Heroin, Homicide and Public Health

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Introduction

In October 1999, a jury empanelled at the Campbelltown District Court found Mr Quoc Cao guilty of manslaughter on the basis that he had given a clean needle and syringe to a heroin user who subsequently died after injecting heroin. The formulation of the charge against Cao was novel and raises questions regarding the scope of manslaughter doctrine. Furthermore, in the context of widespread risk behaviours among injecting drug users and a relatively high prevalence of blood-borne diseases in the injecting drug user community, the outcome of the case has implications for public health and harm minimisation policies.

In response to the prosecution of Mr Cao and in light of its public health implications, the Criminal Law Review Division of the Attorney General's Department conducted a review of the law relating to self-administration of prohibited drugs. In May 1999, the NSW Drug Summit took up the recommendations of the Criminal Law Review Division in proposing that the self-administration of prohibited drugs be decriminalised. This would, as explained below, remove the basis for Cao's conviction. However, despite positive media coverage which seemed to endorse these recommendations, self-administration continues to be an offence in NSW.

This paper considers the case of *R v Cao* from several perspectives, moving from a technical legal analysis to an examination of policy and socio-legal considerations. The paper begins by outlining the case against the accused, with the next three sections exploring and critically assessing precedent and legal principles relating to the elements of unlawful and dangerous act manslaughter. This will be followed by a critique of the case in the context of policy considerations relating firstly to the offence of manslaughter, and secondly to public health issues associated with intravenous drug use. The final section discusses the decision to prosecute from a socio-legal perspective.

The case against the accused

On 18 June 1996, Matthew Sutton — who had never previously met Cao — approached Cao in the streets of Cabramatta, told him that he had some heroin and asked him whether he had a clean needle. Cao replied that he was about to go home, and that he would give Sutton a clean needle if Sutton gave him a lift home. They then drove to Cao's home. However, there were conflicting accounts of what happened after Cao gave Sutton the needle. Counsel for Cao argued that Sutton went outside to inject himself, rather than injecting in Cao's room. The prosecution case was that Sutton asked whether he could shoot

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up in Cao's room, and that he went outside for some fresh air after injecting himself. Sutton was found dead in the street near the boarding house in which Cao was staying at 8am the following morning.[1]

The trial initially proceeded on the basis of both criminal negligence manslaughter as well as unlawful and dangerous act manslaughter. The former requires proof that the accused failed in a duty of care towards the deceased. On the fourth day of the trial, however, Ford ADCJ held that there was no case on the basis of criminal negligence manslaughter.

In relation to the remaining charge of unlawful and dangerous act manslaughter,[2] it must be proved beyond reasonable doubt that the accused committed an unlawful act which was also dangerous and which caused the death of the deceased. The unlawful act in the present circumstances was the self-administration of heroin by the deceased, which is an offence under s12(1) of the *Drug Misuse and Trafficking Act* 1985 (NSW) (*'DMT Act'*). Cao's provision of injecting equipment made him complicit in this unlawful act, and therefore responsible for its consequences. It will be argued below that this is a contrived and inappropriate formulation. However it was the only possible way of framing the charge: there was no evidence that the accused either injected the deceased in contravention of s13 of the *DMT Act*, or that he supplied heroin to the deceased.

Self-administration: an unlawful act?

As stated above, the first element of manslaughter is that the accused committed an unlawful act. However, it will become clear from the discussion below that not every offence against statute or the common law constitutes an unlawful act for the purposes of manslaughter.

The 'unlawfulness' of self-administration has not been specifically determined by the courts in relation to manslaughter. The closest that the courts have come was in obiter comments by the NSW Court of Criminal Appeal in *McLean v R* (1981) at 41. Roden J (with whom Nagle CJ at CL and Fisher J agreed) suggested that where death occurs as a result of the administration of heroin, a person may be guilty of manslaughter in three circumstances: first, if the accused himself or herself injected the deceased; second, if the accused is 'present intentionally assisting or encouraging that act (principal in the second degree)'; or third, 'if though not present he [sic] had counselled or assisted that act (accessory before the fact)'.

On the basis of the facts described above, the second or third of these situations apply to *Cao*, and the court's comments therefore pose a barrier to the argument that self-administration, or accessorial liability for self-administration, is not an unlawful act for the purpose of manslaughter. These comments, however, are obiter dicta because the decision relates to whether or not the appellant could be guilty of manslaughter on the basis of the common purpose doctrine. In any case, a number of arguments can be made in an attempt to rebut the court's comments in *McLean*.

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1 These facts are taken from His Honour's summing up in *Cao*. A transcript of the summing up is on file with the author.

2 For the sake of brevity, the remainder of this paper will refer to unlawful and dangerous act manslaughter as 'manslaughter'. If manslaughter by criminal negligence is referred to, its full description will be used.

Interestingly, Ford ADCJ initially doubted whether the prosecution could proceed on the basis of unlawful and dangerous act manslaughter. In handing down a judgment in relation to a preliminary application as to the form of manslaughter to be relied upon, Ford ADCJ made the following comment:

> As to whether or not there was an unlawful and dangerous act may be a matter of some doubt. If in fact the accused merely supplied a needle which the deceased then used to inject himself, then it seems to me it is rather doubtful that it could be relied upon as a dangerous act on the part of the accused, merely in supplying a needle which the deceased then chose to use himself for the purpose of injecting himself with heroin.

Is self-administration 'unlawful' for the purposes of manslaughter?

The approach taken in early cases was that *all* unlawful acts could constitute the basis of manslaughter, regardless of the triviality of the offence. As manslaughter jurisprudence developed, however, both the common law as well as commentators began to move away from this approach.[3] Snelling (1956–57:439) suggests that this process was designed to 'ameliorate the strictness of the rule that accidental death arising from any unlawful act is manslaughter by making the qualification which accords with commonsense in favour of more trifling and venial breaches of statute law'.

By its nature as a 'constructive crime', manslaughter doctrine is apt to produce harsh and unjust outcomes if applied too dogmatically, and there has therefore been a tendency by the courts to restrict constructive liability. This direction of the law seems to have been followed in *Pullman v R* (1991), where the NSW Court of Criminal Appeal considered whether a breach of the *Motor Traffic Regulations* could form the basis of a manslaughter charge. Hunt CJ at CL (with whom Campbell and Newman JJ agreed) stated the law in the following terms: '[A] more appropriate dividing line ... is to require the act upon which this category of manslaughter is based to be one which is unlawful *otherwise than by reason of the fact that it infringes some statutory prohibition*' [emphasis added] (at 97).

The court held that an unlawful act for the purposes of manslaughter must be 'unlawful in itself'. While continuing the trend towards reducing the harshness of an overly strict application of manslaughter doctrine, it is in some senses difficult to attribute meaningful content to the court's test. Goode and Leader-Elliott (1992:264) have even suggested that the test 'defies constructive comment'. This difficulty of interpretation is exacerbated by the fact that the principle seems to be original to Hunt CJ at CL in terms of its conception,[4] and has not been followed or applied in any subsequent superior court cases.

Despite these problems, the judgment of Hunt CJ at CL is one of the only modern appellate court expositions of legal principle relating to the 'unlawful' element of manslaughter, and it is therefore worth exploring possible interpretations of the words 'unlawful in itself'. One possible interpretation would be to suggest that an offence is 'unlawful' because it is dangerous (Goode & Leader-Elliot 1992:263; Howard 1982:112).

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3 Firstly, the law developed to exclude tortious acts: *R v Fenton and Ors*; compare, however, the interpretation given to this case by Buxton (1966:182–183). Secondly, acts which were *mala prohibita* as opposed to *mala in se* were also excluded: Snelling (1956–57); this distinction, however, was explicitly rejected by Hunt CJ at CL in *Pullman* (1991). Finally, the law also excluded acts which were unlawful because they involved the negligent performance of an otherwise lawful act: *Andrews v DPP*. In a two-part article, Snelling (1956–57) summarises these developments.

4 The principle stated by Hunt CJ at CL should not be confused with the long standing distinction between acts which are *mala in se* and *mala prohibita*, which Hunt CJ at CL states is based on the 'existence or the absence of moral turpitude'. Hunt CJ at CL specifically rejects this distinction, stating that no assistance is to be gained from it.

This necessitates a distinction between the *crime* as dangerous, and the *act itself* as dangerous, which is conceptually awkward and seems to double-judge the question of dangerousness. The Law Reform Commission of Victoria stated that this interpretation is 'confusing because it runs together the "unlawful" element with the "dangerous" element' (1988:34). Furthermore, it was rejected in *Pullman* as being inconsistent with *Andrews*.[5]

Another interpretation of the 'unlawful in itself' test from *Pullman* could focus on whether or not the unlawful act is violent. In proposing a refinement of English manslaughter doctrine, Clarkson argues that homicide is in a 'family of offences' whose underlying common thread is violence. He proposes that manslaughter should require an unlawful act involving violence, as this would satisfy what he sees as the appropriate link between culpability and the consequent but accidental death. Clarkson (2000:157–160) criticises cases such as *R v Cato and Ors*, which involve manslaughter based on drug offences:

> Such offenders have of course engaged in actions of a certain moral quality and there might indeed be risks of adverse consequences flowing from their wrongdoing. They could possibly be liable for killing by gross carelessness. But, by not attacking their victims, they have not chosen to embark on a violent course of action. They have departed too far from the family of violence.[6]

Such an approach would be consistent with the majority of unlawful and dangerous act manslaughter cases, which have historically involved violence; for example assaults which unexpectedly resulted in death. If this interpretation were adopted, self-administration in cases such as *Cao* would not be 'unlawful' for the purposes of manslaughter.

In stating the test in relation to the unlawful element in *Pullman*, the court noted that 'it is obvious that some question of policy is involved as to where the line is to be drawn'. The 'violence' interpretation of the unlawful element has considerable merit in terms of policy, its ability to be applied with certainty in novel cases, and in terms of its consistency with a schematic, coherent and principled approach to homicide. However, this limitation on the 'unlawful' element has not been upheld by the courts, nor does it seem to have been argued in the courts.

Another policy question relates to the appropriateness of liability for manslaughter in circumstances where death is caused by the unlawful act of the *deceased*, and where the accused is charged on the basis of his or her accessorial liability. Such a formulation is in contrast to cases where, for example, a third party assaults the deceased, and where the accused is implicated because he or she aids or assists the third party. In *R v Cramp* (1999), Barr J (with whom Sully and Ireland JJ agreed) accepted that a manslaughter conviction could be based on accessorial liability to an unlawful act committed by the deceased. In that case, the accused had aided and abetted the deceased to drive furiously or recklessly, too fast or under the influence of alcohol.[7] Like *Cao*, the policy basis of *Cramp* — which involves a seemingly novel application of legal principle — will be considered in more detail below.

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5 While Hunt CJ at CL does not explain his reasoning in any detail, it seems to be based on the distinction in *Andrews* between an unlawful act and the negligent performance of an act which is otherwise lawful. Judging unlawful acts by reference to dangerousness would blur the boundary between unlawful acts and the negligent performance of lawful acts. This has been criticised by Goode and Leader-Elliott 1992:263.

6 It should also be noted that Clarkson (2000:151–153, 164–165) agrees with Law Commission (1996) proposals that there should be separate offences of 'killing by gross carelessness' and 'corporate killing'. In the case of work related deaths, individual managers could in appropriate circumstances be prosecuted for a killing by gross negligence. Vehicular homicide would continue to be punishable as a distinct and separate offence, as in NSW and other Australian states.

7 Note that the prosecution of *Cao* preceded the *Cramp* decision.

A further policy issue is the fact that self-administration is not an offence in every common law jurisdiction: for example, Queensland and England. This seems to undermine the unlawfulness of self-administration as a basis for a manslaughter conviction.

The above arguments have concentrated on legal principle and policy because there is no directly applicable precedent, with the 'unlawfulness' of self-administration having not been specifically considered by the courts. In particular, the judgment in *McLean* took for granted the unlawfulness of a deceased person's self-administration. Furthermore, *McLean* is not necessarily an accurate guide to contemporary law relating to unlawfulness in the law of manslaughter, given that legal doctrine has developed since the case was decided in 1981: more specifically, the case predates *Pullman*.

Other drug offences have, however, been considered by the courts. For example, the English Court of Appeal in *Cato* held that the 'unlawful' element was satisfied by possession of heroin, or by the offence under s23 of the *Offences Against the Person Act* 1861 (UK) of maliciously administering a 'noxious thing'. In relation to possession, the court said that 'the unlawful act would be described as injecting the deceased Farmer with a mixture of heroin and water which at the time of the injection and for the purposes of the injection Cato had unlawfully taken into his possession' (at 267). The decision can be strongly criticised, primarily on the basis that mere possession of a prohibited drug is neither dangerous nor sufficiently causal to death, however it illustrates that minor drug offences have grounded a manslaughter conviction.

Despite His Honour's initial apprehension which was mentioned above, the question of unlawfulness was taken for granted by Ford ADCJ during his summing up to the jury. Ford ADCJ told the jury, 'Now the drug legislation in this state makes it a crime to administer a prohibited drug to himself. It's a crime to do that, a crime to shoot up heroin'. Later in his summing up, Ford ADCJ said that 'in considering the question of whether the action of the deceased in injecting himself was unlawful, I've already pointed out to you that it is an offence'. The validity of these comments may be questioned in light of the preceding discussion, and it is also clear that the law is uncertain and in need of principled judicial clarification. It is a matter of speculation which — if any — of the above interpretations an appellate court would adopt. Indeed, it is equally possible that a court would reject any limitation on the 'unlawful' element, as did the minority in *Wilson v R* who commented that an unlawful act 'is one which is contrary to the criminal law' (at 272). However, this would leave more questions unanswered in relation to what constitutes an 'unlawful' act, and would be a reversion to a harsh doctrine of constructive manslaughter.

Did the accused in fact aid or abet the deceased's act of self-administration?

The cases relating to the actus reus of accessorial liability demonstrate that the requisite degree of participation is not very high (Brown et al 2001:1335). On the facts of *Cao*, the prosecution argued that participation was established by the provision of a needle to the deceased, which the accused freely admitted. It was also alleged that the accused permitted the deceased to inject himself in the accused's premises, although this was denied by the accused and it is unclear whether the jury accepted this evidence.

In relation to mens rea for accessorial liability, the High Court (Wilson, Deane and Dawson JJ) in *Giorgianni* held that 'a person cannot aid, abet, counsel or procure the commission of an offence, even a statutory offence involving strict liability, without intent based upon knowledge of the essential facts which constitute the offence' (at 503). In essence, this was the test applied by Ford ADCJ in *Cao*, who said that 'it is argued here by

the prosecution that the accused, by providing a needle in the knowledge that the deceased was going to use it to inject himself, and by affording him the opportunity to inject himself in the room, he thereby gave aid and assistance to the accused [sic]'.[8]

It is also noteworthy that Ford ADCJ told the jury that 'if he'd merely given him a needle that would have perhaps been insufficient to constitute any involvement in the offence'. This suggestion can perhaps be seen as an attempt on the part of His Honour to avoid the injustice of a manslaughter conviction in circumstances where the accused's criminality was negligible. However, the comment is also interesting because it may broaden the range of persons who may be implicated in self-administration, and who might therefore be liable for manslaughter in the event of death if, for example, merely allowing a person to use a place for injecting heroin formed the basis of a charge.[9]

In a study of fatal heroin overdoses in 1992, Zador, Sunjic and Darke (1996:205) reported that 69 per cent of fatal heroin overdoses occurred in a home environment, and that others were present at some time during the interval between injection and death in 58 per cent of cases. Similarly, Darke, Ross and Hall (1996:408) have reported that only a minority of heroin users were alone at the time of their last *non*-fatal overdose. It seems, therefore, that a person who knowingly allows their premises to be used for self-administration is potentially an accessory to that self-administration and — in the event of a fatal overdose — he or she is potentially liable for manslaughter. The conflicting messages are obvious: as a public health measure geared towards prevention of fatal heroin overdose, heroin users are encouraged not to inject alone (see Hall, Lynskey & Degenhardt 1999:18), but on the other hand, those who are present during a fatal overdose may find themselves being prosecuted for manslaughter.

The dangerousness of heroin injection: taken for granted?

A majority of the High Court in *Wilson* held that an act is dangerous if a reasonable person would have realised that he or she was exposing the victim to 'an appreciable risk of serious injury' (at 270). This is an objective test which involves a question of fact to be determined by the jury. It involves two interrelated issues: the nature of possible injury, and the risk of such injury materialising.[10]

In *Cao*, Ford ADCJ directed the jury to consider whether self-administration 'involved the risk of bodily harm or even death'. Later in his summing up, Ford ADCJ referred the jury to:

> medical evidence which suggests that injecting heroin does have quite serious consequences in its depressing effect upon the brain and generally speaking, and it may well be that anybody who is familiar with the drug scene must know that there are *risks* involved.

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8 This slip of the tongue by Ford ADCJ is interesting and indeed could be interpreted as indicating the confusing nature of the charge.

9 There has been some judicial discussion about whether 'mere presence' during the commission of the offence is sufficient to constitute the actus reus of aiding and abetting: see, for example, *McCarthy v Ryan*; *Wilcox v Jeffrey*. On the other hand, 'mere presence' may be distinguishable from *knowingly* allowing a person to use his or her premises for the commission of an offence.

10 This distinction between the nature of the injury as well as the degree of risk was highlighted by the minority in *Wilson*, namely Brennan, Deane and Dawson JJ. The minority's test was similar to the majority's test, however it was not as onerous in that the minority omitted the word 'serious'.

With the greatest respect to His Honour, these directions involve an incorrect statement of the law. The suggestion that 'quite serious consequences' or 'risks', as opposed to *serious* injury and *appreciable* risks, are sufficient to constitute a dangerous act is inconsistent with the majority's test in *Wilson*. The majority had expressly rejected a test based merely on risk of harm or injury on the basis that it insufficiently reflected the principle that there should be a close correlation between moral culpability and legal responsibility. Ford ADCJ also seemed to pre-judge the question of dangerousness in telling the jury that 'in this particular case the risk was such that death could ensue'.

In applying the correct test of dangerousness to cases such as *Cao*, the relationship between heroin use and dangerousness raises the following question: in relation to the *nature* of the injury, should the 'ordinary' effects of heroin use, for example depression of the central nervous system and respiratory system,[11] constitute a 'serious injury'? If this is the case, then as a matter of logic this 'serious injury' will necessarily occur in every case of heroin administration. In turn, this has the effect of obviating any meaningful assessment of the *risk* of such injury occurring, and therefore effectively bypassing the dangerousness inquiry. Such an outcome is repugnant to the purpose of the dangerousness element, which Snelling (1956–57:443–444) describes as bringing the law 'more in line with the modern trend away from constructive crimes towards responsibility for foreseeable consequences'. This idea was echoed by the High Court in *Wilson*. If the 'ordinary' effects of heroin constitute serious injury, then drug-related manslaughter is truly a constructive crime.

An alternative approach is to assess the risk of some *further* kind of harm as a result of heroin use. For example, Darke, Ross and Hall (1996:406) have suggested that an overdose occurs when a person loses consciousness, has difficulty in breathing, collapses or is unable to be roused. 'Serious injury' could therefore be constituted by overdose, and the test of dangerousness in these kinds of cases would be whether a reasonable person would have realised that self-administration exposed the drug user to an appreciable risk of overdose.

Whether there is an appreciable risk of heroin overdose necessitates an examination of the frequency and correlates of heroin overdose. Recent research challenges popular perceptions which tend to focus on the purity of heroin, the presence of contaminants and the inexperience of users. Rather, both non-fatal and fatal overdoses are significantly related to polydrug use and the user's severity of dependence and length of heroin using career. In relation to polydrug use, other central nervous system depressants such as alcohol and benzodiazepines feature prominently in overdoses (Darke, Ross & Hall 1996:409–410; Zador, Sunjic & Darke 1996:206–207; Hall & Darke 1997:17–18; Hall, Lynskey & Degenhardt 1999:16–17).[12] Furthermore, it has been reported that overdoses involving only heroin are in the minority, and in this regard Darke et al (2000) even found that a large proportion of heroin overdose fatalities have relatively *low* blood morphine concentrations.[13]

In this context, it is questionable whether a reasonable person would have been aware that there was an appreciable risk of overdose. In *Dawson, Nolan and Walmsley* (1985), the Court of Appeal in England held that the reasonable person has the same knowledge as the person committing the unlawful act and 'no more' (at 157). Applying this principle to the facts of *Cao*, the reasonable person in the position of the accused would probably not have known that the deceased in fact had a blood alcohol level of 0.137 grams per 100 millilitres

11 For an analysis of the pharmacological effects of heroin administration and overdose, see White (1998).

12 Warner-Smith et al (2001:1115–1121) acknowledge previous research as outlined, and they further hypothesise that liver and lung disease as a result of life-style factors such as malnutrition or smoking may increase overdose risk.

13 Note that once heroin is administered it is quickly metabolised into morphine.

of blood. Furthermore, evidence that the accused and the deceased had never met each other before the night of the deceased's death means that the reasonable person in *Cao* would probably not have known the deceased's severity dependence scale or length of injecting career. Therefore, given both the nature of common correlates of heroin overdose as well as research findings which suggest that overdose from heroin injection alone is improbable, it is arguable that a reasonable person would not have realised that the administration of heroin in these circumstances carried an appreciable risk of overdose.

In addition to the correlates of or the reasons for overdose, a related issue is the prevalence of non-fatal overdose. Recent surveys of heroin users have shown a range of reported overdoses, from 23 per cent of survey respondents (Gossop et al 1996:402), to 43.8 per cent of respondents (Weatherburn, Lind & Forsythe 1999:16) and 66 per cent of respondents (Darke, Ross & Hall 1996:409). A direct comparison of the frequency of non-fatal overdose with the frequency of injections per year would not only be statistically crude, but is also impossible due to an absence of research in relation to an estimated number (as opposed to percentage) of annual non-fatal overdoses.

On the other hand, Ford ADCJ felt compelled to tell the jury that 'nowadays, death from an injection of heroin is not unexpected'. In contrast, a crude statistical estimate of the likelihood of fatal heroin overdose would lead to a different conclusion. Hall et al (2000) have estimated the number of dependent heroin users in Australia to be between 67,000 and 92,000, with a mean of 77,000. Based on one heroin injection per day and reported statistics that there were 550 heroin overdose deaths in Australia in 1995 (Hall & Darke 1997), it can be concluded that between one in 44,464 and one in 61,055 injections result in death, with a mean of one in 51,100 injections. In other words, there are on average 19.5 deaths per one million injections. While this statistic is admittedly problematic and unreliable,[14] it does illustrate the exaggerated nature of the suggestion that heroin overdose is common or 'not unexpected'. In the absence of accurate statements based on research data, a direction to the jury about the likelihood and nature of heroin overdose portrays an inaccurate picture which stirs up drug mythologies and misconceptions.

Contrary to the above discussion, the summing up of Ford ADCJ on the question of dangerousness involved a simplistic, imprecise and even incorrect analysis of both the law and the facts. His Honour directed the jury on issues relating to the cause of death, for example the presence of alcohol. However, the jury should have been directed that this evidence was also relevant to questions of risk and injury in relation to the dangerousness element. Furthermore, the reasonable person's knowledge should have been accurately described to the jury.

Is relative dangerousness relevant?

The question also arises whether the law can take into account the *relative* dangerousness of an unlawful act. In particular, the injection of heroin may expose a person not only to the inherent harm associated with the pharmacological effects of the heroin itself, but also to the incidental harm associated with unsafe injection practices; for example, blood borne diseases such as HIV, hepatitis B and hepatitis C. In assessing dangerousness, can the law accommodate the fact that the use of a clean syringe reduces the risk of incidental harm such as HIV or hepatitis C?

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14 For example, it does not take into account non-dependent users, nor does it take into account the fact that dependent users might use more or less than once a day. Furthermore, the statistic should be broken down according to the different states and territories, with appropriate adjustment not only for the relative number of deaths, but also the proportion of heroin users in each state and territory.

Policy considerations in relation to patterns and contexts of heroin use would strongly militate in favour of such an approach. As will be discussed below, injecting drug users often adopt risk taking behaviours — such as the use of discarded or used syringes — in response to intensive policing and other social, cultural, situational and environmental factors (Maher et al 1998:32–41). In these circumstances, rather than raise the spectre of a manslaughter conviction in the event of unexpected death, the law should give priority to public health objectives such as minimisation of the risk of blood borne diseases, a fortiori where drug users are often likely to inject even though clean equipment is not available (Maher et al 1998).

Furthermore, the provision of a *clean* syringe to an injecting drug user reduces the syringe provider's subjective moral culpability. Given the statement in *Wilson* that the law should demand a correlation between culpability and legal responsibility, it is incongruous that a person who deliberately promotes harm-minimisation should face a manslaughter conviction in the event of an accidental death which is, ultimately, caused by the deceased himself or herself.

Despite these arguments, the test of dangerousness in *Wilson* does not seem to cater for an assessment of relative dangerousness. So too, in considering whether abortion was an unlawful and dangerous act, the court in *R v Buck and Buck* (1960) seemed to reject the principle of relative harm: abortion 'is an offence which involves a considerable risk to the person, *no matter with what care it may be committed*' [emphasis added] (at 219–220). The failure to accommodate this notion of relative dangerousness betrays the law as out of touch with the social reality of drug-related harm. The irony of this outcome is evident: the law may condemn an act as dangerous despite it being intended to reduce harm.

Causation: attribution of legal responsibility

As a matter of common sense, it might be questioned whether the acts of the accused in *Cao* caused the death of the deceased. In other words, it might be suggested that the provision of a needle and syringe is too trivial to have caused a person's death. Alternatively, it may be thought that the voluntary and intentional self-administration by the deceased 'broke the chain' of causation.

However, the legal ramifications of accessorial liability challenge this commonsense view: according to the common law as stated in *R v Lowery & King [No 2]* (1972), an accessory is '*guilty in law* of the crime committed by the hand of the principal in the first degree' [emphasis added] (at 561). The interaction of this principle with liability for manslaughter is stated in simple terms by Professor Howard (1982:37):

> The criminal responsibility of an accomplice does not depend on whether homicide can be attributed to him. His responsibility is in the first place dependent, stemming from the attribution of homicide to the principal offender; and secondly, is based on a certain relationship between him and the principal offender.[15]

According to this principle, an accessory in cases such as *Cao* would be guilty in law of self-administration, and the causation inquiry would therefore be directed at whether the death was caused by the act of self-administration. This was the basis on which the trial was conducted, with Ford ADCJ telling the jury that 'one element, of course, that must be proved is that the death occurred as a result of an injection of heroin'.

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15 For similar statements, see *R v McAuliffe* at 308–309 (Gleeson CJ, Grove & Allen JJ agreeing); *R v Andrew* at 57.

However, despite the way in which the trial was conducted, and despite the general principles of the common law, it is arguable that accessorial liability in relation to drug offences under the *DMT Act* does *not* result in the attribution to the accused of legal responsibility for the principal offence. More specifically, having regard to s19 of the *DMT Act*, it is arguable that the accused in *Cao* is not responsible in law for the self-administration of the deceased. Section 19 of the *DMT Act* is as follows:

> A person who aids, abets, counsels, procures, solicits or incites the commission of an offence under this Division is *guilty of an offence* and liable to the same punishment, pecuniary penalties and forfeiture as the person would be *if* the person had committed the first mentioned offence [emphasis added].

The words 'guilty of an offence' suggest that, in contrast to the common law, an accessory to a drug offence is guilty in law of a *separate* statutory offence, namely aiding and abetting. An analogous offence is that of aiding and abetting suicide under, for example, s31C of the *Crimes Act* 1900 (NSW),[16] which Professors Smith and Hogan (1992:380) construe in the following way: 'The words "aids, abets, counsels or procures", are those used to define the secondary participation in crime but here they are used to define the principal offence.'

While the argument has not been considered by the courts, it is suggested here that s19 should be given an analogous interpretation.[17] In making this argument, it is worth noting that s19 of the *DMT Act* can be distinguished from ss345–351 of the *Crimes Act* and from s100 of the *Justices Act* 1901 (NSW): Mason J and Wilson, Deane and Dawson JJ in *Giorgianni* (1984) confirmed that these sections are procedural, providing merely that the accessory may be proceeded against, convicted and sentenced as a principal.

If this interpretation of s19 is accepted, the prosecution would need to prove that the act of providing a needle and/or premises to the deceased in fact 'substantially contributed' to the death of the deceased.[18] In this regard, the English Court of Appeal in *R v Dalby* (1982) held that the act of the accused must be 'directed at the victim' (at 919). On the facts of *Dalby*, the supply of a prohibited drug to the deceased was not directed at the deceased and did not cause any direct injury to him. This requirement of 'directness' was clarified in *Goodfellow* (1986) to mean that 'there must be no fresh intervening cause between the act and the death' (at 27). Applying these principles to the facts of *Cao*, the act of self-administration arguably constitutes a 'fresh intervening cause' and would break the chain of causation between the accused's act of providing the needle and syringe and the death of the deceased.

By way of clarification, it should be noted that the summing up in *Cao* does not clearly disclose whether s19 or the common law was employed to establish accessorial liability. On the basis of the directions of law given by Ford ADCJ, it seems that His Honour either relied upon the common law, or that His Honour adopted an interpretation of s19 which had the same *effect* as the common law in terms of accessorial liability. If s19 was relied upon, it is respectfully suggested that the directions of law were incorrect. It may also be a matter for debate whether s19 precludes the application of the common law.

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16 The provision which Professors Smith and Hogan were considering is s2 of the *Suicide Act* 1961 (UK). Another similar provision is s249F of the *Crimes Act*, which makes a person 'guilty of an offence' if he or she aids or abets the commission of a crime under Part 4A of the *Crimes Act*.

17 Compare the brief comment made by Brown et al (2001:547), that a person who assists or encourages someone to inject themselves will be guilty of the offence of self-administration on the basis of the principles of accessorial liability.

18 Note also that this interpretation would alter the application of the law relating to the dangerousness element, as discussed above.

Did the accused in fact cause the death of Mr Sutton?

In the leading cases of *Royall* (1990) and *Osland* (1998), the High Court has not unanimously or authoritatively laid down a single test of causation in criminal cases, and therefore there are semantic differences in the various judgments.[19] On the other hand, the NSW Court of Criminal Appeal in *Moffat* (2000) noted that while the tests in the various High Court judgments are not identical, it is clear from all the judgments that the act of the accused must constitute a 'substantial contribution' towards death.

In relation to the cause of death, the accused tendered medical evidence which challenged the fact that 'narcotism' was the cause of death. In particular, there was evidence that there were omissions in the coroner's report, and that certain tests were not conducted. Furthermore, both prosecution and defence medical experts agreed that the presence of alcohol, in this case 0.137 grams per 100 millilitres of blood, would heighten the depressant effect of heroin.

In light of these factors, Ford ADCJ should have directed the jury that they had to determine whether the deceased's act of self administration substantially contributed to his own death.[20] However, Ford ADCJ simply told the jury that they had to consider whether 'death occurred as a result of an injection of heroin' and that the prosecution had to establish beyond reasonable doubt that 'death occurred as a result of the intake of heroin'. While these directions were perhaps inadequate and imprecise, it would be difficult to argue that Mr Sutton's act of self administration of heroin did not 'substantially contribute' to his death.

Pushing the limits: the rationale for the offence of manslaughter

Manslaughter is evidently a 'constructive' crime: the accused's responsibility for causing death is 'constructed' from his or her fault in committing an unconnected and possibly minor unlawful act (Law Commission 1996:12–13). Professor Glanville Williams (1957:293) more cynically suggested that a crime is constructive where 'it does not fall within the ordinary meaning of terms, but is only brought thereunder by a strained interpretation or extension'. Indeed, it is the constructive nature of unlawful and dangerous act manslaughter and the consequent implications for culpability which have inspired its most trenchant and vociferous criticisms. On the other hand, manslaughter is said to be justified by the serious consequences of a person's actions — namely death.

In relation to culpability, critics of manslaughter have suggested that criminal liability should not turn on 'moral luck' or on consequences which are beyond the control of the accused. Some academic commentators have advocated a 'correspondence principle', which is based on subjectivism and the principle of individual autonomy, and which demands not only that the accused had the requisite fault requirement, but that the accused's intention, knowledge or recklessness related to the proscribed harm (Ashworth 1999:89; Mitchell 1999:196). Constructive manslaughter is criticised because there is no correspondence between the mens rea on one hand, which relates merely to the unlawful act, and on the other hand the proscribed harm, namely death. The essence of the issue is captured in the following comment by Lord Parker CJ in *Creamer* (1965):

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19 In relation to *Royall*, compare Brennan J at 398, Deane & Dawson JJ at 411, Toohey & Gaudron JJ at 423 and McHugh J at 444.

20 This rests on the assumption that the appropriate causal link is between self administration and death. Compare the arguments immediately above.

> It is the accident of death resulting which makes him guilty of manslaughter as opposed to some lesser offence ... This can no doubt be said to be illogical, since the culpability is the same, but nevertheless, it is an illogicality which runs throughout the whole of our law (at 82).

In relation to *Cao*, the accused was convicted in circumstances where his culpability in relation to the unlawful act of self-administration was itself constructed by the principles relating to accessorial liability: his subjective mens rea was therefore merely the knowledge that the deceased was going to inject himself with heroin. This level of fault grossly violates the correspondence principle and should be insufficient to ground a manslaughter conviction.

On the other hand, the correspondence principle has been criticised by a number of commentators who have sought to justify constructive manslaughter. If these arguments — which are made in *defence* of constructive liability — can be impugned in relation to *Cao*, it follows that the outcome in *Cao* will be difficult to justify in terms of legal policy, notwithstanding its basis in legal principle and precedent.

The principal argument against the correspondence principle relates to the seriousness of the consequences. In this regard, the minority in *Wilson* justified its lower threshold test of dangerousness by reference to the 'sanctity of human life'. However, it is not merely the serious consequences which are said to justify constructive liability: it is the attribution of responsibility for those consequences to the accused. Horder (1995:763–764) argues that 'the existence of an intention to do wrong may make it legitimate to hold someone criminally responsible for any adverse consequences of which there was a risk in committing the intended wrong'.

The attribution of responsibility for consequences is based on the notion that a person who deliberately wrongs another person thereby changes his or her normative position in relation to the risk of adverse consequences of that wrongdoing. In this regard, Horder (1999:509) suggests that

> one's normative position may affect the ascriptive consequences. It can make a moral difference, for example, that one was *aiming* at some goal, such as harm to the person. Here, precisely because one was striving to do harm (an issue of normative significance), the degree of harm of that kind that one ended up doing should not matter to the issue of liability (the issue of ascriptive significance).[21]

In other words, a person who intends harm to another person thereby crosses a certain moral threshold and should be liable for whatever consequences ensue. In essence, Horder and Gardner are driving at the presence of hostility between the accused and the deceased, whether this be as a principal offender or as an accessory. For example, a person who recklessly punches a person commits a hostile unlawful act which is aimed at harming the victim, and the aggressor should therefore be liable, on Horder's analysis, if death unexpectedly ensues.

While these arguments may perhaps provide a persuasive policy justification for constructive manslaughter, they are undermined when accessorial liability is factored into the equation. Accessorial liability is itself a constructive doctrine which attributes the actions of one person to another: to rely on constructive liability in order to construct liability is at odds with the justification for manslaughter, which seeks to ascribe responsibility for the consequences resulting from a person's actions. While there may be cogent policy arguments for grounding manslaughter on the basis of accessorial liability for an unlawful act,[22] it is suggested here that the legal policy basis of manslaughter does not

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21 For a similar argument, see John Gardner (1994:509).

22 For example, Howard (1982:250–251) argues that accessorial responsibility is justified because a person who deliberately promotes the commission of a crime by another is 'at least as great a social danger as the person who actually commits it'.

warrant conviction in circumstances where the deceased is also the principal offender in relation to the initial unlawful act. Conviction of the accused in such circumstances would depend on contrived and circular reasoning.

On the facts of *Cao*, the deceased caused harm to *himself* by administering heroin to *himself*, and the accused is attributed with this act as a result of legal principles relating to accessorial liability: it is nonsensical and circular to then suggest that the accused should be responsible for the consequences of his actions. Put simply, it is contrived to suggest that the accused caused (in a factual sense) heroin to be administered to the deceased and that the accused should therefore be liable for the consequential death. Furthermore, in the context of a case such as *Cao*, it is meaningless to speak of hostility or an intention to harm the deceased. The mere knowledge that the deceased is going to inject heroin cannot, on any analysis, be construed as a hostile frame of mind, nor can it be suggested that the accused was aiming at harming the deceased. Therefore, in cases such as *Cao* there is a weakness in Horder's and Gardner's justification of constructive manslaughter based on the serious consequence, namely death, being attributed to the accused as a result of his or her altered moral or normative position.

A similar argument would apply to *Cramp*, which was mentioned above. In that case, the accused encouraged the deceased to drink a large quantity of alcohol and to then drive in excess of 150 kilometres per hour. The deceased died after crashing her car into a telegraph pole. The conviction in *Cramp* depended on accessorial liability in relation to motor vehicle-related offences, and is therefore similarly difficult to justify by reference to the policy rationale which underlies manslaughter.[23]

Finally, the conviction of the accused in *Cao* disaccords with the principle of individual autonomy which is said to form such a fundamental justification of criminal laws (Ashworth 1999:27). The autonomy principle should in this case be applied to the deceased: how can liability for manslaughter be justified in circumstances where the deceased has voluntarily and intentionally undertaken a harmful course of action which ultimately proved fatal? Responsibility for his unfortunate death should rest with the deceased himself.[24]

In *Demerian* (1989), McGarvie and O'Bryan JJ in the Supreme Court of Victoria upheld an appeal against a murder conviction on the basis that the conviction would involve too contrived an application of legal principle. The accused had been an accomplice to the deceased, who had accidentally killed himself while trying to kill another. The conviction for murder necessitated the combination of innocent agency with the doctrine of transferred malice. It is suggested that a court faced with a case such as *Cao* should similarly reject the conviction as a 'complex and artificial application of principle'.[25]

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23 Note that in *Cramp*, manslaughter by criminal negligence was also left to the jury, and that the accused could not be charged with vehicular homicide offences under s52A because he was not the driver of the vehicle.

24 While it might be suggested that this raises broad issues relating to aiding and abetting suicide, this offence can be distinguished in policy terms on the basis that the death of the deceased in a suicide is deliberate rather than accidental, and that the offence being charged is a specific statutory offence. In other words, in charging a person as an aider and abettor of suicide under s31C of the *Crimes Act*, there is no suggestion that the offender is morally or legally responsible for the death of the deceased.

25 Compare *Maroney v R* (2000), where Thomas JA (dissenting) held that the receiver of prohibited drugs could not be charged with aiding and abetting supply because this necessitates the conclusion that 'the intended receiver is indeed charged with supplying a dangerous drug to himself'. Thomas JA stated that '[I]t is not the court's function to stretch the net of penal statutes to their widest arguable limits so as to produce so artificial a result ... [and] to arrive at the curiously convoluted charge that [has been] formulated.'

Compromised public health

It is almost trite to point out that intravenous drug use exposes an injecting drug user to the risk of contracting blood-borne viruses such as HIV, hepatitis C and hepatitis B. Transmission is believed to occur predominantly by means of sharing injecting equipment (Crofts et al 1997), although other injection-related risk behaviours — such as sharing mixing spoons and swabs — can also expose a person to blood-borne viruses (Crofts & Aitken 1997; Maher et al 1998).[26] In this context, the distribution of clean injecting equipment is critical in containing the spread of HIV. Wodak and Lurie (1996:128–130) have documented Australia's success in stemming the tide of HIV infections among injecting drug users, and have argued that the early implementation of harm reduction policies — for example needle and syringe programs — was vital in minimising the incidence of HIV in the injecting drug user community, and therefore also in the wider community (see also Hurley, Jolley & Kaldor 1997).

While the spread of HIV/AIDS has stabilised, infection for hepatitis C remains prevalent among injecting drug users (Hall, Lynskey & Degenhardt 1999:11–12). The literature in relation to hepatitis C prevalence among injecting drug users is too voluminous to review in this paper, however a number of key conclusions warrant a brief discussion. Firstly, hepatitis C is epidemiologically different to HIV: it is far more infectious and therefore even occasional sharing of needles and syringes carries an extreme risk of hepatitis C infection (Crofts, Aitken & Kaldor 1999:221). Another factor which is relevant to the epidemiology of hepatitis C is its relatively high prevalence — compared to HIV — within the injecting drug user community at the time that harm minimisation policies were first introduced.

Secondly, hepatitis C prevalence among injecting drug users remains high, although recent studies have found its incidence to be decreasing (MacDonald et al 2000:57; Crofts & Aitken 1997). Thirdly, needle and syringe programs ('NSPs') have been found to reduce the incidence of both hepatitis C and hepatitis B among injecting drug users (Hagan et al 1995; MacDonald et al 2000). Finally, despite reported reductions in the use of unclean needles and syringes (Crofts & Aitken 1997; MacDonald et al 2000), risk taking behaviour remains widespread among injecting drug users. For example, in their survey of needle exchange attenders, MacDonald et al (1997:240) found that 31 per cent of respondents had used second-hand needles and syringes in the last month. Furthermore, ethnographic research by Maher et al in South West Sydney documents widespread risk-taking behaviour (Maher et al 1998:25ff).[27]

In the context of these findings, the distribution and use of clean injecting equipment is imperative in terms of public health. Crofts, Aitken and Kaldor (1999) have argued that 'the control of the hepatitis C epidemic requires more intense concentration on reducing needle sharing and other risky behaviour, and will require a greater effort to decrease incidence than HIV has'. While the attendance of injecting drug users at NSPs plays a fundamental role in increasing access to clean needles and also has the advantage of exposing injecting

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26 The sharing of injecting equipment such as spoons and filters primarily exposes a person to hepatitis C, as opposed to HIV.

27 Compare Weatherburn, Lind and Forsythe (1999:43), whose study distinguished between people who inject in places where they feel safe and in places where they do not feel safe: the figures for 'never share syringe' are 80.6 per cent and 68.8 per cent respectively. However, this study was conducted by way of a survey or questionnaire, and it is therefore to be expected that the results are much lower than ethnographic research of injecting drug users suggests. In other words, in evaluating responses to surveys in this context, it is to be expected that an injecting drug user would understate the extent of his or her risk taking behaviour, for fear of appearing foolish or reckless.

drug users to targeted intervention, education and treatment, there are pragmatic reasons why attendance at NSPs may not be possible. For example, in their quantitative study of the relationship between concern over arrest for possession of drug paraphernalia and risk behaviours, a US study by Bluthenthal et al (1999:7) found that injecting drug users who were concerned about being arrested were over twice as likely to share syringes.

While s11(1A) of the *DMT Act* means that possession of a hypodermic needle or syringe is not an offence in NSW, drug users may nevertheless be reluctant to carry injecting equipment. For example, Maher et al (1998) document that injecting drug users often do not carry clean injecting equipment because of a cultural reluctance to do so, and because of the potential for increased police interference by, for example, the use of stop and search powers, warrant checks and the reliance on injecting equipment as evidence of self-administration. Similarly, the Intergovernmental Committee on AIDS reported that NSP clients were reluctant to carry sterile needles because they feared prosecution for self-administration (Schwartzkoff & Watchirs 1991:14–15, 62–63). Maher et al (1998:25–49) also report that pragmatic issues such as pharmacy opening hours may mean that injecting drug users are unable to obtain clean injecting equipment for themselves. For example, the deceased in *Cao* met the accused after 9:30pm, when pharmacies or NSPs were closed in Cabramatta. This means, of course, that an injecting drug user may be tempted either to share another person's injecting equipment or to use discarded needles.

If the spread of blood-borne viruses is to be contained, peer distribution of clean needles can — and indeed must — play an important role in supplementing authorised NSPs. While there are no quantitative data about the extent of peer distribution of clean needles, the Criminal Law Review Division of the Attorney General's Department (1999:2) accepted that it

> has been quite common for needle and syringe clients to collect (and return) needles not only for themselves but on behalf of other people such as partners and friends. These practices play a significant role in relation to the prevention of the transmission of HIV and other blood borne communicable diseases.

As a result, there is a strong argument against criminalising the conduct of an injecting drug user who gives a clean syringe to another injecting drug user. As noted above, the infectiousness of hepatitis C and its prevalence in the injecting drug user (and wider) community mean that safe injecting practices should be promoted, encouraged and adopted as a high priority. In contrast, holding a person who gives an injecting drug user a clean needle responsible for the death of that injecting drug user in the event of a fatal overdose is incongruous with the public health imperative of minimising the prevalence of blood-borne viruses. Furthermore, given pre-existing high levels of risk behaviours among injecting drug users, the message sent by such a prosecution is antithetical to the public health objective of NSPs. In this regard, it is noteworthy that the prosecution attracted media publicity, which may have engendered further fears of prosecution and fuelled risk taking practices. Furthermore, news of prosecutions such as *R v Cao* is apt to spread quickly among injecting drug users in communities such as Cabramatta, especially where the accused is personally known within the subculture.

These issues were — perhaps surprisingly — touched upon by Ford ADCJ in *Cao*, who said to the jury that

> you may well ask what is the real distinction or difference — if there is one — between a person at a needle exchange who hands out a needle and a person such as the accused in this case who — being a user himself — has a needle and hands one onto a person who is drug dependent, such as the deceased.

To treat one situation as a legally acceptable harm minimisation imperative and the other as an unlawful act which warrants conviction for manslaughter in the event that a heroin user suffers a fatal overdose is incongruous. Furthermore, it is illogical in the context of the underlying reason for adopting harm minimisation measures, namely the containment and prevention of blood-borne diseases within the injecting drug user community and therefore the wider community. In any case, this distinction should not be the basis on which a person is or is not charged and convicted of manslaughter.

Reform options

Limitations on space prevent a detailed discussion of reform options. However as stated in the introduction to this article, the Attorney General's Department (1999) conducted a review of the relevant law in response to the (then pending) *Cao* case. In broad terms, two options for reform were canvassed: the preferred option was the decriminalisation of self-administration. The second option involved the specific elimination of accessorial liability in relation to self-administration, in circumstances where a person provides clean injecting equipment to another person. The NSW Drug Summit adopted these proposals in recommending the repeal of s12 of the *DMT Act*, which would involve decriminalising the self-administration of prohibited drugs (New South Wales 1999:para 6.13). However, despite positive and supportive media coverage which focused on public health implications (Totaro 1999, 2001), this recommendation has not been passed into law.

While the Attorney General's Department (1999:13) felt that piecemeal reform would be 'politically unsaleable', it is suggested here that the repeal of self-administration is politically improbable because of the symbolic significance of such a move. Despite the recent commencement of the safe injecting room and the maintenance of NSPs, the dominant political rhetoric remains rooted in notions of zero tolerance, law and order and a 'war on drugs'. The enactment of the *Police Powers (Internally Concealed Drugs) Act* 2001 (NSW), the *Police Powers (Drug Premises) Act* 2001 (NSW) and the *Justice Legislation Amendment (Non-association and Place Restriction) Act* 2001 (NSW) as well as the *Drug Misuse and Trafficking Amendment (Sniffer Dogs) Act* 2001 (NSW) are recent examples of the pervasiveness of this approach. Furthermore, the momentum for progressive drug reform which surrounded the Drug Summit has now subsided, and therefore reform such as the repeal of self-administration is unlikely, for the time being, to draw political favour.

By way of clarification, it should briefly be noted that persons involved in the conduct of the safe injecting room in Darlinghurst are exempt from criminal liability in relation to ss14 and 19 of the *DMT Act*, and therefore could not be prosecuted for manslaughter on the same basis as Mr Cao. Furthermore, users of the safe injecting room are exempt from criminal liability in relation to self-administration.[28]

The decision to prosecute

In attempting to understand how and why police decided to charge and prosecute Mr Cao, it is instructive to draw on socio-legal research relating to the detective function of policing. Several issues arise: firstly, how did the provision of a syringe come to be characterised as manslaughter rather than as merely a case of aiding and abetting the self administration of a prohibited drug? Secondly, how was the law used and able to be used by police to this end? Thirdly, why was the death of Mr Sutton characterised as an unlawful homicide rather than as a regrettable but accidental self-inflicted death?

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28 See ss36O and 36N of the *DMT Act*.

In comparison to uniformed police patrol work, there is a paucity of policing literature in relation to detective work, both in Australia and overseas. Among the handful of studies, the leading research into detective work is by Ericson (1981) in Canada. Ericson's thesis is that, based on information work which a detective has done, he or she decides whether an incident can be made into a 'crime' and, if there is a suspect, whether he or she can be made into a 'criminal' (1981:7). In other words, detectives are active and dominating actors in a process of 'defining reality' and 'making crime'.

In this regard, detectives exercise a high degree of control over two enabling resources which can be used to serve their interests. Firstly, police powers as well as substantive and procedural law are enabling and provide detectives with scope for discretion while also achieving crime control in accordance with organisational interests (Ericson 1981:11). Ericson states that 'the law makes apprehension possible, explaining why the detective *may* arrest or charge, *but not why he may want to* arrest or charge' (1981:13, emphasis added).

Secondly, detectives enjoy a '"low visibility" position within the organisational nexus which allows them to control essential knowledge and the flow of information' (Ericson 1981:10). Essentially, it is this resource in the context of an enabling legal system which allows detectives to 'make crime'. Detectives are able to 'define' or, to use a less powerful word, 'present' or 'construct' reality as a result of their power over the collection and collation of information. The detective is 'involved in a process of transforming an individual event into categories which have a character of permanence and exactness' (1981:18–19, see also 211, 214).

For example, other actors in the criminal justice process are not present when victims are interviewed, when suspects are interrogated, when physical evidence is gathered, and they similarly do not have the benefit of selecting the information and evidence which is and (importantly) is *not* relied upon to charge a suspect. While other actors such as the Director of Public Prosecutions, defence solicitors and barristers and the judge also play a part, detectives have a unique 'positional advantage' because other actors are always to some extent dependent on police accounts of what happened (Ericson 1981:17). Furthermore, the initial choice of charge is influential in focusing attention on and shaping the way in which an incident is subsequently perceived and considered.

Dixon suggests that during the police handling of a case, there is a process of 'legalisation' in which an incident is 'transformed' into a case and in which the law provides 'pigeonholes into which the actions of the suspect and police can be slotted' (1997:270, 272). Ericson's point is that in this process of 'legalisation', detectives play an active and integral part in interpreting, characterising and presenting what happened and in deciding into which particular pigeonhole a case should be slotted. This is not merely a decision about the offence with which a detective charges a suspect: it is a process of presenting and redefining an incident, and moulding it to fit into a particular legal paradigm.

There are points of similarity with conclusions in more general policing research conducted in England by McConville et al (1991), who have advocated a 'case construction' approach:

> [A]t each point of the criminal justice process, 'what happened' is the subject of interpretation, addition, subtraction, selection and reformulation ... Case construction implicates the actors in a discourse with legal rules and guidelines and involves them in using rules, manipulating rules and interpreting rules. It involves not simply the selection and interpretation of evidence, but its creation. Understanding the selections made and the decisions taken requires, therefore, analysis of the motivations of the actors, their value systems and ideologies.

This is not to suggest a police conspiracy: McConville et al are at pains to point out that there are no perjorative overtones in this constructionist analysis (1991:11). Similarly, Dixon (1997:44) states that 'acknowledging the reality of crime ... is not inconsistent with a strong claim about the process by which an incident is transformed into a case'.

However, in contrast to Ericson, McConville et al at times take it for granted that a particular 'reality' or 'version' of the facts can be seen to exist. They often tend to assume what Ericson is determined to challenge, namely that there is an objectively determinable reality. Nevertheless, the value of McConville et al lies in their acknowledgment of the malleability of the law to suit police interests, and the structural location of police cultures and the law in the process of social construction.

While there are obvious dangers in assuming that conclusions based on research in other countries, with peculiar socio-economic, cultural and political conditions, can be applied to another place,[29] there are nevertheless elements of universality to these arguments and conclusions. On the basis of this research into the nature of detective work, it can be seen how detectives investigating the death of Mr Sutton were able to charge Mr Cao with manslaughter. As a result of the range of substantive offences with which Mr Cao could have been charged as well as detectives' ability to 'define' or 'produce' reality as a result of their control over information and the presentation of evidence, detectives had considerable influence and power over the way in which the death of Mr Sutton was reconstructed. In particular, detectives were able to use these resources to reconstruct and present the situation not as an accidental death, but as an unlawful homicide.

It would equally have been open to detectives to treat Mr Cao's role in the death of Mr Sutton as one in which he was not a manslayer, in other words, someone who should be responsible for the death of another human being. Rather, Mr Cao's conduct could have been presented as one heroin user merely providing a clean needle and syringe to another heroin user who unfortunately but altogether coincidentally died as a result of that particular injection of heroin. In other words, it would have been open to detectives to accept Mr Cao's and the public health community's construction of the case.

However, what is essentially left unanswered is the motivation for charging Mr Cao with an offence which grossly overstated his criminality and culpability.[30] In the absence of interviews with detectives involved in the case, this can only be a matter of speculation. One credible hypothesis is that detectives thought that Mr Cao sold heroin to the deceased and were frustrated about the lack of evidence and the consequent inability to prosecute Mr Cao for supplying heroin. The detectives suspected that Mr Cao was a heroin dealer who supplied heroin to Mr Sutton, which was denied by Mr Cao during his electronically recorded interview with police.

In discussing police decisions about the choice of charge, McConville et al describe an analogous situation where a suspected drug supplier was searched, but with no drugs found. Police, however, charged the suspect with possession of an offensive weapon after finding an object which looked like a small baseball bat, and which turned out to be a souvenir from

29 Compare the research and conclusions of Miyazawa (1992) into detective work in Japan. In particular, Miyazawa suggests that Japanese detectives operate in a highly enabling environment as far as the law is concerned, but that their operational environment is also highly visible. Nevertheless, Miyazawa illustrates that Japanese detectives are still involved in a process of 'making crime'.

30 Compare Sanders (1977:84) who suggests that the detective seeks to figure out 'what really happened', and that the sociological inquiry is therefore to understand how the sense of 'what really happened' is developed. This seems to down-play the extent to which a detective's conclusions about 'what really happened' can be influenced by personal or organisational motivations and interests and by the process of 'making crime'.

Spain. The arresting officer was quoted as saying that '[I]t was as though we were charging him with the offensive weapon because we didn't get any drugs. To get something at the end of the day' (McConville et al 1991:117). On this analysis, it may be hypothesised that detectives thought that Mr Cao deserved more than a mere summary conviction under s19 of the *DMT Act*, and therefore pursued other more serious charges such as manslaughter. As a result, rather than viewing Mr Cao as an accessory to a relatively minor summary offence, his conduct was characterised and constructed as manslaughter. In this situation, the law is permissive and detectives were able to present and reconstruct reality and to formulate their accounts in such a way that suits their interests.

Again, without empirical research, the reasons why detectives might have been inclined to think or act in this way can only be a matter of speculation. However, the context and culture of policing in Cabramatta perhaps sheds some light on the decision to charge Mr Cao with manslaughter. Recall Ericson's point that detectives 'make crime' and 'define reality' in accordance with their organisational interests. Police construction of cases does not occur in a vacuum, but is inevitably affected by the social, cultural and political context of their work. In particular, it might be suggested that constant media attention and political pressure relating to an actual and perceived crime 'problem' in Cabramatta as well as a frustration with the continuing drug trade might motivate some police to become over-enthusiastic or zealous in pursuing the conviction of those who are perceived as 'criminals'. It must be emphasised in accordance with Dixon's and McConville et al's warnings, that there are no perjorative overtones and no suggestion of misconduct or impropriety in advancing this suggestion: it is merely an attempt to retrospectively understand how and why Mr Cao was charged with one of the most serious offences in the criminal law.

Conclusion

This paper has sought to analyse the law relating to manslaughter in its application to the sharing of clean needles among injecting drug users. A number of different perspectives have been offered: it has been argued that there is uncertainty in principles relating to the law of manslaughter, and that the conviction of the accused depends on a contrived and illogical application of legal principle. While its prosecution in the District Court rather than the Supreme Court and the fact that it was a trial not an appellate judgment mean that the case has little weight as a legal precedent, *R v Cao* essentially extends the law and in effect penalises a new category of conduct.

Furthermore, public health and harm minimisation imperatives have been shown to conflict and interact with a technical and yet also creative application of manslaughter doctrine. In terms of moral culpability, there is little reason to suggest that Mr Cao should be guilty of manslaughter rather than a summary offence: the death of Mr Sutton was both unexpected, out of his control and occurred after a deliberate decision by Mr Sutton to inject himself. Mr Cao's moral culpability is essentially unaltered by the death of Mr Sutton, and it is therefore incongruous that Mr Cao was prosecuted for manslaughter. The decisions to charge, prosecute and convict Mr Cao are therefore disappointing, especially in light of the inevitable judgment about a person's culpability which accompanies charge and conviction. The indelible judgment of the law is that Mr Cao did not simply assist the deceased to shoot up heroin by providing a clean needle: he is someone who — to use the archaic language which appears on indictments for manslaughter — 'feloniously slew' the deceased.

As a result of public health imperatives and uncertainty in the application of legal principle to cases such as *Cao*, and also in the context of unpredictable exercise of police discretion and the enabling environment in which detectives operate, there is a strong argument in favour of legislative intervention. While the decision of Ford ADCJ to defer sentencing Mr Cao subject to good behaviour for three years can perhaps be seen as a vindication of these concerns, there is of course no guarantee that future cases will attract similar leniency.

Above all, *R v Cao* contains symbolic significance. Firstly, the Indo-Chinese accused can be seen as representing demonised aspects of the drug culture in South West Sydney. A second issue of symbolism relates to the incongruity between *Cao* and public health objectives relating to drug-related harm minimisation. Injecting drug users no doubt find the prosecution and conviction of Mr Cao difficult to reconcile with messages from health professionals about the importance of using clean injecting equipment. However, in an area of law and public policy which is contentious, politically volatile and in which symbolism has achieved an iconic status, what is needed is to see the situation with reason, perspective and pragmatism.

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