The appellant was found guilty of having negligently caused serious harm to Mr Collins contrary to s 174E of the *Criminal Code*. In order to have found the appellant guilty the jury must have been satisfied beyond reasonable doubt that he engaged in conduct and that conduct caused serious harm to Mr Collins and the appellant was negligent as to causing the serious harm.

[3] The parties agreed both at trial and on the hearing of the appeal that the "conduct" was the act of the appellant striking the victim whilst holding a glass in his hand. This is consistent with the approach of the High Court in *R v Falconer*[1] and with *R v Williamson*[2] and *Duffy v R*.[3] By operation of s 43AF of the *Criminal Code*, which applies to offences under s 174E, conduct can only be a physical element if it is voluntary and it is only voluntary if it is the product of the will of the person whose conduct it is.

[4] In relation to the offence under s 174E of the *Criminal Code* the trial Judge instructed the jury that the Crown did not have to prove that at the time the appellant struck Mr Collins with the glass, he did so intentionally, knowing that he had the glass in his hand. In my opinion this was in error. The Crown had to prove that the conduct of the appellant was voluntary as contemplated by s 43AF of the *Criminal Code*. If the appellant was not aware of the presence of the glass then it could not be a voluntary act.

[5] Counsel for the Crown did not contend otherwise. However, contrary to the submissions made on behalf of the appellant, the Crown argued that there was insufficient evidence before the jury to raise the issue of whether or not the act was willed. For the reasons expressed by Blokland J, I would hold that the issue was raised and became a matter for consideration by the jury.

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1 [1990] 171 CLR 30 at 39.
2 (1996) 67 SASR 428 at 434 per Doyle CJ.
3 (1980) 3 A Crim R 1.

Kelly J

[6] The facts in this appeal are set out in the reasons for decision of Blokland J.

[7] The appellant appeals against conviction on the ground that the learned trial judge erred in directing the jury that the Crown did not have to prove that the appellant knew he had the glass in his hand when considering the alternative count of negligently causing serious harm. The appellant contends that the trial judge should have directed the jury that, to find the appellant guilty of negligently causing serious harm, they must be satisfied beyond reasonable doubt that the appellant's conduct in hitting Mr Collins with the glass was voluntary, that is, it was a product of the appellant's will.[4]

[8] The charge of negligently causing serious harm is defined in s 174E of the *Criminal Code* as follows:

> "A person is guilty of a crime if:
>
> (a) the person engages in conduct; and
>
> (b) that conduct causes serious harm to another person; and
>
> (c) the person is negligent as to causing serious harm to the other person or any other person by the conduct."

[9] Counsel for the appellant and counsel for the respondent were agreed that the conduct in question in this case was swinging the glass at the victim's

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4 *Criminal Code* ss 43AF(1) and (2).

head and not simply swinging his arm or fist towards the victim's head, as that is the way the case had been run at trial.

[10] Dr Rogers SC for the respondent contended that there had been no error by the trial judge because there was no evidence which raised the issue of involuntariness for consideration. It was therefore not necessary for the trial judge to give a direction in relation to it.[5] Dr Rogers conceded that if there had been any evidence to raise the issue of whether the appellant's conduct had been voluntary, then the appellant would have been entitled to have that issue left to the jury, and a direction in relation to voluntariness should have been given.

[11] The appellant on the other hand contended that it was open on the evidence for the jury to find that the swinging of the glass was not a willed act, and that, therefore, a direction should have been given to the jury that, to find the appellant guilty of negligently causing serious harm, they must be satisfied beyond reasonable doubt that the appellant's conduct in hitting Mr Collins with the glass was a product of the appellant's will. Ms Cox QC for the appellant pointed to the evidence of the record of interview in which the appellant told police:

> "…. I do recall lunging towards him. I don't know if I had a glass in my hand or whatever."
>
> and:

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5 *Ladd v R* [2009] NTCCA 6; (2009) 27 NTLR 1 at 28; *Alfred v Magee* (1952) 85 CLR 437 at 466.

> "I may have went to hit him and not even realised that I still had the glass in my hand. I don't know. May've done."

[12] Dr Rogers contended that the substance of what the appellant said in the record of interview was only that he was so intoxicated that he could not really remember what had happened, and that self-induced intoxication cannot be taken into account in considering the question of voluntariness.[6] It seems to me that the appellant's statements in the record of interview go further than this, and do amount to evidence which (although slight) was capable of raising the issue of whether the appellant's conduct in swinging the glass (as opposed to swinging the arm simpliciter) was a willed act.

[13] In light of the respondent's two concessions, therefore, first that the conduct in question was in fact swinging the glass not simply the arm, and, secondly, that if there was evidence which raised the issue of voluntariness the appellant was entitled to have that issue go to the jury, it seems to me that the appeal must succeed.

[14] During oral submissions counsel for the respondent submitted that for the purpose of s 174E the appellant did not have to know he had a glass in his hand for his conduct to be voluntary or intentional. However, that cannot be correct if, as was conceded, the relevant conduct was swinging <u>the glass</u> as distinct from simply swinging the arm.

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6 *Criminal Code* s 43AF(5).

[15] Counsel for the respondent also submitted that s 174E does not require proof of intention as the relevant fault element under that section is negligence, defined in s 43AL as follows:

> "A person is negligent in relation to a physical element of an offence if the person's conduct involves:
>
> (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
>
> (b) such a high risk that the physical element exists or will exist,
>
> that the conduct merits criminal punishment for the offence."

[16] At first blush that is an attractive argument. The fault element in s 174E(c) is given as, "the person is negligent as to causing serious harm", and negligence is defined by reference to "conduct". However, such an interpretation would be contrary to the reasoning in *Ladd*.[7]

[17] In *Ladd*, Martin (BR) CJ, delivering the judgment of the Court of Criminal Appeal, considered the fault elements in the offences of murder and manslaughter defined in s 156 and s 160 of the *Code* respectively.

[18] Section 156 defines murder as follows:

> "A person is guilty of the crime of murder if:
>
> (a) the person engages in conduct;
>
> (b) that conduct causes the death of another person; and

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7 *Supra*.

(c) the person intends to cause the death of, or serious harm to, that or any other person by that conduct."

[19] Section 160 defines manslaughter as follows:

"A person is guilty of the crime of manslaughter if:

(a) the person engages in conduct;

(b) that conduct causes the death of another person; and

(c) the person is reckless or negligent as to causing the death of that or any other person by the conduct."

[20] In *Ladd*, Martin (BR) CJ concluded:

"[92] Neither s 156 nor s 160 specify a fault element for the first physical element of engaging in conduct. Given the history of the law of homicide and the underlying philosophy of the common law and the Code that the act causing death must be both voluntary and intentional, the intention of the legislature that s 43AM(1) operates to insert the fault element of intention can readily be inferred.[8] The legislature did not intend that the fault elements found in s 156(1)(c) or s 160(c) would suffice. In both s 156 and s 160, s 43AM(1) operates to insert a fault element of intention for the first physical element of engaging in conduct.

[93] As to the fault element for the result of death in respect of the crime of manslaughter under s 160, s 43AM has no operation. The wording of s 160(c) leaves no room for doubt that the legislature intended to exclude s 43AM and that that recklessness or negligence is the fault element for the result. Section 160(c) speaks of a person being reckless or negligent "as to causing the death" of another person. Section 43AM can only operate to insert into an offence by default a fault element if the law creating the offence "does not provide a fault element for a physical element". Section 160 provides a fault element for the physical element of conduct causing death."

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[8] Section 43AM(1) provides that if a law that creates an offence does not provide for a fault element for a physical element that consists only of conduct, intention is the fault element for the physical element.

[21] As Blokland J has pointed out at paragraph [49] of her reasons, special leave to appeal to the High Court was refused in *Ladd* on the basis that there was no reason to doubt the correctness of the decision of the Court of Criminal Appeal on this question of construction.

[22] I agree with Blokland J that, given the parallel structure of the two sections, logically, the same analysis of fault elements must apply to the charge of negligently causing serious harm under s 174E as applies to the charge of negligently causing death under s 160. That is to say, the fault element of intention applies to the physical element of engaging in conduct in s 174E(a).

[23] It follows from that that if the conduct in question is conceded to be swinging the glass as distinct from merely swinging the arm, in order to find the appellant guilty of negligently causing serious harm under s 174E, it would have been necessary for the jury to find that the appellant had intentionally swung the glass. It would have been otherwise if, as the learned trial judge appears to have assumed in his sentencing remarks, (quoted by Blokland J at paragraph [27] of her reasons) the conduct in

question had been "a very forceful punch".[9]

[24] However, as both parties were agreed that the conduct was the swinging of the glass at the victim's head, and it was necessary for a conviction under s 174E for that conduct to be intentional, it follows that the learned trial judge was in error in telling the jury they did not have to be satisfied that the appellant knew the glass was in his hand in order to find him guilty of the alternative charge under s 174E.

[25] I agree that the appeal must be allowed and a new trial ordered.

Blokland J

[26] On 14 February 2011 the appellant pleaded not guilty to having unlawfully caused serious harm to Darcy James Collins contrary to s 181 of the *Criminal Code* (NT). On 16 February 2011 a jury acquitted him of this count but found him guilty of the alternative charge of negligently causing serious harm to Mr Collins pursuant to s 174E of the *Criminal Code*. The alternative verdict was available by virtue of s 318 of the *Criminal Code*. He was sentenced to imprisonment for a period of 18 months suspended after four months. There is no challenge to that sentence.

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9 I consider the analysis of the conduct by the trial judge to be a reasonable one. If a person aims a blow at another person, unaware that he is holding a glass, logic suggests that his conduct consists simply of aiming the blow – ie "a very forceful punch". There was no evidence in this case to suggest that aiming the blow was anything other than an act of will by the appellant. The only question was whether he knew the glass was in his hand at the time. Viewed that way, as the trial judge said in his sentencing remarks, the fact that he did not realise the glass was in his hand, at least in part because of his intoxication, was part of the reason why the appellant's conduct was negligent. However, that analysis is not open in the present case in light of the joint contention by the parties as to the nature of the conduct.

[27] The circumstances of the incident are to be gleaned from the unchallenged findings of fact made by the learned trial Judge. The appellant and Mr Collins were present in a hotel bar on the evening of 24 July 2009. An argument developed between them regarding a recent game of rugby. Mr Collins placed his face close to the face of the appellant and brushed his hand down the face of the appellant. The appellant asked him to refrain but he repeated the action on two more occasions. The appellant had a beer glass in his hand. He turned away from Mr Collins as if to put the glass down and then swung his arm with the glass in his hand forcibly connecting with the left side of Mr Collin's face in the region of the left eye and left temple. In sentencing the appellant his Honour said:

> You were provoked by what he did to some degree. You became angry when he refused to stop, and in your anger, you threw a very forceful punch at him, not realising that you still had the glass in your hand.

And later:

> Objectively, this was a serious offence. The reason that you did not know you still had the glass in your hand was due mainly to your state of intoxication. The fact that you did not realise the glass was in your hand was part of the reason why your conduct was negligent.

[28] The appellant has been granted an extension of time within which to seek leave to appeal against conviction and has also been granted leave to appeal. The sole ground of appeal is that the learned trial Judge erred in directing the jury that they should consider the alternative charge of negligently

causing serious harm if they were not satisfied beyond reasonable doubt that, at the time the appellant struck Mr Collins with a glass, he did so intentionally, knowing that he had a glass in his hand.

[29] In directing the jury in relation to the charge of unlawfully causing serious harm to Mr Collins the trial Judge instructed the jury that the Crown had to prove the various elements of the offence beyond reasonable doubt including "that at the time (the appellant) struck Darcy James Collins with the glass, he did so intentionally, knowing he had the glass in his hand". The appellant submits that the verdict of the jury necessarily implies that the jury was not satisfied beyond reasonable doubt that at the time he struck Mr Collins with the glass, he did so intentionally, knowing that he had glass in his hand. That being the case the appellant contends that he could not be found guilty of the offence contrary to s 174E *Criminal Code* (NT) because, in the circumstances of the case, that offence includes the same element.

[30] Closely related to the first of the appellant's contentions is the argument the jury should have been instructed in terms that satisfied the requirement of voluntariness under s 43AF *Criminal Code* (NT), which in this case required proof of knowledge of the glass. Consequentially, error is alleged as the learned trial Judge specifically directed that the appellant's knowledge of

the glass in his hand in relation to the s 174E count "is not something the Crown has to prove".[10] Neither counsel sought a re-direction at trial.

[31] The acquittal on count one is explicable on grounds other than those advanced by the appellant. The alternative bases are first, that the jury may have acquitted the appellant because the jury was not satisfied he was aware of the glass in his hand and therefore could not intend or foresee serious harm; alternatively, the jury may have accepted the appellant was aware he held the glass in his hand when he struck Mr Collins but nevertheless did not intend or foresee serious harm.

[32] There was no dispute between the parties that the "conduct" for the purposes of s 174E of the *Criminal Code* was the act of the appellant striking the victim whilst holding a glass in his hand. It was not the simple act of striking but rather the striking with a glass. The trial had been conducted on that basis.

[33] By way of comparison between the two counts, criminal responsibility for count one, (unlawfully cause serious harm) was governed by the principles contained in Part II of the *Criminal Code* (NT). The act had to be proven voluntary in the sense of being "willed".[11] The serious harm must be proven

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10 AB 146.

11 Although it is often assumed any notion of 'voluntariness' under Part II NTCC arises from s 31 NTCC by virtue of its heading "Unwilled Acts …", the observation has often been made s 31 does not deal with voluntariness, but rather intention and foresight. This issue historically arose when s 31 was excluded from application for some offences, eg under the (repealed s 154 NTCC) and regulatory offences. A number of cases recognise voluntariness is part of NTCC regardless of whether s 31 NTCC applies. See *Hoessinger v The Queen* (1992)

to be intended or foreseen under s 31(1) of the *Criminal Code* (NT). In assessing voluntariness, intention or foresight, the jury was entitled to have regard to intoxication. In summing up, the learned trial Judge directed the jury in terms consistent with s 31(1) *Criminal Code* (NT).

[34] Criminal responsibility for count two was governed by Part IIAA *Criminal Code* (NT). The appeal was argued on the basis that the question of knowledge or awareness of the glass fell to be resolved under s 43AF *Criminal Code* (NT). The respondent argued there was no evidence the impugned conduct was not voluntary, aside from intoxication which must be excluded from consideration by virtue of s 43AF(5) *Criminal Code* (NT).

[35] In terms of whether the appellant's argument may be grounded in lack of voluntariness, it is clear s 43AF *Criminal Code* (NT), which has application to offences under s 174E, excludes from criminal responsibility conduct which is not a product of the will of the person who engages in the conduct. The section is in the following terms:

> (1) Conduct can only be a physical element if it is voluntary.
>
> (2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.
>
> *Examples of conduct that is not voluntary*
>
> *1 A spasm, convulsion or other unwilled bodily movement.*

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62 A Crim R 146 at 149; *Sanby v The Queen* (1993) 117 FLR 218 at 222 and *Kruger v Kidson* [2004] NTSC 24, para 12.

2 An act performed during sleep or unconsciousness.

3 An act performed during impaired consciousness depriving the person of the will to act.

(3) An omission to perform an act is only voluntary if the act omitted is an act the person can perform.

(4) If the conduct constituting an offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.

(5) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.

[36] Section 42AD(2) *Criminal Code* (NT) relevantly provides that to "engage in conduct" is to perform an "act".[12] Under s 43AE *Criminal Code* a physical element of an offence may be conduct, a result of conduct or a circumstance in which conduct or a result of conduct happens. The first physical element "engage in conduct" under s 174E must be proven to be voluntary. The second physical element "cause serious harm" in s 174E is the "result" of the conduct. The question of voluntariness does not arise with respect to the "result". Once the result of serious harm is established, the fault element of negligence under s 43AL of the *Criminal Code* applies to the assessment of the conduct resulting in serious harm. Negligence is a fault element determined objectively.[13]

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12 Alternatively engage in conduct is to "omit to perform act", immaterial here.

13 S 43AL NTCC.

[37] The appellant argued the requirement of awareness of the glass in the appellant's hand accords with the long held understanding of the meaning of an "act" in the criminal law: that the act be the product of the will, incorporating a consciousness of the quality of the act. This is reflected in the phrase "product of the will" in s 43AF(2) *Criminal Code* (NT). Courts in all jurisdictions have grappled with the question of the breadth and quality of the conduct incorporated in the "act": *Vallance*[14]; *Mamote-Kulang;*[15] *Timbu Kolian*[16] and *Kaporonovski.*[17]. Under Part II of the *Criminal Code* (NT), consideration was given to the same issue: *Pregelj v Manison;*[18] *Krosel;*[19] *McMaster;*[20] *DPP v WJI.*[21] In terms of s 23 of the Griffith Codes the meaning of "act" was explained in *The Queen v Falconer*[22] by Mason CJ Brennan and McHugh JJ at 38:

> In our opinion, the true meaning of "act" in s 23 is that which Kitto J. in *Vallance* attributed to 'act' in s 31(1) of the Tasmanian Code, namely, a bodily action which, either alone or in conjunction with some quality of the action, or consequence caused by it, or an accompanying state of mind, entails criminal responsibility … Adopting the meaning of 'act' expressed by Kitto J. in *Vallance*, the act with which we are concerned in this case is the discharge by Mrs Falconer of the loaded gun; it is neither restricted to the mere contraction of the trigger finger nor does it extend to the fatal wounding of Mr Falconer.

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14 (1961) 108 CLR 56.
15 (1964) 111 CLR 62.
16 (1968) 119 CLR 47.
17 (1973) 133 CLR 209.
18 (1987) 88 FLR 346.
19 (1986) 41 NTR 34.
20 (1994) 4 NTLR 92.
21 (2004) 219 CLR 43.
22 (1990) 171 CLR 30.

[38] More particularly, the appellant has drawn the Court's attention to reliance being placed on *The Queen v Falconer* in *R v Williamson*[23] in the context of an appeal against a conviction for murder, in a non Griffith Code jurisdiction. The appellant in *R v Williamson* argued he was not aware he had a knife in his hand when he struck the deceased. In terms of voluntariness Doyle CJ said:[24]

> "…to prove that the striking of a blow with a knife was a conscious act and a deliberate act, and that necessarily means that the prosecution had to prove that the accused knew that he had the knife in his hand. In the words of the joint judgement of Mason CJ, Brennan and McHugh JJ in *The Queen v Falconer* (at 40), the prosecution had to prove that the accused made a conscious choice to do an act of the kind done. There is such a difference between the striking of a blow with a fist and the striking of a blow, knife in his hand, that in my opinion it was necessary for the distinction to be drawn and for the prosecution to prove that the accused made a conscious choice to strike a blow knowing he had the knife in his hand… The accused must be shown to have made a conscious choice to perform an act of the kind done, and that in a case such as the present there is a significant difference between a punch and striking with a knife, and it cannot be said that to prove a conscious choice to punch is to prove an act of the kind in fact done".

[39] This is consistent with the reasoning in the earlier case of *Duffy*[25] which held the knowledge by an accused of holding a glass in his hand was fundamental to the question of whether striking a blow while holding a glass was an act which occurred independently of the exercise of the will.[26]

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23 (1996) 67 SASR 428.
24 *R v Williamson* (above) at 434.
25 (1980) 3 A Crim R 1. *Duffy* was decided under s 23 *Criminal Code* (WA).
26 See Wallace J at 9-10; Jones J at 10-13.

[40] Some consideration needs to be given to whether Part IIAA *Criminal Code* (NT) should be differentiated from the approach taken in both common law and Griffith Code jurisdictions. It may be accepted Part IIAA *Criminal Code* (NT) manifests legislative intent to clearly separate the physical and fault elements. This appears from the overall structure of Part IIAA *Criminal Code* (NT). Section 43AB provides an offence "consists of physical elements and fault elements". It also appears in the Explanatory Statement accompanying the introduction of the *Criminal Code (Criminal Responsibility) Reform Bill (No 2)* 2005 making a number of observations virtually identical with the MCCOC[27] "General Principles of Criminal Responsibility", Chapter 2, and the Commonwealth Criminal Code on which Part IIAA is based. If the question of knowledge of the glass can genuinely be comprehended in the "act", and therefore within the physical elements, the approach need not change. It is not however free from difficulty.

[41] A decision was taken by the legislature not to define "act". The Explanatory Statement concluded that given the history of problems in relation to "act" and any relevant circumstances, the better course was not to define "act" in the *Criminal Code* (NT) and to rely on a common sense approach of the courts to apply the interpretation in *Falconer*.[28] The MCCOC and subsequently the legislature were cognisant of the type of difficulty

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27 "Model Criminal Code Officers Committee".

28 Explanatory Statement, *Criminal Code Amendment (Criminal Responsibility) Reform Bill (No 2)* 2005 at 5. Serial No 7. NT Legislative Assembly. MCCOC, "General Principles of Criminal Responsibility" at 12-13.

presented here; namely whether "acts" (or conduct), are comprised only of a physical component, or whether broader circumstances may be included. A further question was the content of any minimal mental component, "the product of the will". The example discussed in the Explanatory Statement dealing with crucial facts and circumstances that are not elements of the offence is as follows:[29]

> The second, more difficult, problem was how the Code should deal with the often crucial facts and circumstances surrounding conduct which gave that conduct colour and meaning but are not legal elements of the offence. For example, take a case where the defendant pushes a glass into a victims face. Should the "act" be understood narrowly as just a bodily movement (the movement of the defendant's hand) or more broadly to include the circumstance that the defendant had a glass in his hand? The problem is that if "act" includes circumstances defining the conduct, then the distinction between "act" and "circumstances" seems to collapse. This would also confuse the relationship between conduct and the fault elements. The fault elements should assume a distinction between acts and circumstances.

[42] The conceptual difficulty of effectively including a form of mental state within the concept of voluntariness, (beyond the minimal mental component to satisfy the "will" to perform the relevant act), was criticised by MCCOC as confusing the relationship between conduct and fault elements.[30] Despite the difficulties, it was clearly concluded the better course was to rely on the common sense approach of courts to define "acts". As it is accepted in this case the act incorporated holding the glass, the use of the glass must be

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29 Explanatory Statement (above) at page 4.
30 MCCOC (above) at 11.

proven to have been a product of the will. Whether the conduct was a product of the will is a question for the tribunal of fact.[31]

[43] Set out within s 43AF(2) *Criminal Code* (NT) are examples of conduct expressed to be "not voluntary". The examples are "inclusive", however the Explanatory Statement makes the point "it is hard to imagine any involuntary conduct which would not be covered by the list".[32] It explains "reflex actions" were left out of the list, as some reflex acts can be regarded as voluntary, for example, the responses of a skilled sports person.[33] The examples of what is "not voluntary" address conditions that might lead to a conclusion of absence of will, however, this does not detract from the proposition that an unwilled act may simply be an act not impelled by the mind, even though it is not referrable to a condition set out in the examples. As it was clearly intended the courts retain the previous role in defining "acts", it is concluded here Part IIAA *Criminal Code* (NT) permits continuing the previous approach outlined earlier in these reasons.

[44] If however this conclusion is incorrect and the question of awareness of the glass cannot properly be dealt with as "conduct not the product of the will", in this particular case, "intention" to engage in the conduct is the relevant fault element. The jury may assess the knowledge or awareness possessed by the accused to determine whether the conduct was intentional. A person

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31 *Ugle v The Queen* (2002) 211 CLR 171; *Murray v The Queen* (2002) 211 CLR 193.

32 Explanatory Statement, *Criminal Code Amendment (Criminal Responsibility) Reform Bill (No 2)* 2005 at 5.

33 Explanatory Statement (above) at 5-6.

has "intention" in Part IIAA *Criminal Code* (NT) in relation to conduct, if the person "means" to "engage in that conduct".[34] The Crown does not have to prove the resultant harm was intentional. The question of lack of voluntariness for practical purposes will arise when the prosecution does not have to prove intent, knowledge or recklessness as in those instances the task may be clearer for the trier of the fact to assess the appropriate fault element rather than any asserted lack of voluntariness.[35]

[45] Assistance may be drawn from the decision in *Ladd v The Queen*.[36] Although dealing with murder and manslaughter, Martin (BR) CJ's judgment discusses the introduction and structure of the provisions in Part IIAA *Criminal Code* (NT). Significantly, for analogous purposes, Martin (BR) CJ sets out the elements for manslaughter, including negligent manslaughter.[37] The elements for negligently cause serious harm are the same as those for negligent manslaughter, save obviously for the different "result" of conduct.

[46] Section 174E of the *Criminal Code* is in the following terms:

> A person is guilty of a crime if:
>
> (a) the person engages in conduct; and
>
> (b) that conduct causes serious harm to another person; and

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34 S 43AI(1) NTCC.

35 This factor appears to have been recognised in the Explanatory Statement (above) at 5, derived from the MCCOC, Chapter 2 at 15.

36 (2009) 27 NTLR 1.

37 *Ladd v The Queen* (above) at 36-37; Angel J agreed with the Orders of Martin (BR) CJ, save for one point that is not material. Mildren J substantially agreed, but offered a different view on the construction of s 43AM.

(c) the person is negligent as to causing serious harm to the other person or any other person by the conduct.

Penalty: Imprisonment for 10 years.

[47] Relevantly, (negligent) manslaughter is defined under s 160 *Criminal Code* (NT) as:

A person is guilty of the crime of manslaughter if:

(a) the person engages in conduct; and

(b) that conduct causes the death of another person; and

(c) the person is negligent as to causing the death of that or any other person by the conduct.

[48] In *Ladd v The Queen*, Martin (BR) CJ noted s 160 *Criminal Code* (NT) did not specify a fault element for s 160(a) "engaging in conduct". Relying on the history of the law of homicide and the underlying philosophy of the common law and the *Code* that the act causing death must be both voluntary and intentional, his Honour concluded the intention of the legislature was that s 43AM(1) *Criminal Code* (NT) operates to insert the fault element of intention for the first physical element "engaging in conduct". Section 43AM provides:

(1) If a law that creates an offence does not provide a fault element for a physical element that consists only of conduct, intention is the fault element for the physical element.

(2) If a law that creates an offence does not provide a fault element for a physical element that consists of a result or circumstance, recklessness is the fault element for the physical element.

Note for subsection (2)

Under section 43AK(4), recklessness can be established by proving intention, knowledge or recklessness.

[49] As to the fault element for "causing the death" Martin (BR) CJ held there was no need to resort to s 43AM *Criminal Code* (NT), as in the case of negligent manslaughter the fault element is found within the section creating the offence. It was held for that particular physical element there was no need to resort to s 43AM *Criminal Code* (NT). Odgers notes the application for special leave to appeal to the High Court in respect of this decision was dismissed on the basis that "there is no reason to doubt the correctness of the decision of the Court of Criminal Appeal on that question of construction".[38] Current trial directions in at least one negligent manslaughter case have followed accordingly.[39]

[50] Criminal responsibility in relation to negligently cause serious harm should be approached in the same way as criminal responsibility for negligently cause death. The Explanatory Statement on s 174E (negligently causing

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38 Odgers, Principles of Federal Criminal Law, second edition, at 69, citing *Ladd v The Queen* [2010] HCA Trans 46. Although on this point the decision was relevant to a murder conviction, the construction point concerned the application of s 43AM NTCC.

39 Eg. *R v Martyn*, No 21000456, 14/06/2011, Directions of Barr J. "Negligence 1. Did the accused punch (the victim)? 2. Did the accused intend to punch (the victim)?" And see paper,(2011), Criminal Lawyers Conference (NT), Ms L Armitage "Bad Luck and Manslaughter…", commenting on the same trial: "Conduct must be voluntary, (a product of the will) (s 43AF); Conduct must be intentional (s 43AI); the person meant to engage in the conduct".

harm) acknowledges the level of negligence required for negligently causing serious harm is the same as that required for criminal negligence manslaughter.[40]

[51] Both offences are defined by the physical elements "engage in conduct" and a "result of conduct". "Engage in conduct" means to perform an act. No fault element is specified for the physical element 'engage in conduct'. By default, "engage in conduct" is governed by s 43AM *Criminal Code* (NT). A person has intention in relation to conduct if the person "means" to engage in that conduct.[41] The only fault element specified is negligence in relation to causing the death in the case of negligent manslaughter or causing the serious harm in relation to s 174E. Part IIAA *Criminal Code* (NT) anticipates offences where different fault elements may apply for different physical elements. Section 174E is such an offence.

[52] This approach is similar to that taken in some other jurisdictions. For example, Victoria has legislated for negligent manslaughter and negligently causing harm. It has been held the degree of negligence appropriate for negligently causing serious harm is the same as that required for negligent manslaughter.[42] Further, manslaughter by negligence at common law required proof of a deliberate act, whether expressed as "willed" or

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40 Explanatory Memorandum (above) at 39-40.
41 S 43AI NTCC.
42 *R v Shields* [1981] VR 717.

"intended" which in fact caused the death of the victim in circumstances falling short of the standard of care required.[43]

[53] What distinguishes s 174E from count one is that the Crown is relieved from proving intention or foresight of the result (serious harm). Further, self induced intoxication cannot be used to consider whether the conduct is voluntary (s 43AF); neither can intoxication be used for assessing whether the conduct engaged in was "intentional". When a physical element consists only of "conduct", (as is the case with s 174E(1)), s 43AS *Criminal Code* (NT) operates so that evidence of self induced intoxication cannot be considered. Intoxication is excluded from determining whether a "fault element of basic intent existed". "Basic intent" possesses quite a different meaning in Part IIAA *Criminal Code* (NT) than previously understood in the common law. A "fault element of basic intent" means a fault element of intention for a physical element that consists only of conduct. Further, under s 43AT *Criminal Code* (NT), in terms of assessing the fault element "negligence", regard must be had to the standard of a reasonable person who is not intoxicated. The effective exclusion of self induced intoxication at all stages protects the integrity of the objective test of the fault element of negligence.

[54] The history of criminal negligence in both the common law and code jurisdictions emphasises the need to distinguish criminal and civil

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43 *Nydam v R* [1977] VR 430.

negligence. The criminal law is generally concerned with deliberate acts, however with negligence the question is whether the conduct that has caused death or injury falls so far short of the standard of care that a reasonable person would have exercised in the circumstances and involves such a high risk of death or serious injury that it merits criminal punishment.[44]. The history and philosophy of the law of homicide as referred to by Martin (BR) CJ in *Ladd v The Queen* equally applies to negligently cause serious harm, more particularly so given that historically negligence was only ever imputed to manslaughter and not to other offences.

[55] As it is concluded in this matter the relevant issue may be resolved under voluntariness, I will mention briefly the arguments on the evidence. It was contended on behalf of the respondent that parts of the evidence of the witnesses Buckland, Zimmerman and the appellant's ROI with police revealed that the only evidence relevant to voluntariness was the appellant's intoxication which was impermissible to raise in relation to an unwilled act. The appellant told police he did not remember having a glass in his hand at the time he struck the victim. Although the evidence in support of lack of voluntariness separate from the intoxication was not strong, there was sufficient in the evidence of the witnesses Buckland;[45] and Zimmerman[46] for the issue to be left to the jury.

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44 S 43AC NTCC.
45 AB at 33.
46 AB at 40, 41-43.

[56] The learned trial Judge should have directed the jury on the following matters:

(a) it was for them to determine what the relevant conduct was but that they may think it was indeed a blow struck with the glass;

(b) they must determine whether that act was a voluntary willed act, that is, that he was conscious of the glass in his hand;

(c) if he was not aware of it simply because of his level of intoxication that would not be sufficient;

(d) putting aside his level of intoxication, if the Crown did not satisfy the jury that it was a willed act because of the surrounding circumstances such as that he thought he put the glass down or he was reacting instinctively then he would not be guilty of the offence because a person is only criminally responsible for his willed acts.

[57] The appeal must be allowed and a new trial ordered.

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