

*James Morgan**

OFFENCES AGAINST THE PERSON AND SEXUALLY TRANSMITTED DISEASES: *AUBREY V THE QUEEN* (2017) 260 CLR 305

I INTRODUCTION

Section 35 of the *Crimes Act 1900* (NSW) provides for a criminal offence of grievous bodily harm. Prior to legislative amendment in 2007,¹ this provision did not expressly extend criminal liability to transmission of disease. In the case of *Aubrey v The Queen*,² it fell to the High Court of Australia to interpret this historical version of s 35. In doing so, the High Court departed from the English authority of *R v Clarence*³ — interpreting that s 35, as it stood in 2004, did not require immediate physical injury, and extends to transmission of disease.

This case note, after reviewing the background and procedural history of *Aubrey*, turns to evaluation of the Court's decisions and its ramifications. With *Aubrey* relating purely to a historical version of New South Wales legislation, its immediate ramifications are somewhat limited. Indeed, s 35 as it now stands already expressly extends criminal liability to that which *Aubrey* extends its historical predecessor to. Nevertheless, *Aubrey* provides a persuasive indication as to the interpretation of both similar provisions in other Australian jurisdictions, and future provisions.

II BACKGROUND

A Transmission of HIV

Michael Aubrey ('the appellant') and the complainant engaged in unprotected sexual intercourse during the early months of 2004. The appellant did so with the knowledge that he had been diagnosed as HIV positive. As a result, the complainant contracted HIV.⁴

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¹ See generally *Crimes Amendment Act 2007* (NSW).

² (2017) 260 CLR 305 (*'Aubrey'*).

³ (1888) 22 QBD 23 (*'Clarence'*).

⁴ *Aubrey* (2017) 260 CLR 305, 311 [2].

B Procedural History

1 Initial Proceedings

The appellant was charged with two offences under the *Crimes Act 1900* (NSW).⁵ The appellant sought an order quashing the charge of the more general offence of maliciously inflicting grievous bodily harm under s 35(1)(b), on the basis that transmission of a disease did not constitute the *infliction* of grievous bodily harm under the *Crimes Act 1900* (NSW) as it stood in 2004.⁶ Hearing the motion, Sorby DCJ ruled that proceedings were to be stayed due to ‘uncertainty’ on this question.⁷

2 The First Appeal

The New South Wales Court of Criminal Appeal (‘NSWCCA’), on appeal by the Crown, dissolved the stay and accepted the Crown’s submission that:

the word ‘inflicts’ should not be given a limited and technical meaning which requires that the harm result from a violent act which creates an immediate result. That being so, the transmission of a disease which manifests itself after a period of time can amount to the infliction of grievous bodily harm.⁸

Special leave to appeal against this order to the High Court was refused.⁹

3 The Trial

Following these interlocutory appeals, the appellant was convicted at trial of maliciously inflicting grievous bodily harm under s 35(1)(b), and acquitted of the alternative charge.¹⁰

4 The Second Appeal

The appellant appealed against this conviction on the grounds that: firstly, the charge as alleged disclosed no offence known to law (contending that disease transmission does not constitute infliction of grievous bodily harm); and secondly, the trial judge

⁵ Note that the *Crimes Act 1900* (NSW) as it stood at the time of the appellant’s conduct is quite different to the state of the Act today. The provisions regarding the relevant offences, along with several other relevant sections, have been amended quite substantially since the *Crimes Amendment Act 2007* (NSW) and *Crimes Amendment (Reckless Infliction of Harm Act 2012)* (NSW).

⁶ *Aubrey* (2017) 260 CLR 305, 311 [3].

⁷ *R v Aubrey* (Unreported, District Court of New South Wales, 8 March 2012) [23].

⁸ *R v Aubrey* (2012) 82 NSWLR 748, 750 [9].

⁹ See Transcript of Proceedings, *Michael Aubrey (AKA Albury) v The Queen* [2013] HCATrans 110 (10 May 2013).

¹⁰ *Aubrey* (2017) 260 CLR 305, 312 [5].

erred in directing the jury that the malice element was satisfied.¹¹ A differently constituted NSWCCA dismissed the appeal, agreeing with the reasoning of the previous NSWCCA decision.¹²

Subsequently, the appellant was granted special leave to appeal to the High Court.¹³

C Central Issues

This appeal gave rise to two key issues for determination by the High Court. Firstly, whether the sexual transmission of a grievous bodily disease is capable of constituting the *infliction* of grievous bodily harm.¹⁴ Secondly, whether recklessness and maliciousness require that the accused person foresaw the *possibility*, or alternatively, the *probability* that sexual intercourse would result in the other person contracting the grievous bodily disease.¹⁵

III DECISION OF THE HIGH COURT

The High Court dismissed this appeal by a majority composed of Kiefel CJ, Keane, Nettle and Edelman JJ. Justice Bell was in dissent.

A Sexual Transmission of Disease as Infliction of Grievous Bodily Harm

1 The Majority Judgment

The majority held that s 35 of the *Crimes Act 1900* (NSW) does not require the production of immediate physical injury, meaning sexual transmission of a disease can indeed amount to infliction of grievous bodily harm.¹⁶

In doing so, their Honours departed from the English case of *Clarence*,¹⁷ in which a majority of the Court for Crown Cases Reserved held that a man who had sexual intercourse with his wife, knowing that he was infected with gonorrhoea, could not be convicted of maliciously inflicting grievous bodily harm under similar UK legislation.¹⁸ *Clarence* had long stood as authority that infliction of grievous bodily harm does not include the ‘uncertain and delayed operation of the act by which infection is

¹¹ *Ibid.*

¹² *Aubrey v The Queen* [2015] NSWCCA 323, [23]–[25].

¹³ See Transcript of Proceedings *MA v The Queen* [2016] HCATrans 277 (16 November 2016).

¹⁴ *Aubrey* (2017) 260 CLR 305, 312 [6].

¹⁵ *Ibid.*

¹⁶ *Ibid* 326 [40].

¹⁷ (1888) 22 QBD 23.

¹⁸ *Offences Against the Person Act 1861*, 24 & 25 Vict, c 100, s 20.

communicated’,¹⁹ and requires ‘an assault and battery of which a wound or grievous bodily harm is the manifest *immediate and obvious result*.’²⁰

The majority in *Aubrey* articulated various key reasons why *Clarence* should no longer be followed.²¹ Crucially, the decision in *Clarence* and notion of infliction requiring immediate physical injury, ran counter to contemporaneous authority from the very same court.²² The majority in *Clarence* were also not unanimous in their reasoning — resting their conclusion on quite different bases²³ — and delivered their judgments alongside forceful dissents.²⁴ Furthermore, *Clarence* seemingly synonymously used the terms ‘inflicting’, ‘causing’, and ‘occasioning’;²⁵ regarded provisions which appeared to leave open infliction by any means;²⁶ and did not employ standardised language.²⁷ Additionally, *Clarence* rested on a mere rudimentary understanding of infectious diseases,²⁸ relied upon the marital sexual consent presumption,²⁹ and was rejected in later English decisions.³⁰

Whilst the majority in *Aubrey* acknowledged that the Court should ordinarily be hesitant to overturn a longstanding authority where the earlier judicial officers were more familiar with the purpose of the underlying legislative provision,³¹ their Honours were satisfied that it was appropriate to overturn in this instance. Notably, *Clarence* had been considered ‘doubtful’ for some time, and it was not clear that any of the majority judges had particular insight into the purpose of the UK legislative provision.³² Accordingly, their Honours were satisfied that it was appropriate to depart from *Clarence*.

Turning to the appellant’s various contentions regarding the interpretation of s 35, the majority rejected each of them in turn. Most notably, their Honours rejected the notion that infliction of disease requires ‘immediate consequence’; a disease can be inflicted without the symptoms being immediately manifest.³³

¹⁹ *Clarence* (1888) 22 QBD 23, 41–2.

²⁰ *Ibid* (emphasis added).

²¹ *Aubrey* (2017) 260 CLR 305, 319–21 [18]–[26].

²² *Ibid* 319 [18]; see generally *R v Martin* (1881) 8 QBD 54; see generally *R v Halliday* (1889) 61 LT 701.

²³ *Aubrey* (2017) 260 CLR 305, 319 [19].

²⁴ *Ibid* 319 [20].

²⁵ *Ibid* 319 [21].

²⁶ *Ibid* 320 [22].

²⁷ *Ibid* 320 [23].

²⁸ *Ibid* 320 [24].

²⁹ *Ibid* 320–1 [25].

³⁰ *Ibid* 321 [26].

³¹ *Ibid* 324 [35].

³² *Ibid* 324 [36].

³³ *Ibid* 321 [27] citing *Alcan Gove Pty Ltd v Zabic* (2015) 257 CLR 1.

2 *Justice Bell in Dissent*

In dissent, Bell J concluded that it was not appropriate to depart from *Clarence*, and held that transmission of HIV by sexual intercourse could not constitute the infliction of grievous bodily harm within the meaning of s 35(1)(b) as it stood in 2004, during the time of the appellant's conduct.³⁴ Her Honour remarked that:

it is a large step to depart from a decision which has been understood to settle the construction of a provision, particularly where *the effect of that departure is to extend the scope of criminal liability*. For more than a century *Clarence* has stood as an authoritative statement that the 'uncertain and delayed operation of the act by which infection is communicated' does not constitute the infliction of grievous bodily harm. *If that settled understanding is ill-suited to the needs of modern society, the solution lies in the legislature addressing the deficiency, as it has done.*³⁵

Turning to the legislation, her Honour noted that the *Crimes Act 1900* (NSW) essentially followed the UK Act³⁶ which was the subject of *Clarence*.³⁷ Her Honour went on to conclude that the common element in each analysis of the majority in *Clarence* was that infliction of grievous bodily harm requires an act having an immediate relationship to the harm, which is inconsistent with the 'uncertain and delayed operation of the act by which infection is communicated.'³⁸ Regarding the subsequent English decision that considered *Clarence*, Bell J considered that it 'does not undermine the conclusion that the sexual transmission of a disease is not within the expression "infliction of grievous bodily harm" in the 1861 UK Act and its analogues.'³⁹

Noting that the construction of 'infliction of grievous bodily harm' in *Clarence* is an entirely plausible one, her Honour considered that the Court should not depart from this authority.⁴⁰ Indeed, her Honour went on to remark that:

Certainty is an important value in the criminal law. That importance is not lessened by asking whether it is likely that persons would have acted differently had they known that the law was not as it had been previously expounded.⁴¹

³⁴ *Aubrey* (2017) 260 CLR 305, 331–2 [53].

³⁵ *Ibid* 332 [55] (emphasis added).

³⁶ *Offences Against the Person Act 1861*, 24 & 25 Vict, c 100.

³⁷ *Aubrey* (2017) 260 CLR 305, 333–4 [56]–[62].

³⁸ *Ibid* 335 [65].

³⁹ *Ibid* 338 [72].

⁴⁰ *Ibid* 338 [73].

⁴¹ *Ibid*.

Accordingly, her Honour would have allowed the appeal — ordering a verdict of acquittal be entered on the basis that sexual transmission of a disease could not constitute infliction of grievous bodily harm.⁴²

B Recklessness/Maliciousness — Foresight of Possibility vs Probability

The Court was unanimous in their conclusion that the fault element for infliction of grievous bodily harm required foresight of the *possibility* of harm, as opposed to the *probability*.⁴³ The majority detailed their reasoning for this conclusion, with which Bell J agreed — although her Honour noted that, in her view, this issue was not reached due to her dissenting conclusion regarding infliction of grievous bodily harm.⁴⁴

Observing that malice had no clear uniform meaning at common law at the time the relevant New South Wales provisions were enacted,⁴⁵ the Court went on to note that some other Australian jurisdictions, such as Victoria, have required proof of foresight of probability of harm for a grievous bodily harm offence (as opposed to possibility).⁴⁶ However, the Court ultimately held that the approach taken in the NSWCCA case of *R v Coleman*⁴⁷ — in which the Court rejected the Victorian approach of requiring foresight of probability of grievous bodily harm — was correct.⁴⁸ Indeed, the Court noted that foresight of probability (at least at common law) is closely tied to the moral significance of murder, and ‘does not necessarily, if at all, apply to statutory offences other than murder.’⁴⁹

The appellant also made submissions on the basis of recent English decisions which found that it was necessary to show that, where an accused person has foreseen the possibility of harm, it was unreasonable for them to take the risk in proceeding nevertheless. It was submitted that this development regarding recklessness should lead the Court to replace the requirement of foresight of possibility with one of foresight of probability.⁵⁰ The Court rejected this submission on the basis that recklessness is to be balanced against the social utility of particular activities⁵¹ — a task best left to juries.⁵²

⁴² Ibid 338 [74].

⁴³ Ibid 329 [47].

⁴⁴ Ibid 331–2 [53].

⁴⁵ Ibid 326 [41]; see also *ibid* 326–8 [42]–[44].

⁴⁶ Ibid 328 [45]; see generally *R v Campbell* [1997] 2 VR 585.

⁴⁷ (1990) 19 NSWLR 467.

⁴⁸ *Aubrey* (2017) 260 CLR 305, 329 [47].

⁴⁹ *Ibid*.

⁵⁰ Ibid 329–30 [48].

⁵¹ Ibid 330 [49].

⁵² Ibid 331 [50].

IV RAMIFICATIONS — EXTENDING THE SCOPE OF CRIMINAL LIABILITY

*A Ramifications in New South Wales*1 *The Current Version of s 35*

Prima facie, in departing from the authority of *Clarence*, *Aubrey* could be seen as expanding the scope of criminal liability imposed by s 35 in New South Wales to include sexual disease transmission. Indeed, it was for this very reason that Bell J expressed a hesitancy to depart from *Clarence*.⁵³

However, since 2004, when the appellant's relevant conduct took place, the *Crimes Act 1900* (NSW) has been significantly amended — including s 35, the provision providing for the grievous bodily harm offence in question. Accordingly, as it stands now, this New South Wales criminal offence is worded quite differently to the provision examined by the Court in this case. Most notably, the offence provided for in s 35 is now worded in terms of 'caus[ing]' grievous bodily harm (as opposed to 'inflicting'), with a fault element of 'recklessness' (as opposed to 'maliciousness').⁵⁴

This being so, the impact of *Aubrey* upon the interpretation of s 35 as it stands now is somewhat limited. Certainly, one cannot conclude that, due to this case, the current formulation of s 35 has been expanded to include criminal liability for sexual transmission of disease. Indeed, the statute now expressly defines grievous bodily harm as including grievous bodily disease⁵⁵ — meaning *s 35 as it now stands already extends criminal liability to such disease transmission*. In her dissent, Bell J noted this fact, reasoning that such extension of criminal liability was best left to the legislature.⁵⁶

2 *The Historical Version of s 35*

However, it is worth noting that *Aubrey* has certainly had the effect of expanding the scope of criminal liability imposed by the historical version of s 35, which was the subject of this case. This version of s 35 stood largely unchanged until an amendment on 27 September 2007 expressly defined grievous bodily harm to include contraction of disease.⁵⁷ For all trials and appeals regarding relevant conduct that occurred prior to 2007, the criminal liability imposed by s 35 has been similarly expanded by *Aubrey* to include sexual disease transmission. Therefore, only to this limited extent for conduct prior to 2007, *Aubrey* has had the effect of extending criminal liability in New South Wales. One imagines that in practical application, this will have somewhat limited consequences.

⁵³ Ibid 332 [55].

⁵⁴ *Crimes Act 1900* (NSW) s 35.

⁵⁵ *Crimes Act 1900* (NSW) s 4 (definition of 'grievous bodily harm').

⁵⁶ *Aubrey* (2017) 260 CLR 305, 332 [55].

⁵⁷ *Crimes Amendment Act 2007* (NSW) s 3, sch 1 cl 1. Note also that s 35 was further significantly amended in 2012: see generally *Crimes Amendment (Reckless Infliction of Harm) Act 2012* (NSW).

B *Ramifications in Other Australian Jurisdictions*

Turning to ramifications beyond New South Wales, the impact of *Aubrey* on most other Australian jurisdictions is similarly limited. Most Australian jurisdictions now expressly extend criminal liability to transmission of disease, though the exact wording and operation of these provisions varies from state to state. Specifically, the relevant legislation in Northern Territory, South Australia, Victoria and Western Australia already expressly captures disease transmission in their respective broad harm based offences.⁵⁸ This being so, *Aubrey* can have very limited effect on the interpretation of harm offence provisions in these jurisdictions.

However, certain other Australian jurisdictions do not yet expressly extend criminal liability to disease transmission for their broad harm offences. Specifically, the Australian Capital Territory, Queensland and Tasmania.⁵⁹ As such, the departure from *Clarence* in *Aubrey* could be seen to provide a persuasive indication as to the interpretation of the broad harm offences in these jurisdictions.

1 *Australian Capital Territory*

Of these three jurisdictions, only the Australian Capital Territory's broad harm offences use the same language of 'inflicting grievous bodily harm',⁶⁰ as with the historical s 35 examined in *Aubrey*. This similarity in language lends itself to a strong argument that *Aubrey* could be considered persuasive authority that the Australian Capital Territory's grievous bodily harm offences should be interpreted such as to extend criminal liability to sexual disease transmission. Indeed, the author suggests that the High Court is likely to interpret the relevant Australian Capital Territory provisions in this way, should this issue be brought before it.

2 *Queensland and Tasmania*

By comparison, Queensland and Tasmania's grievous bodily harm offences are less similar to the historical s 35. Instead, the relevant provisions respectively refer to 'do[ing]'⁶¹ and 'caus[ing]'⁶² grievous bodily harm, as opposed to 'inflict[ing]'.⁶³ Certainly, one could nevertheless tender a compelling argument that *Aubrey* is

⁵⁸ See *Criminal Code Act* (NT) ss 186, 1A(2); *Criminal Law Consolidation Act 1935* (SA) ss 24, 21 (definition of 'physical harm'); *Crimes Act 1958* (Vic) ss 18, 15 (definition of 'physical injury'); *Criminal Code Act Compilation Act 1913* (WA) ss 297, 1(4)(c).

⁵⁹ See *Crimes Act 1900* (ACT) s 20, dictionary (definition of 'grievous bodily harm'); *Criminal Code 1899* (Qld) ss 320, 1 (definition of 'grievous bodily harm'); *Criminal Code Act 1924* (Tas) ss 172, 1 (definition of 'grievous bodily harm').

⁶⁰ *Crimes Act 1900* (ACT) s 20 (emphasis added).

⁶¹ *Criminal Code 1899* (Qld) s 320.

⁶² *Criminal Code Act 1924* (Tas) s 172.

⁶³ *Crimes Act 1900* (NSW) s 35(1)(b), later amended by *Crimes Amendment Act 2007* (NSW).

persuasive authority to the same effect. However, this distinction in the legislation's language renders the argument somewhat less immediately convincing.

C Signal Regarding Interpretation of Future Provision

The contemporary *direct* implications of this case are somewhat limited. However, *Aubrey* nevertheless yields an informative signal regarding how the High Court will likely approach interpretation of future harm related provisions.

The *Crimes Act 1900* (NSW), along with corresponding criminal legislation in other Australian jurisdictions, will certainly undergo heavy amendment over future years. In departing from *Clarence*, the High Court has demonstrated a clear willingness to extend criminal liability to conduct not causing immediate physical injury, and particularly to disease transmission in harm based offences against the person, even without express inclusion by the legislature. As the legislation surrounding offences against the person develops, *Aubrey* may well prove an invaluable authority in the interpretation of future provisions.

V CONCLUSION

In *Aubrey*, the High Court broadened the scope of criminal liability imposed by a historical version of s 35 of the *Crimes Act 1900* (NSW) — departing from the English authority of *Clarence*. This historical version of s 35 has since been significantly amended, such that it now already expressly extends criminal liability to the same effect. As such, the direct repercussions of the decision in *Aubrey* are rather limited — with the criminal liability imposed by s 35 only being extended for conduct that occurred prior to 27 September 2007. Criminal liability in New South Wales is already expressly extended to the same effect for conduct after 2007 by virtue of legislative amendments.

Nevertheless, *Aubrey* provides a useful and persuasive indication as to how similar provisions in other Australian jurisdictions, and future provisions, would be interpreted by the High Court. Specifically, the High Court's departure from *Clarence* in *Aubrey* demonstrates that immediate physical injury is not necessarily required for harm based offences against the person, but rather extends to the comparatively delayed effects of disease transmission. This notion is one that has largely already been endorsed by Australian legislatures, with corresponding legislative amendments having been implemented in multiple Australian jurisdictions to dispel any doubt to the contrary. Yet, where this is not expressly clear in both current and future Australian criminal legislation, *Aubrey* could well prove instrumental in interpretation.

