Note - *Zaburoni v The Queen* [2016] HCA 12: A Reaffirmation of the High Threshold of Proof Necessary to Establish Specific Intent

HANNAH GREY*

I INTRODUCTION

Zaburoni v The Queen ('*Zaburoni*')[1] presented the High Court with the opportunity to clarify the definitional scope of specific intent for the purposes of establishing the charge of intent to cause grievous bodily harm or transmit a serious disease pursuant to s 317(b) of the *Criminal Code 1899* (Qld) ('the *Code*').

This note identifies three graded tiers of intent that were considered by the plurality of Kiefel, Bell and Keane JJ in *Zaburoni* in relation to specific intent as an element of s 317(b). Nettle J in a separate majority judgment provided illustrative reasoning as to the second tier. The High Court unanimously held that intent to cause harm could not be inferred from the appellant's conduct, and instead his conduct constituted mere recklessness. This case note submits that this reaffirmation of such a high threshold is an undesirable development in Australian criminal law because it immunises similar offenders from prosecution without direct evidence of purpose or malice.

II FACTUAL BACKGROUND

The appellant, Mr Godfrey Zaburoni, was infected with the human immunodeficiency virus ('HIV') and engaged in unprotected sex with his partner in the course of their twenty-one month relationship. Mr Zaburoni was diagnosed in 1998, and met his partner in 2006. At no time did the appellant inform the complainant that he was HIV-positive. Mr Zaburoni also made false assertions about his HIV-positive status when asked by the complainant and the police.

In 2013 the appellant was convicted in the District Court of Queensland of unlawfully transmitting a serious disease to another with intent to do so under s 317(b) of the *Code*. The offence carries a maximum penalty of life

---

* Final year BA-LLB student at the University of Tasmania and Co-editor of the *University of Tasmania Law Review* in 2016. The author wishes to thank Dr Helen Cockburn for her assistance in discussing matters raised in this case note. The author is responsible for any errors contained herein.

1 [2016] HCA 12 (6 April 2016).

imprisonment. It was not in issue on appeal to the High Court that to transmit HIV to another person is to occasion grievous bodily harm to that person contrary to s 320, a less serious offence.[2] At trial, the accused pleaded guilty to this alternative charge under s 320 in the hope of discharging the higher indictment under s 317(b). The prosecution did not accept this and so both offences went to trial; the jury returned a guilty verdict pursuant to s 317(b).

On 18 April 2013, Dick DCJ sentenced the appellant to a term of nine and a half years' imprisonment. Mr Zaburoni appealed against his conviction to the Court of Appeal of the Supreme Court of Queensland.

A *Procedural History: Court of Appeal*

Both parties in the Court of Appeal cited *R v Willmot (No 2)*[3] as authority for the settled proposition that 'actual intent' must be proved in order to establish liability under s 317(b). Thus, the jury was required to make a subjective assessment of the accused's intention based on inferences drawn from the appellant's objective conduct.[4]

The majority in the Queensland Court of Appeal held that intention was satisfied for the purposes of s 317(b). Gotterson and Morrison JJA found that it had been open to the jury to be satisfied beyond reasonable doubt that the appellant intended to transmit HIV to the complainant, in circumstances in which he had engaged in frequent acts of unprotected sexual intercourse with his partner while knowing that he was HIV-positive. Gotterson JA, writing the leading majority reasons, observed that this conduct 'defied description as mere recklessness as to the risk of transmission'.[5]

B *High Court: Special Leave Granted and Appeal Allowed*

In February 2016 the High Court granted the appellant special leave and on 6 April the Court held that where proof of intention to produce a particular result is made an element of liability for an offence, the prosecution is required to establish that the accused meant to produce that result by his or her conduct. Proof of intention was subsequently not established; the appellant was alternatively found guilty under s 320.

III SPECIFIC INTENT: THREE TIERS

The High Court plurality judgment of Kiefel, Bell and Keane JJ can be characterised as identifying three graded tiers that will be determinative of

---

2 The offence carries a maximum penalty of 14 years' imprisonment.

3 [1985] 2 Qd R 413 *('Willmot').*

4 Eric Colvin, John McKechnie and Jodie O'Leary, *Criminal Law in Queensland and Western Australia: Cases and Materials* (Sydney, Lexis Nexis, 2005) 66–8.

5 *R v Zaburoni* (2014) 239 A Crim R 505, 515 [46].

whether an accused's conduct meets the threshold of specific intent pursuant to s 317(b). For the purposes of this case note, this reasoning has been divided into three tiers:

1. Specific intent established through purpose or desire;
2. Specific intent established in circumstances where an accused is aware that their conduct will certainly cause harm; and
3. Specific intent not established where conduct constitutes recklessness.

A *First Tier: Specific Intent through Purpose or Desire*

The plurality reasoned that specific intent is established where it could subjectively be inferred that an accused meant to produce a particular result. The plurality endorsed the use of the terms 'purpose' and 'desire' when characterising such specific intent,[6] reasoning that 'intention generally does involve desire'.[7] Thus the plurality rejected Connolly J's assertion in *Willmot* that the notion of desire is not involved in proof of intention. However the plurality conceded in obiter dicta that, in limited circumstances, a direction may be given to divorce the issue of desire.[8] On this point Nettle J disagreed with the plurality, reasoning that intention could be established whether or not the accused desired to cause harm.[9] The plurality discounted the prosecution's reference to 'motive' when referring to specific intent, reasoning that motive describes the reason that prompts the formation of intent.[10]

In the Queensland Court of Appeal case of *R v Reid*,[11] specific intent pursuant to s 317(b) was established because the inference of intent was based on evidence that the accused entertained malice towards the complainant, thus having a desire to cause harm.[12] In *Zaburoni*, the plurality correctly distinguished *Reid* on the facts, as the accused in *Reid* stated that his HIV was equivalent to 'having a loaded gun', while the accused in *Zaburoni* told the complainant's friend that he withheld knowledge of his HIV-positive status because he 'didn't want to ruin her life'.[13]

It follows that the plurality did not find that the appellant had a purpose or

---

6 *Zaburoni* [2016] HCA 12 (6 April 2016) [19].
7 Ibid [18].
8 Ibid [18].
9 Ibid [66].
10 Ibid [17].
11 [2007] 1 Qd R 64 ('*Reid*').
12 Ibid [13].
13 *Zaburoni* [2016] HCA 12 (6 April 2016) [46] (Kiefel, Bell and Keane JJ).

desire to infect the complainant with HIV.

B *Second Tier: Specific Intent Established through Certainty of Consequences*

The plurality confirmed that specific intent for the purpose of s 317(b) could be established through an inference drawn from an accused's awareness of the inevitable consequences of their conduct, but this inference was not made out on the facts of *Zaburoni*.[14] This finding, referred to here as the 'second tier' of specific intent, falls below the higher threshold outlined above.[15] The plurality reasoned that

> where an accused is aware that his or her conduct will certainly produce a particular result, the inference that the accused intended, by engaging in that conduct, to produce that particular result, is compelling.[16]

This line of reasoning echoes the Law Commission of England and Wales Report that recommended the meaning of intention include foresight of virtual certainty.[17]

1 *Awareness of Risk*

This secondary threshold is partially supported by the plurality's acceptance of Connolly J's reasoning in *Willmot*.[18] Thus the plurality affirmed Applegarth J's dissenting judgment in the Court of Criminal Appeal.

Connolly J in *Willmot* affirmed the ordinary and natural meaning of intention: 'to have in mind'.[19] However, Connolly J then upheld the requirement for 'direct evidence of the accused's awareness of death or grievous bodily harm as the probable result of his act' for his Honour's definition to be satisfied.[20] In effect this raises the threshold of intent beyond the ordinary definition as expounded by Connolly J.[21] The plurality, while noting the 'evident tension' of Connolly J's inferential leaps, accepted the validity of Applegarth J's application of *Willmot* to the extent that evidence of awareness, 'taken with other evidence, may support a conclusion that the person intended to produce that harm'.[22] However

---

14 Ibid [44].

15 However, this second tier is higher than the common law standard of intent expounded in *R v Crabbe* (1985) 156 CLR 464, in which the reckless murder test was satisfied if the accused was aware that their conduct would *probably* result in death.

16 *Zaburoni* [2016] HCA 12 (6 April 2016) [15].

17 Law Commission (England and Wales), *A New Homicide Act for England and Wales?* (Consultation Paper No 177, 2005) [4.6].

18 [1985] 2 Qd R 413, 418.

19 Ibid 418.

20 Ibid 419.

21 [1985] 2 Qd R 413, 419.

22 *Zaburoni* [2016] HCA 12 (6 April 2016) [10].

when considered in isolation without further corroborating evidence, awareness of risk merely equates to recklessness.[23]

Gageler J did not similarly endorse the application of *Willmot* to any degree, thus disagreeing with the plurality's recognition of a second tier of specific intent: 'the intention to be proved was an actual subjective intent to achieve that result as distinct from awareness of the probable consequence of his actions'.[24] Nettle J did not explicitly address the point of awareness but agreed with the orders of the majority.

Therefore, *Zaburoni* confirms that a finding of awareness, in its own right, does not sufficiently establish specific intent to the requisite degree needed to satisfy the s 317(b) offence. However, when coupled with other evidence, awareness of risk might satisfy this second tier of specific intent for the purposes of s 317(b).

2 *Awareness of Risk Inferred From Lies*

The accused's awareness of risk was subjectively inferred by the plurality from the lies that the accused told his partner about his HIV positive status, before and during their sexual relationship. This was compounded by the accused's lies to the police about the number of times he and his partner had engaged in unprotected sexual intercourse. However, the plurality, like the Court of Appeal, reasoned that lies alone were not sufficient to justify drawing the inference of intention.[25] Nettle J in contradistinction reasoned that lies may support an inference of intention with respect of the second tier.[26]

3 *Statistical Risk Does Not Establish Certainty of Conduct*

The plurality found that this second tier of specific intent was not satisfied through expert evidence of the statistical risk of HIV transmission. Instead it is the accused's understanding of that risk that is material. While the plurality did not further extend this reasoning, an inference could be made that even if it could be proved that the accused did have an understanding of the statistical likelihood of HIV transmission, the expert evidence provided that there was a 14% risk of transmission in the context of the accused's relationship lasting twenty-one months.[27] As such, this statistical risk may not be enough to establish certainty of conduct for the purposes of the second tier of specific intent.[28] The plurality found that the accused's previous access to medical advice from several doctors in 1998 established only awareness of risk.[29] As discussed above, awareness of risk does not

---

23 Ibid [42] (Kiefel, Bell and Keane JJ).
24 Ibid [55].
25 Ibid [58].
26 Ibid [70].
27 Ibid [62].
28 Ibid [62].
29 Ibid [41].

establish specific intent unless coupled with other evidence.

4 *Nettle J: Providing Clarity on Second Tier*

Nettle J's separate judgment provides welcome guidance as to the scope of the second tier of specific intent. Nettle J distinguished probability of harm where it is proved that an accused foresaw that his or her actions would have an inevitable or certain consequence: 'it logically follows that the accused intended to bring about that consequence'.[30] Nettle J provides cogent examples to exemplify his reasoning, characterising his separate majority judgment as instructive and illuminating for the elusive second tier of specific intent.

5 *Frequency*

The plurality concluded the only rational inference that could be drawn regarding frequency of conduct was that the appellant engaged in frequent unprotected sexual intercourse for enhanced sexual gratification. It could not from the facts be concluded that the appellant intended to cause harm. The plurality's careful emphasis on the facts suggests that a different outcome may eventuate if the frequency went so far as to suggest intention, potentially if paired with positive indications of specific intent like in *Reid*.

C *Third Tier: Recklessness: Zaburoni on High End of Spectrum*

The plurality's principal finding was that the appellant's conduct constituted callous recklessness and accordingly Mr Zaburoni was not guilty of the s 317(b) offence. This was despite the appellant's conduct falling on the high end of the recklessness spectrum because the appellant demonstrated 'callous indifference' due to his failure to take antiretroviral medication and monitor his condition, and for his false representations towards the complainant about his HIV-positive status.

This reasoning aligns with Andrews AJ's comments in *Kanengele-Yondjo v Regina*.[31] In that case, the accused was charged pursuant to the common law equivalent of s 317(b), and was held to have 'a gross, callous and reprehensible disregard for the health and welfare of the victims'.[32]

IV IMPLICATIONS

A Specific Intent in Legal Contexts

Zaburoni represents the increasingly technical approach taken when construing the definitional scope of specific intent in codified Australian

---

30 Ibid [66].
31 [2006] NSWCCA 354 (16 November 2006) ('*Kanengele-Yondjo'*).
32 Ibid [15].

jurisdictions.[33] This decision effectively undermines Connolly J's reasoning in *Wilmot* that 'there is no uncertainty in relation to the term "intent" in the Queensland *Code*'.[34] It is clear that the collective method taken by the prosecution in *Zaburoni*, consisting of an evidentiary medley of facts, is an inadequate approach to establish specific intent. Instead, intent must be inferred from specific evidence of an accused's purpose or desire to produce a particular result.

Arguably, *Zaburoni*'s narrow construction of specific intent has detrimental consequences for victims and is in opposition to broader public opinion.[35] Andrew Hemming highlights that in England,[36] s 317(b)'s parallel provision is s 20 of the *Offences Against the Person Act 1861* (UK), which only requires proof of recklessness. Legislative reform to include recklessness under the umbrella of s 317(b) would subsequently align with the UK approach.

Nettle J's analysis of the second tier of specific intent, in its juxtaposition to the plurality's reasoning, offers direction on this ambiguous area of law. As such, Nettle J's clarification regarding the second tier in *Zaburoni* is characterised as a high watermark in Australian specific intent jurisprudence and consequently offers clear guidance to trial judges and appellate courts.

B Shifting Jurisdictions – Common Law and Code Inconsistency?

It has been suggested that *Zaburoni*'s narrowed construction of specific intent gives rise to further inconsistency between codified and common law jurisdictions.[37] As the common law principles of 'foreseeability, likelihood and probability' do not assist in establishing intention pursuant to s 317(b), arguably the codified interpretation imports a higher standard for establishing intent. Additionally, in contradistinction to State jurisdictions, the Commonwealth Code provides that recklessness may satisfy the requirement of specific intent.[38]

However, common law prosecutions for HIV transmission have also failed

---

33 *Turner v R* [2004] WASCA 127 (11 June 2004) [23].

34 *Willmot* (1985) 18 A Crim R 42, 46.

35 Tracy Bowden and Kerry O'Brien, 'Man Jailed for Spreading HIV' *ABC* (online) 6 December 2005 <http://www.abc.net.au/7.30/content/2005/s1524350.htm>.

36 Andrew Hemming, 'Reasserting the Place of Objective Tests in Criminal Responsibility: Ending the Supremacy of Subjective Tests' (2011) 13 *University of Notre Dame Australia Law Review* 69, 76.

37 Flynn Rush, 'Intention and Recklessness – The Need for Law Reform in Light of Zaburoni?' *Linkedin Pulse* (online) 6 April 2016 <https://www.linkedin.com/pulse/intention-recklessness-need-law-reform-light-zaburoni-flynn-rush>.

38 See, eg, *Criminal Code 1995* (Cth) s 115.1(d).

to establish intent pursuant to the equivalent charge of s 317(b).[39] As such, *Zaburoni*'s impact is not merely confined to codified jurisdictions. For example, in *Kanengele-Yondjo,* the prosecution was unable to prove the requisite intent to secure a conviction. Instead, the accused was convicted pursuant to the lesser charge; the six-year sentence handed down received extensive criticism. Stephen Odgers SC stated that:

> transmitting a life-threatening disease…where he deceives the women… the maximum penalty of seven years just really isn't sufficient to reflect that culpability.[40]

However, comparatively, the sentence handed down in *Kanengele-Yondjo* exceeded the revised sentence the appellant in *Zaburoni* received – five years wholly suspended under the lesser offence of s 320.[41] Thus, *Zaburoni* renews debate regarding the difficulties of establishing intent across both codified and common law jurisdictions. Linked to this inadequacy is the culpability disparity between s 317(b) and s 320. This may give rise to legislative reform of s 317(b), possibly by following the UK approach, or by adopting the same terminology as the Commonwealth Criminal Code.

C *Policy Implications*

Criminal prosecution of HIV transmission in Australia is a rare occurrence.[42] *Zaburoni* sends a warning message to DPP offices about the high threshold of establishing specific intent, suggesting that s 320 and its equivalents may be considered the only viable alternative in the absence of malice evidenced in *Reid*.

Zaburoni confers protection on HIV sufferers and HIV advocacy groups welcome the decision. This decision stands for the proposition that it cannot be inferred that a HIV sufferer engaging in unprotected sexual intercourse intended to transmit HIV. Advocates argue that severe sentences can act as a deterrent to people seeking medical assistance and support services, disproportionally stigmatise the disease and discourage voluntary HIV testing for fear of prosecution.[43] These public policy considerations induced Tasmania to repeal its HIV specific legislation in 2015.[44]

---

39 *Kanengele-Yondjo* [2006] NSWCCA 354 (16 November 2006).

40 Bowden and O'Brien, above n 35.

41 Andrew Kos, 'Godfrey Zaburoni, who Infected Partner with HIV, Walks Free from Jail' *ABC* (online) 3 June 2016 <http://www.abc.net.au/news/2016-06-03/godfrey-zaburoni-suspended-sentence-gbh/7474160>.

42 Australian Federation of AIDS Organisations, *HIV Criminal Cases* <http://www.hivmediaguide.org.au/media-tool-kit/hiv-in-the-news/criminal-cases-involving-hiv-transmission-or-exposure/>.

43 Australian Federation of AIDS Organisations, *Zaburoni v The Queen Appeal Success* <https://www.afao.org.au/news/zaburoni-v-the-queen-appeal-success#.V2ZCsiN962w>.

44 *Public Health (Miscellaneous Amendments) Act 2015 (Tas)*.

V CONCLUSION

There is little doubt that appellate decisions regarding specific intent will continue to turn on the individual facts as intentional HIV transmission 'is invariably a question of degree'.[45] While it is unclear as to whether legislative reform will follow *Zaburoni*, it is evident that the decision will reignite commentary as to whether or not the reaffirmed high threshold of specific intent is desirable. On this point, this note has submitted that the plurality's reasoning is an undesirable development which immunises offenders from prosecution, absent evidence of malice or purpose to transmit HIV.

[45] *Zaburoni* [2016] HCA 12 (6 April 2016) [68].