

# Social Exclusion and Racism

## Case Summaries

[R v Lewis \[2014\] NSWSC 1127](#) (Rothman J)

*Murder – Aboriginal male adopted by Caucasian parents - background of social exclusion – consideration of Baumeister studies on effect of social exclusion during childhood – application of Bugmy and Fernando to ‘non-traditional’ case*

- Aboriginal male adopted by Caucasian parents at 6 weeks – informed of adoption at age nine after comment at school – became rebellious – subjected to racist comments impacting schooling – sought and became easily influenced by other Aboriginal youth and commenced antisocial behaviour – became involved in drugs, alcohol, violence, abuse and criminal activity: **at [26]-[31]**
- Applied Fernando and Bugmy to ‘non-traditional’ case – offender relied upon social exclusion not exposure to physical and alcohol abuse in home environment: **at [37]-[38], [43]**
- Considered academic writing on effect of social exclusion during childhood as suffered by offender:

[40] In a most helpful submission, aided by an equally helpful Crown submission, Mr Bruce SC cited some passages from the Baumeister studies. The Crown acknowledged its possible application, at page 7 of its supplementary Crown submissions, in the following terms:

"It is accepted that the evidentiary material provides the court with some bases to conclude that the offender did suffer social exclusion in his formative years. From the Baumeister Study it would appear that the offender's reaction to social exclusion by connecting with his cultural peers and resorting to an antisocial lifestyle marked by alcohol and drug abuse, violence and criminality was expected and possibly inevitable."

[41] The thesis of Professor Baumeister can be summarised in the following passage and I apologise for citing it at length. In R.F. Baumeister & C.N DeWall, "The Inner Dimension of Social Exclusion: Intelligent Thought and Self-Regulation Among Rejected Persons" (2005) *Journal of Personality and Social Psychology*, 88, 589-504, the authors remarked:

"It is easy to propose how people ideally or optimally would respond to social exclusion. They ought to redouble their efforts to secure acceptance. Toward that end, they should reduce their aggressive and antisocial tendencies and increase prosocial behaviour. They should improve at self-regulation so as to perform more socially desirable actions. And even if improved social acceptance is not a promising option, they ought at least to become more thoughtful and intelligent and should avoid self-defeating behaviours, so as to fare better on their own if necessary. Yet our laboratory studies have found the opposite of all of these to be closer to the truth.

Initially we thought that emotional distress would be the central feature of the impact of social rejection, and all behavioural consequences would flow from this distress. This too has been disconfirmed. Across many studies we have found large

behavioural effects but small and inconsistent emotional effects, and even when we did find significant differences in emotion these have failed to mediate the behaviours. Indeed, the sweeping failure of our emotion mediation theories has led us to question the role of emotion in causing behaviour generally (but that is another story).

Self-regulation and cognition, instead of emotion, have emerged from our most recent data as the most important inner processes to change in response to social exclusion. Rejected or excluded people exhibit poorer self-regulation in many spheres. They also show impairments in intelligent thought, though these are limited to forms of thought that are linked to self-regulation (that is, thinking processes that depend on effortful control by the self's executive functioning).

Nonetheless, the findings from this work have helped shed light on both the inner and outer responses to exclusion. They help illuminate why many troubled individuals may engage in maladaptive or seemingly self-destructive behaviours. They may also have relevance to the responses of groups to perceived exclusion from society as a whole. Although there are some exceptions, such as the intellectually vigorous culture maintained by Jews during the centuries of discrimination and ghettoization, many groups who felt excluded or rejected by society have shown patterns similar to those we find in our laboratory studies: High aggression, self-defeating behaviours, reduced prosocial contributions to society as a whole, poor performance in intellectual spheres, and impaired self-regulation. Our findings suggest that if modern societies can become more inclusive and tolerant, so that all groups feel they are welcome to belong, many broad social patterns of pathological and unhealthy behaviour could be reduced."

[Kentwell v R \(No.2\) \[2015\] NSWCCA 96](#) (Bathurst CJ, Rothman J in separate judgment, McCallum J agreeing)

*Sexual offences – relevance of background of social exclusion and racism – Aboriginal male adopted by white family – felt like “a black fella in a white fella’s world” – reference to Baumeister studies on social exclusion – application of Bugmy and Fernando to ‘non-traditional’ case*

- Aboriginal male adopted by non-Aboriginal family at 12 months – felt like “a black fella in a white fella’s world” – trouble at school – grew up ignorant of cultural heritage – early alcohol abuse due to school experience – asked to leave home due to drinking problem: **at [73]-[74]**
- On re-sentence accepted that ***Fernando*** and ***Bugmy*** considerations could apply to ‘non-traditional’ cases involving social exclusion as experienced by offender: **at [13]** per Bathurst CJ, **at [88]-[94]** per Rothman J.
- Reference to studies which establish link between social exclusion and discrimination and aggression and anti-social behaviour: **at [90]-[94]** per Rothman J

[90] I proceeded in *Lewis* to rely upon studies in the United States of America relating to the effect on behaviour of social exclusion and discrimination. It is unnecessary to reiterate those comments or refer in detail again to the studies.

[91] Those studies disclose, somewhat counter-intuitively, that social exclusion from the prevailing group has a direct impact and causes high levels of aggression, self-defeating behaviours, and reduced pro-social contributions to society as a whole, poor performance in intellectual spheres and impaired self-regulation. While intuitively, for those who have not themselves suffered such extreme social exclusion, the response to exclusion would be greater efforts to secure acceptance, the above studies make clear that the opposite occurs.

[92] Thus, a person, such as the appellant, who has suffered extreme social exclusion on account of his race, even from the family who had adopted him, is likely to engage in self-defeating behaviours and suffer the effects to which earlier reference has been made. This is how the appellant has been affected.

[93] Circumstances such as that are akin to a systemic background of deprivation and are a background of a kind that may compromise the person's capacity to mature and to learn from experience: *Bugmy* at [41] and [43]. As a consequence, this background of social exclusion will, on the studies to which detailed reference has been made in *Lewis*, explain an "offender's recourse to violence...such that the offender's moral culpability for the inability to control that impulse may be substantially reduced": *Bugmy* at [44].

[94] The studies by Professor Baumeister, reference to which is contained in the judgment in *Lewis*, make clear that such extreme social exclusion will likely result in anti-social behaviour and most likely result in criminal offending. However, in each case, there must be evidence to suggest the application of these principles and the effect of the exclusion. In this case, the evidence in relation to the appellant of that factor is substantial.

- Accepted evidence of impact of social exclusion on offender, with evidence of prospects of rehabilitation justify lesser sentence - balanced against seriousness of offending: at [98]-[99]

### **BS-X [2021] ACTSC 160** (Loukas-Karlsson J)

*Motor vehicle and burglary offences – juvenile Aboriginal offender with severe childhood trauma – individual report supported by references to Bugmy Bar Book chapters and Significance of Culture to Wellbeing, Healing and Rehabilitation Report – application of Bugmy principles*

- Psychological report described 15y old Wiradjuri man with complex developmental trauma – born to drug addicted 15y mother and removed into non-indigenous foster care at 12 months – exposed to mother's drug use throughout life – experienced younger brother's removal from mother's care and placement with different carer due to mother's drug use – early substance abuse – difficult schooling period – disconnection with cultural identity - multiple significant losses and grief – externalised grief, loss and anger through maladaptive techniques - profound trauma resulting in mental health and behavioural issues
- Psychological report supported by references to multiple **Bugmy Bar Book** chapters: at [56], [58], [62], [63]
- Further reference to **Significance of Culture to Wellbeing, Healing and Rehabilitation Report** with emphasis on importance of culturally appropriate treatment to facilitate rehabilitation – importance of individual rehabilitation to both individual and community protection: at [81]-[85]

- Reference to comment in *Hoskins* [2021] NSWCCA 169 that childhood deprivation does not need to be profound at [81]-[85]
- Application of *Bugmy* principles

***R v Rossi-Murray* [2019] NSWSC 482** (Rothman J)

*Manslaughter – considered background and impact of social exclusion – reference to Baumeister studies – institutionalisation – relevant to special circumstances*

- Aboriginal offender with long history of violence and incarceration – father a drug addict and often incarcerated – exposed to family violence – no appropriate male role model growing up - exposed to bullying and racism at school – behavioural problems including ADHD – early substance abuse – institutionalised: at [40]-[59]
- Psychologist report suggested ‘history of responding with aggression to perceptions of marginalisation extends from his experiences of social exclusion at school due to his Aboriginal heritage’ – response exacerbated by anxiety, substance abuse and gaol experience: at [60]
- Reference made to Baumeister studies and *Lewis* [2014] NSWSC 1127 – applied approach to social exclusion confirmed in *Kentwell (No 2)* [2015] NSWCCA 96: at [61]-[62]
 

[66] Nevertheless, his earlier offending, this offence for which I must pass sentence, and the subsequent offence for violence in gaol, all evidence the accuracy of the Baumeister studies and reflect the kind of reaction that Professor Baumeister suggested would, almost inevitably, flow from the kind of social exclusion that the offender has suffered.
- Found special circumstances in the need to address the issues associated with social exclusion and the need to overcome the antisocial behaviour caused by such exclusion: at [76]

***R v Hookey* [2018] NSWCCA 147** (Rothman J, Hoeben CJ at CL and Button J agreeing)

*Wound with intent to cause grievous bodily harm – Crown appeal –social exclusion and disempowerment linked to prevalence of environment of violence, alcohol and drugs in Aboriginal community – importance of treatment not longer incarceration*

- Unprovoked stabbing during road rage incident – background of ‘social deprivation and substantial disadvantage’ including exposure to violence and alcohol abuse: at [14]
 

[61] Persons of Aboriginal descent are not entitled to any greater leniency than any other person. Nevertheless, as the High Court stated in *Bugmy* the social exclusion and disempowerment of persons of Aboriginal descent and of Aboriginal communities seems to have made an environment of violence, alcohol and drugs more prevalent in the Aboriginal community than in the total population. The answer is not longer incarceration. The answer lies in the treatment that neutralises or reverses the effect of social exclusion, disempowerment, discrimination and violent environment. It is fair to say that the respondent has taken steps towards that end.
- Sentence imposed outside range and manifestly inadequate but appeal dismissed in view of offender’s insight into offending and rehabilitation: at [62], [68]

[R v Johnson \(No.5\) \[2017\] NSWSC 1169](#) (Button J)

*Manslaughter – background included racism at school – consequences of tragic elements of childhood – reflected in sentence*

- Difficult childhood for aboriginal offender – father suffered from poor mental health culminating in suicide – frequent moves disrupted schooling – suffered racial abuse at school responding with anger and fists – sexual abuse – combination of these factors led to mental health problems and long term substance abuse – also resulted in ‘ young man who responded to racism forcefully becoming a chronically violent adult’: **at [29], [30]**
- Sentence to reflect the ‘adverse aspects of the life of this Aboriginal offender ... without for a moment diminishing the value to be accorded by the criminal justice system to the life of the similarly disadvantaged Aboriginal man’: **at [62], [63]**

[R v Sharpley \[2014\] NSWDC 253](#) (Yehia SC DCJ)

*Aggravated break, enter and steal offence - sentencing of offender from disadvantaged rural Aboriginal community – evidence of socio-economic conditions of community – relevance to understanding moral culpability of offender – background of deprivation reduced moral culpability*

- Young male from rural Aboriginal community – parents separated when offender young due to domestic violence – continued exposure to father’s alcohol abuse and violence – learning difficulty and barely literate – little employment: **at [26]-[31]**
- Evidence of social-economic conditions of community provided by Aboriginal Legal Service field officer— referred also to findings of the Walgett Gamilaroi Working Community in 2005 – issues include: widespread violence and alcohol abuse – severe deprivation – racism and stereotyping – inequalities and lack of opportunity – lack of resources and living conditions – welfare mentality – difficulty accessing services – low levels of literacy and numeracy – low student retention and high truancy rates – high levels of criminal and anti-social activity - unemployment: **at [22]-[23]**
- Evidence of extreme deprivation, substance abuse and violence within community relevant and essential to understanding and assessing moral culpability of offender:

[25] The level of substance abuse and violence coupled with the lack of opportunity gives rise to a sense of hopelessness and disempowerment amongst some members of the local community that cannot be ignored when assessing the moral culpability in the individual’s case. This offender’s history of deprivation and exposure to alcohol abuse, violence and the lack of opportunity to thrive in such an environment is intrinsically connected to his current predicament. ...

[40] The uncontested evidence before me is that the community from which the offender comes and in which he has been raised has experienced an appalling degree of deprivation over a long period of time. This offender is a product of that community and it is therefore necessary for me to assess his moral culpability, bearing in mind the particular socio-economic factors that exist in his community that have inevitably had an impact upon him. Failure to do so would be a failure to fulfil the principle of individualised justice. ...

...

[49] Prolonged and widespread social disadvantage has produced a community so demoralised and alienated that many within it, like this offender, have succumbed to alcohol abuse, criminal misconduct and a sense of hopelessness. That background of disadvantage and of deprivation may impact upon the individual so deeply and so broadly that it serves to shed light on matters such as, for example, the offender's recidivism.

### **Obiter Judgements in Neal**

[Neal v R \[1982\] HCA 55, \(1982\) 149 CLR 305](#) (Murphy J and Brennan J in separate judgements, Gibbs CJ and Wilson J allowing appeal on procedural basis)

*Appeal against sentence of imprisonment for unlawful assault – appeal allowed on basis of procedural unfairness – comments made by Murphy J and Brennan J as to relevance of ‘race relations’ as mitigating factor*

- Aboriginal Chairman of the Council at an Aboriginal Community Reserve in North Queensland sentenced to imprisonment for spitting at the white manager of the shop on the Reserve – on appeal by offender Court of Appeal increased sentence - appeal to High Court allowed on basis of failure to give appellant opportunity to withdraw appeal before increasing sentence
- In an obiter judgment Murphy J referred to the case as a ‘race relations case’ and described the offender’s ‘deep sense of grievance at the paternalistic treatment of white authorities’ on the reserve as well as referring to the offender’s sense of powerlessness and exclusion: **at pp.315-319**
- In a separate obiter judgment Brennan J concluded the ‘emotional stress’ resulting from the ‘paternalistic system of life on the reserve’ should have at least been considered as a possible mitigating factor: **at pp.324-5**

### **Relationship Between Racial Vilification and Borderline Disability Disorder**

[R v Dalton \[2005\] NSWCCA 156](#) (Smart AJ, Santow and Hislop JJ agreeing)

*Manslaughter of young child – history of family violence and racial vilification at school contributed to Borderline Disability Disorder*

- Childhood included violence at hands of father and racial vilification at school – offender responded to vilification by self-harming: **at [18]-[21]**
- Combination of Aboriginality, racial vilification at school and childhood experiences led, in part, to development of Borderline Personality Disorder: **at [44]**

[45] Dr Lloyd was relying on principles formulated by Dr Linehan in his published works, *Skills Training for Treating Borderline Personality Disorder and Cognitive Behavioural Treatment of Borderline Personality Disorder*, the Guildford Press New York. Dr Lloyd applied those principles to this case when he wrote:

"Deemed self invalidation. Dennis' early childhood experiences were fragmented invalidating and dangerous. All through his childhood he experienced racial vilification at school."

[46] Dr Lloyd expressed the view that the conduct of the offender towards the child, namely, the months of physical harm, with the harm becoming lethal for the child, "describes a set pattern of behaviour that contributes to describing Dennis' personality". Dr Lloyd saw the racial vilification as playing a part in the onset of the Borderline Personality Disorder.

- Accepted there was no error in sentencing judge applying *Fernando* principles: **at [48]**
- Despite subjective mitigating factors sentence found to be manifestly inadequate: **at [68]**