SECTION 172 OF THE CODE AND CRIMINAL NEGLIGENCE

Hon. Justice Stephen Estcourt AM

In the 2016 trial, *State of Tasmania v Shield*, the accused was charged with causing grievous bodily harm contrary to s 172 of the *Criminal Code*. The particulars of the single count on the original indictment alleged that he discharged the spear from a spear gun into the victim's neck.

The case may be of interest as to sentencing considerations in cases involving ss 150 and 152 of the Code. In *Shield v Tasmania* [2017] TASCCA 6, Brett J, with whom Blow CJ and Slicer AJ agreed, dispelled the perception that cases in which death or grievous bodily harm are caused by culpable negligence are generally treated less seriously in sentencing than other examples of the crime of manslaughter or causing grievous bodily harm. His Honour said at [15] that culpable negligence constituted by the breach of the duty specified in s 150 of the Code will always carry with it the potential for grave consequences to the safety and wellbeing of others, irrespective of the actual outcome, and that for that reason significant emphasis on general deterrence is warranted in the assessment of sentence.

For present purposes however I wish to use this case to illustrate how cases involving s 172 of the Code may be pleaded in an indictment when the State does not rely on a specific intent on the part of the accused pursuant to that section but, in addition to subjective recklessness under s 172, wishes to rely in the alternative on ss 150 and 152 of the Code.

In *Shield*, at trial, the State wished to open its case to the jury on the basis that it did not rely at all on an intentional act by the accused, but rather on the basis that he was subjectively reckless under s 172 or, alternatively, that he was culpably or criminally negligent pursuant to ss 150 and 152 of the Code in that he, without lawful excuse, omitted to perform his duty as a person who had a thing in his charge or under his control, which in the absence of precaution or care in its use or management may endanger human life, to take reasonable precautions against, and to use reasonable care to avoid, such danger.

As authority for this course the State relied on the decision of Underwood CJ in *Tasmania v Nelligan* [2005] TASSC 94.

Before turning to *Nelligan*, which involved a charge not under s 172 but under s 170, it is useful to recall that ss 170 and 172 have been part of the Code since it was enacted in 1924. They are based on UK legislation, the *Offences Against the Person Act* 1861 (UK) s18 and s20. A similar Act was introduced in Tasmania in 1863, the *Offences against the Person Act* 1863, the relevant provisions being ss16 and 18. They were identical to provisions in the English legislation.

In *Barron v Tasmania* [2010] TASCCA 3 at [21] Wood J observed as to the relationship between ss 170 and 172:

> "21 It is worthwhile to take some time to focus on the nature of the crime under consideration and some well settled sentencing principles that apply to the Code, s172. A specific intention to cause grievous bodily harm is not an element of this crime. The crime of causing grievous bodily harm requires a mental element involving either an intent to cause grievous bodily harm or subjective recklessness, ie foresight of the likelihood of that kind of harm (*R v Bennett* [1990] Tas R 72). By contrast an essential element of a crime against s170 is the intention to cause some kind of serious bodily harm (*R v Allen* [1999] TASSC 112, per Cox CJ at par2).
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> 22 There is an overlap in the application of ss 170 and 172 so that they are both capable of applying to situations where grievous bodily harm is intended."

As I have said, *Nelligan* was a charge under s 170 and not s 172. It involved the discharge of a shotgun. The State's case was that the accused *intended* to cause grievous bodily harm to the complainant when he fired the gun. I repeat that was not the case in *Shield* where the State eschewed any reliance on the assertion available under s 172 of an intended act.

In *Nelligan* if the jury decided to acquit the accused of the crime charged in the first count on the basis of a lack of the required intention, s 334A of the Code permitted an alternative verdict of guilty of wounding or causing grievous bodily harm (or assault, of course). That alternative verdict could have been left to the jury upon the basis that the accused foresaw that grievous bodily harm or wounding was the likely consequence of this act, ie that the accused was guilty of subjective recklessness. The authority for that proposition is *Vallance v The Queen* (1961) 108 CLR 56 and *R v Bennett* [1990] Tas R 72. (See also *Tasmania v Oates* [2017] TASSC 39 as to the mental element in assault. And see *Koani v R* [2017] HCA 42 at [29]-[39] as to the "act" to which criminal responsibility attaches under the Code in a firearms case).

However in *Nelligan* the Crown did not wish to seek an alternative verdict upon the available basis that a mental element in the crimes of wounding or grievous bodily harm was subjective recklessness. Rather, the indictment, by the second count, pleaded a specific alternative crime, namely that the accused was guilty of causing grievous bodily harm upon the basis that he was criminally negligent pursuant to ss 150 and 152 of the Code.

There was no such second count on the original indictment in *Shield*. There was only one count of causing grievous bodily harm on the indictment. The issue was that the State simply did not wish to assert a specific intention in the case of a crime that allowed for two states of mind and at the same time relied on culpable negligence.

In allowing the State to follow the course that it desired in *Nelligan*, Underwood CJ relied on the authority of *R v McDonald* [1966] Tas SR 263.

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McDonald was a case of wounding where at 268 Burbury CJ referred to *obiter dicta* in *Vallance* and held that ss 150 and 152 do apply to the crime of wounding. He said, at 268-269:

> "But having regard to the whole question in the light of the judgments of the High Court in *Evgeniou v The Queen* (1964) 37 ALJR 508, I have come to the firm conclusion that s 152 as applied to the several sections in Ch 16 of the Code (including s 150) creates an exception to the principles of criminal responsibility expressed in s 13(1) and (2). In other words, the provisions of ss 152 and 150 of the Code do constitute provisions 'otherwise expressly provided' for the purpose of s 13(1) and (2). That is to say that if the accused is guilty of culpable negligence in the common law sense, he is not exculpated because the injury occurs by chance or because his omission was not intentional."

I do not doubt, with respect, that Burbury CJ was correct and that *Nelligan* was correctly decided. If the jury in *Shield* had been presented with a choice in a single count of causing grievous bodily harm contrary to s 172 between an assertion by the State of intended but not reckless harm on the one hand and criminal responsibility as a result of a s 152 omission on the other, no problem would arise. In such a case the analogy pressed by counsel for the State in *Shield* involving the choice between murder and manslaughter on a single count of murder would have held good.

That was not the case in *Shield* however. The State sought to roll up the questions of subjective recklessness and culpable negligence in a way that risked unfairness to the accused. There would have been no means, other than speculation, to know whether a verdict of guilty on the single count would have been based on the finely nuanced distinction between subjective recklessness and objective negligence. At the very least that was a factor relevant to sentence if the accused had been found guilty.

Whilst strictly speaking not duplicitous, the original indictment would have been similarly unfair not only because it would not allow the accused to know the basis on which he had been found guilty if he had been, but also because he could potentially have been deprived of the ability to make a no case submission or a *Prasad* submission that might possibly have been available on the evidence at trial if the State had relied on one only of the two alternative bases of criminal liability, or pleaded them in separate, alternate counts.

In *Shield* as a result of a ruling during the trial the State was offered the choice between electing to proceed on one or other of the two available bases of criminal responsibility on the original single count indictment, or of separating the count into two alternate counts to facilitate the taking of a special verdict from the jury if necessary. The State chose the latter course.

The new indictment separated criminal responsibility into distinct and separate pathways, but of course there remained only one crime charged on the indictment (although the alternate crime of assault was left to the jury). The course taken was that the jury was directed as to the alternate bases of liability that were open to lead to a verdict of guilty, and was provided with a memorandum explaining the pathway of reasoning to subjective recklessness and the pathway of reasoning to culpable negligence. It was then asked, upon returning a verdict of guilty to the crime of causing grievous bodily harm, to answer, pursuant to s 383(3) of the Code, the special question as to the pathway by which the verdict was reached.

In the result that special question was unanimously answered in such a way as to permit the accused to be convicted and sentenced on the basis of culpable negligence. The task of the Court of Criminal Appeal in the accused's subsequent appeal against the severity of sentence may not have been as clear cut had the guilty verdict been otherwise.

The difficulty remains however that even a special question may not be helpful. A jury may unanimously conclude that the accused is guilty of the crime of causing grievous bodily harm, but some may reach that conclusion on the basis of subjective recklessness, while others may be satisfied of culpable negligence. One would think that if the jury could not agree on subjective recklessness that they would at least be able to agree on objective negligence. That outcome cannot however be guaranteed and the possibility of an inability to agree on a special question in *Shield* did exist.

It may be that the answer is that the State should nail its colours to the mast before indicting in cases where subjective recklessness is not clear, but the less culpable element of objective negligence is.

It may be that the proper course is to indeed have but one count but with the respective alleged states of mind separately particularised pursuant to s 315 of the Code. This leaves the judge to find the necessary facts for sentence, which, because of the speculative nature of such a fine distinction as is involved here, may be inconsistent with the basis on which the jury reached its verdict. But that problem regularly arises, although to perhaps a lesser degree, within s 172 itself, where a guilty verdict may be based on either intent or subjective recklessness. In the case of murder, of course, the jury may find guilt on a range of alternative bases (although interestingly the High Court has recently decided that it was an error of law to leave to a jury an alternate case based on a criminally negligent act or omission in a case of murder based in the first instance on an alleged intention to kill or inflict grievous bodily harm; *Koani v R* (above) at [26]). Self-defence is another example where some jurors might find no self-defence and others may find excessive force. Maintaining a sexual relationship with a young person under 17 years of age was another prior to the decision of the High Court in *Chiro v The Queen* (2017) 260 CLR 425 (and may become so again if the effect of *Chiro* is abrogated by State legislation). In all such cases there could in theory be a special verdict taken, but that as I have said raises its own special problems.

The recent High Court decision in *The Queen v Dookheea* [2017] HCA 36 highlights at [34] that whilst a reasonable doubt is a doubt which the jury as a reasonable jury considers to be reasonable, different jurors might have different reasons for their own reasonable doubt.

The problem thrown up in *Shield* is not yet satisfactorily resolved.

THE HONOURABLE JUSTICE STEPHEN ESTCOURT QC
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