Acquired Brain Injury (ABI) / Traumatic Brain Injury

Case Summaries

New South Wales

***Firth v R* [2018] NSWCCA 144** (Wilson J, Simpson AJA and Bellew J agreeing)

Break and enter – cognitive impairment consequent upon brain injury, significant deprivation – sentence manifestly excessive, appeal allowed

- The CCA held the applicant's sentence did not reflect the sentencing judge's finding that mental impairment due to brain injury and background of significant childhood deprivation should ameliorate sentences: **at [50], [62]–[67], [76]; *Bugmy v The Queen* (2013) 249 CLR 571 at [43]–[45]**
- Where an offender's background has been so dysfunctional and deprived such that capacity to exercise sound judgments is impaired, and the level of impairment is worsened by mental illness, general deterrence will have a lesser role: **at [77]–[78], [89]–[90]; *DPP (Cth) v De La Rosa* (2010) 205 A Crim R 1; (2010) 79 NSWLR 1**
- Brain injury age 16 hit by vehicle; forgetfulness, difficulties finding words, concentration, dizziness, unclear thinking: **at [32]–[33]**; Mental health, episodes of uncontrolled rage where often "blacks out", only vague memories of behaviour: **at [39]–[40]**

***Aslan v R* [2014] NSWCCA 114** (Simpson J, Adams and McCallum JJ agreeing)

Sexual assault – prison weighs more heavily due to ABI; special circumstances – no causal link between ABI and offences – causal link between ABI and drug / alcohol consumption

- Sentencing judge took into account that prison would weigh more heavily due to ABI. Special circumstances found: **at [25]–[27], [30], [42]**
- The CCA found the judge did not err in finding no causal link between ABI and offences: **at [36]; *DPP (Cth) v De La Rosa* [2010] NSWCCA 194; (2010) 79 NSWLR 1**. Applicant's extensive criminal record pre-injury does not suggest a connection; post-injury there were significant periods with no, or minor, convictions: **at [44]**
- Judge did accept a causal link between ABI and drug / alcohol consumption. No error finding effect of ABI was limited to applicant being more susceptible to abusing drugs and alcohol due to less intellectual capacity to refuse: **at [26], [36], [41]**
- Brain injury from car accident: **at [10]**

***Connelly v R* [2009] NSWCCA 293** (RA Hulme J, McClellan CJ at CL and Price J agreeing)

Inflict GBH with intent – ABI – prison more onerous; special circumstances; causal connection – reduced moral culpability

- Significant brain injury from childhood accident resulting in mild intellectual impairment
- Sentencing judge found: Offence linked to mental illness exacerbated by continuing abuse of drugs; Causal connection between mental health and offence reduced the importance of general deterrence: **at [20]**; Special circumstances based on ABI would make prison more onerous: **at [24]**; Impaired intellectual functioning (inability to control temper; extreme outbursts of anger) reduces moral culpability; Offence less objectively serious than otherwise would have been: **at [35]**
- [CCA determined issue as to provocation only. Appeal dismissed].

Victoria

***Luchian v R* [2019] VSCA 145** (Maxwell ACJ and Beach JA)

Armed robbery

- Aged 25; acquired brain injury from assaults and car accidents; impaired mental functioning; deprived background; institutionalised both by way of care organisations as a child, sentences while a young child or youth and sentences as an adult; substance abuse
- In the absence of some step or process designed to break the cycle of the appellant's offending, the community will continue to require protection from his offending indefinitely. Moreover, the appellant's deprived background must be given full weight: **at [54]; *Bugmy v The Queen* (2013) 249 CLR 571**
- Appeal allowed. New sentence of 19 months imprisonment with CCO of 3 years imposed

***R v Finlayson* [2008] VSCA 50** (Buchanan JA, Vincent and Ashley JJA agreeing)

Historical indecent assaults – "brain damaged man" should not have been incarcerated for offences committed more than 30 years ago: ***at [13]***

- Court accepted neuropsychologist's opinion of causal relationship / significant role of brain injury and commission of offences: **at [11]**; ***Verdins* (2007) 16 VR 269**
- Inappropriate vehicle for general deterrence; applicant has been rehabilitated; mental and physical ill health likely to render prison more onerous: **at [12]**
- Brain injury aged 14, fell from racehorse

***Gray v R* [2010] VSCA 312** (Nettle JA, Tate JA agreeing)

Armed robbery – ABI – significantly mitigated moral culpability – shorter non-parole period – substantial period of supervised treatment

- ABI due to motor accident followed by increased drug use and dependence. Psychotic episode leading to commission of offences
- Mental state deficiencies significantly mitigated moral culpability; and reduced need for denunciation, general deterrence and punishment. Likely effects of imprisonment and mental state also justify a more merciful and directed sentence: **at [14]–[16]**; ***Verdins* (2007) 16 VR 269**
- A shorter non-parole period is imposed. Appellant's mental state and need for a substantial period of supervised treatment is more just, and would more probably deter re-offending: **at [22]–[24]**

***Tannous v R* [2017] VSCA 91** (Redlich and Ferguson JJA)

Arson, robbery, assault – ABI and impaired mental health reduced moral culpability – causal link

- Commission of offences (at least in part) causally linked to mental impairment and drug abuse a key contributor to offending: **at [67]**
- Imprisonment will weigh more heavily and may have a significant adverse effect on mental health: **at [47]; *Verdins* (2007) 16 VR 269**
- General and specific deterrence should be given less weight: **at [47]**. Length of term of imprisonment moderated: **at [48]**

***Dennis v R* [2017] VSCA 251** (Kyrou and Hansen JJA)

Child pornography; failure to comply with reporting obligations under Sex Offender Registration Act 2004 – brain injury taken into account on reporting offence – not relevant to child pornography offences

- Traumatic brain injury age 16, motorbike accident
- Appellant had difficulty processing information and organising himself with a view to complying with legal obligations, and learning from mistakes. This explains why he failed to comply with his SORA reporting obligations. His moral culpability in relation to the breach of those obligations was thus moderated and specific deterrence had limited application: **at [114]**
- Moral culpability in relation to child pornography offending was not affected because expert evidence was that the appellant was able to understand that what he was doing was wrong. No causal link between ABI and child pornography: **at [115]**; ***Verdins* (2007) 16 VR 269**

Australian Capital Territory

***R v Flowers* [2014] ACTCA 13** (Ross J, Refshauge and Penfold JJ agreeing)

Crown appeal – recklessly inflict GBH, Aggravated robbery – ABI due to polysubstance abuse – intoxication; ABI associated with disinhibition – ABI relevant on sentence; shorter non-parole period – Crown appeal allowed

- ABI affecting frontal lobes likely due to history of severe polysubstance abuse: **at [61]**
- Expert psychiatric report stating: ABI relevant to commission of offences. At time of offences, acute intoxication was associated with impaired capacity to think clearly or make calm rational choices, and judgment was impaired. There was a causal association between intoxication and offending. The respondent was clearly disinhibited, and ABI is associated with a marked predisposition to disinhibition: **at [5], [47]–[48]; *Verdins* (2007) 16 VR 269**
- Crown appeal allowed. Shorter non-parole period than otherwise would have been imposed having regard to factors including ABI: **at [3], [73]**

***R v Dimitrov* [2018] ACTSC 367** (Mossop J)

Aggravated burglary

- Take into account youth and that brain injury likely to have affected decision-making capacity and hence culpability for offending conduct. Significant head injury clearly does not make it any easier for offender to lead law-abiding life. Significant criminal history, difficult background, limited education, less suitable vehicle for general deterrence: **at [21]**