

THE PROVINCE OF MENTAL IMPAIRMENT IN VICTORIA: AN ANALYSIS OF THE CONFLICT BETWEEN *STILES* AND *HAWKINS* AND A PREDICTION ABOUT HOW IT WILL BE RESOLVED

ANTHONY PYNE*

The defence of mental impairment is the modern expression of the common law defence of insanity. Recently, a difficult question has emerged about the process of proof in mental impairment cases. The problem arises when an accused person claims they have a defence of mental impairment but also claims they did not possess the intent required for the particular crime. The law regarding how to direct juries where both mental impairment and lack of intent are in issue is unsatisfactory. The issue raises fundamental questions of criminal law theory. This article examines the conflict between the 'linear' approach the Victorian Court of Appeal adopted in R v Stiles ('Stiles') and the 'non-linear' approach the High Court took in the decision of Hawkins v The Queen. It examines the problem in light of several criminal law theories. It concludes that the conflict is likely to be resolved by a process of statutory construction and that the approach in Stiles is likely to prevail.

I INTRODUCTION

Perhaps the defining feature of modern criminal law theory and practice is the rise of subjectivism.¹ The idea that there could not be a guilty act without a guilty mind unquestionably had a pervasive effect on concepts of criminal responsibility.² Many crimes became no longer an objectively identifiable, 'manifestly' criminal act that one could simply point to and name, but a harmful act that warranted an inquiry about responsibility.³ For some accused, this inquiry would be extremely

* BA, LLB (Hons II) (Syd), LLM (Syd). Barrister, Victorian Bar.

1 See Nicola Lacey, 'Responsibility and Modernity in Criminal Law' (2001) 9(3) *Journal of Political Philosophy* 249; Lindsay Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (Cambridge University Press, 1997).

2 See Nicola Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64(3) *Modern Law Review* 350 ('In Search of the Responsible Subject').

3 See generally the discussion of 'manifest criminality' and 'subjective criminality' in George Fletcher, *Rethinking Criminal Law* (Oxford University Press, 2000) 115–19.

complex. For as long as there has been crime, there has been ‘madness’.⁴ The precise relationship between ‘madness’ and the subjective element of crime has proved a perennially difficult question. Complex rules were developed to evaluate the claim of non-responsibility insanity presented. Those rules reflect both the importance of subjective responsibility in criminal lawmaking and the practicalities of managing those the system regarded as dangerous.⁵ Those competing objectives are not easy to reconcile. This article examines a seemingly intractable problem in Victorian law. It examines how a fact finder should accommodate two competing claims of non-responsibility: the claim a person is not responsible because they have a mental impairment and the claim they are not responsible because they did not possess the requisite intent. The law regarding how to instruct a jury in a case where both mental impairment and intent are in issue is not settled in Victoria. Exactly when a jury should consider the question of intent and the question of mental impairment is not clear. This article examines why. It also examines the related, and often more crucial, question of whether evidence of mental impairment is relevant to the question of intent.

Part II examines the conflict between the so-called ‘linear’ approach the Victorian Court of Appeal adopted in the case of *R v Stiles* (*‘Stiles’*)⁶ and the ‘non-linear’ approach the High Court took in the decision of *Hawkins v The Queen* (*‘Hawkins’*).⁷ It demonstrates that the present situation facing judges is unsatisfactory. They often do not know exactly what to tell juries. Part III examines competing approaches to resolving the problem, including approaches adopted interstate and in the United Kingdom. Part IV considers the problem through the lens of various criminal law theories. It concludes that the *Stiles* approach is preferable, though perhaps a more nuanced approach should be taken to protect society. The article concludes with a prediction about how the question, if it is ultimately tested on appeal, is likely to be resolved.

II THE CONFLICT BETWEEN HAWKINS AND STILES

A *The Decisions Themselves*

Australian common law regarding how to direct juries in cases where the accused relied on the insanity defence seemed relatively well-settled. The law presumed the accused was of sound mind.⁸ The prosecution was required to prove all

4 See generally Roy Porter, *Madness: A Brief History* (Oxford University Press, 2002).

5 See Rafiq Memon, ‘Legal Theory and Case Law Defining the Insanity Defence in English and Welsh Law’ (2006) 17(2) *Journal of Forensic Psychiatry and Psychology* 230. See also Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford University Press, 2012) ch 3.

6 (1990) 50 A Crim R 13 (*‘Stiles’*).

7 (1994) 179 CLR 500 (*‘Hawkins’*).

8 *Daniel M’Naghten’s Case* (1843) 10 Cl & F 200; 8 ER 718, 722 (Tindal CJ) (*‘M’Naghten’s Case’*).

the elements of a criminal offence beyond reasonable doubt, including that the accused person had the required intent.⁹ If they could do this, the burden shifted to the accused to prove he or she had a ‘disease of the mind’¹⁰ at the time of the impugned act and, because of that mental disease, he or she either did not know the nature and quality of his or her conduct,¹¹ or did not know his or her actions were wrong according to the ordinary principles of reasonable people.¹² The accused had to prove this on the balance of probabilities.¹³ This common law approach was re-affirmed in *Stiles*. The facts were relatively simple. The victim was beaten to death, probably with a piece of timber.¹⁴ The only evidence linking the accused to the killing was his admissions.¹⁵ The accused had schizophrenia.¹⁶ He admitted to various people that he hit the victim. He also said some things that suggested self-defence.¹⁷ But amongst those things he made delusional statements, some suggesting he did not understand the nature and quality of his actions.¹⁸ Insanity was introduced to the jury over objection.¹⁹ The accused was found not guilty of manslaughter because of insanity. He was detained. On appeal, he argued the verdict was unsafe.²⁰ Since the only evidence was his admissions, and he was insane when he made them, his counsel argued the verdict was not supported by evidence.²¹ The Court of Appeal rejected that argument, making the following comments:

We consider that that argument suffers from a fallacious circularity. The proper approach is not circular but linear. The jury in the first place must consider whether the offence is proved. If it is not, the accused should be acquitted, not found not guilty on the ground of insanity. An accused must not lose a chance of acquittal of the offence charged by reason of being insane. In considering whether the offence has been proved, the jury must in the first place act upon the presumption that the accused was of sound mind. The question of insanity only arises if the jury, assuming the accused was of sound mind, would find the offence proved beyond reasonable doubt ...²²

9 *R v Porter* (1936) 55 CLR 182, 184–5 (Dixon J) (*Porter*).

10 *M’Naghten’s Case* (n 8) 722 (Tindal CJ).

11 The ‘nature and quality of the act’ refers only to ‘the physical character of the act’: see *R v Codere* (1917) 12 Cr App R 21, 26–7 (Reading CJ).

12 *Stapleton v The Queen* (1952) 86 CLR 358 (*Stapleton*).

13 *Sodeman v The King* (1936) 55 CLR 192 (*Sodeman*).

14 *Stiles* (n 6) 14 (Crockett, Murphy and Cummins JJ).

15 *Ibid* 15.

16 *Ibid* 16.

17 *Ibid* 15–16.

18 The accused told the police the victim was ‘lucky’ because ‘it wasn’t ... serious’ and ‘[h]e just died mate’: *ibid* 19.

19 *Ibid* 19.

20 *Ibid* 14.

21 *Ibid* 19.

22 *Ibid* 22.

Hawkins was decided four years later. The facts were simpler, though the accused's intention was not. The teenage accused and his father went into a plantation in Tasmania.²³ The accused had a gun. He shot his father in the chest, killing him.²⁴ The prosecution case was premeditated murder.²⁵ The defence case was that the accused went into the plantation intending to kill himself in front of his father but, 'at the last moment, in a disturbed state of mind', turned the rifle on his father and fired, without the intention required to establish murder.²⁶ The defence did not rely on insanity. Instead, the defence wanted to adduce psychiatric evidence about intent. That evidence was that the accused had 'adolescent identity disorder' that would have severely impeded his capacity to think clearly and logically.²⁷ The disorder would have fragmented his thought processes, diminishing his capacity to form an intent to kill.²⁸ The judge ruled the evidence inadmissible for that purpose. The only way the evidence could be used was for the purpose of an insanity defence.²⁹ The defence did not pursue insanity. The trial went ahead without the evidence. The accused was convicted of murder. He appealed on the basis that the trial judge was wrong to exclude the evidence. The High Court agreed that the evidence should have been allowed on the issue of intent.³⁰ However, it also made more general comments about the inquiry required when insanity was in issue. The Court stated:

In principle, the question of insanity falls for determination before the issue of intent. The basic questions in a criminal trial must be: what did the accused do and is he criminally responsible for doing it? Those questions must be resolved ... before there is any issue of the specific intent with which the act is done. It is only when those basic questions are answered adversely to an accused that the issue of intent is to be addressed.³¹

The conflict between these two approaches is plain. Each sets the questions the jury must answer in a different order. They provide no clear answer at common law to a question that must arise in any criminal trial where mental impairment is in issue: what elements does the prosecution have to prove before the jury considers the issue of mental impairment?

23 *Hawkins* (n 7) 504 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

24 *Ibid.*

25 *Ibid* 505.

26 *Ibid* 505.

27 *Ibid* 506.

28 *Ibid* 506–7.

29 *Ibid* 507.

30 *Ibid* 517–18.

31 *Ibid* 517.

B The Problem in the Present Context

The Victorian Parliament replaced the common law defence of insanity with the statutory defence of mental impairment when it enacted the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('*CMIA*').³² Section 20 of the *CMIA* provides:

- (1) The defence of mental impairment is established for a person charged with an offence if, at the time of engaging in conduct constituting the offence, the person was suffering from a mental impairment that had the effect that —
 - (a) he or she did not know the nature and quality of the conduct; or
 - (b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).
- (2) If the defence of mental impairment is established, the person must be found not guilty because of mental impairment.

The issue is whether the words 'engaging in conduct constituting the offence' require the prosecution to prove the mental element of the crime before the jury considers the defence of mental impairment. This situation causes great difficulty for judges. The case of *Director of Public Prosecutions (Vic) v Soliman* ('*Soliman*')³³ is a good example. *Soliman* was a rape case. The accused offered massage services. The complainant attended for a massage.³⁴ At some stage during the massage, the accused penetrated the complainant without her consent.³⁵ The accused later claimed the complainant had consented, giving some reasons for that belief.³⁶ The accused had paranoid schizophrenia.³⁷ There was defence expert evidence that there was 'a reasonable case'³⁸ that at the time of the offence the accused was unable to appreciate that his actions were wrong, and the defence of mental impairment was available.³⁹ This was based primarily on bizarre comments the accused made to the complainant after the offence. The prosecution called expert evidence. That expert said mental impairment was not available, but agreed the accused was probably suffering a psychotic relapse that may have contributed to impaired judgement and impulsivity.⁴⁰ The issues that

32 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 1 ('*CMIA*').

33 [2012] VCC 658 ('*Soliman*').

34 *Ibid* [5] (Cannon J).

35 *Ibid* [6].

36 *Ibid* [11].

37 *Ibid* [28].

38 *Ibid* [30].

39 *Ibid*.

40 *Ibid* [31].

arose were, first, the order in which the jury should be directed regarding mental impairment and the mental element of rape; and, second, whether the expert evidence could be used for the purpose of proving both mental impairment and lack of intent.⁴¹

The Court followed *Stiles*. It found that *Hawkins* did not overrule *Stiles* and should be confined to the provisions of the Tasmanian *Criminal Code Act 1924* (Tas).⁴² It found that following *Hawkins* would mean the jury might never reach consideration of the mental element and the accused might be deprived of an opportunity to be completely acquitted.⁴³ However, the Court ruled that the psychiatric evidence could be used only for the purpose of determining mental impairment. Judge Cannon described this admissibility issue as ‘a very thorny one indeed [that] has caused me much angst’.⁴⁴ Her Honour considered the statement of principle in *Stiles*, which is extracted above,⁴⁵ and decided that the references to the presumption of sound mind meant that evidence of mental illness was not relevant to intent. The jury had to engage in an artificial exercise. Because the accused was presumed to be of sound mind, they had to consider whether intent was proved consistent with that assumption.⁴⁶ Even though they had heard evidence he was not of sound mind, they had to put that aside. The Court found:

If an accused is to be presume[d] to be of sound mind for the purposes of a jury’s consideration of all of the elements, then evidence which goes to the issue of mental impairment, whether it be evidence supporting the defence or rebutting it, should only be considered if, and when all of the elements of rape, are proven. If this were otherwise, then potentially the very same evidence which would be relied upon to establish, or even rebut the defence of mental impairment, may well result in an accused’s outright acquittal and would interfere with the presumption of sound mind. This would potentially undermine the *Stiles* approach and undermine the province of the defence of mental impairment itself.⁴⁷

The ruling in *Soliman* was not appealed. The accused was found not guilty by reason of mental impairment.⁴⁸ He was placed on a supervision order.⁴⁹

41 Ibid [2].

42 Ibid [24]: the Court also noted that *Stiles* (n 6) was followed in the murder case of *R v Fitchett* (2009) 23 VR 91.

43 *Soliman* (n 33) [24] (Cannon J).

44 Ibid [39].

45 See above n 14 and accompanying text.

46 *Soliman* (n 33) [41] (Cannon J).

47 Ibid.

48 Order of Cannon J in *DPP (Vic) v Soliman* (County Court of Victoria, CR-11-01799, 27 August 2012) [8].

49 Ibid [28].

III HOW MIGHT THE PROBLEM BE RESOLVED?

The problem clearly raises challenging questions of principle and administration. Those questions invite consideration of different theories of criminal law. This part considers the justifications for both the *Stiles* and *Hawkins* approaches. It also examines an attempt to deal with the complexity of the questions raised by ‘splitting’ intent, depending on the nature of the offence charged.

A A Freedom-Based Analysis

The requirement that the prosecution must prove every element of a criminal offence is an essential part of the criminal legal system.⁵⁰ Relieving the prosecution of the requirement to prove intent in any circumstance may be seen as manifestly illiberal. It may, in effect, make people who have insanity defences presumptive criminals. The seriousness of many criminal offences changes depending on intent. In Victoria, intentionally causing serious injury, for example, carries a higher maximum penalty than recklessly or negligently causing it.⁵¹ The principles of sentencing are different.⁵² It cannot be dealt with in the Magistrates’ Court.⁵³ Removing the requirement to prove intent may mean that people are liable for the most serious category of offence simply because the prosecution elects to proceed on that particular charge. There is also a persuasive argument that the weight of High Court authority supports *Stiles*. In *R v Porter* (*Porter*)⁵⁴ Dixon J directed the jury in a case where the accused had poisoned his infant son.⁵⁵ There is no question that the jury had to consider intent to kill before they considered insanity. If they were not satisfied of intent to kill, they had to acquit the accused.⁵⁶ *Sodeman v The Queen* (*Sodeman*)⁵⁷ was another murder case where insanity was in issue. The High Court still clearly considered that the prosecution had to establish intent to kill.⁵⁸ Similarly, in *Stapleton v The Queen* (*Stapleton*),⁵⁹ which was also an appeal from a murder trial, the High Court was concerned with directions that seemed to suggest it was for the accused to prove

50 See *Woolmington v DPP (UK)* [1935] AC 462, 481–2 (Viscount Sankey LC for the Court).

51 *Crimes Act 1958* (Vic) ss 16, 17, 24 (*Crimes Act* (Vic)). The maximum penalties are, respectively, 20, 15 and 10 years’ imprisonment.

52 See *Nash v The Queen* (2013) 40 VR 134; *Chol v The Queen* (2016) 262 A Crim R 455.

53 *Criminal Procedure Act 2009* (Vic) s 28.

54 *Porter* (n 9).

55 The case was a murder trial conducted in the High Court before the *Seat of Government Supreme Court Act 1933* (Cth) was passed. The reported decision consists of his Honour’s directions to the jury.

56 *Porter* (n 9) 184–5, 190–1 (Dixon J).

57 *Sodeman* (n 13).

58 *Ibid* 206 (Latham CJ), 208–9 (Starke J), 219 (Dixon J), 229 (Evatt J).

59 *Stapleton* (n 12).

lack of intent.⁶⁰ The Victorian Court of Appeal relied on *Porter in Stiles*.⁶¹ The County Court similarly relied on *Porter in Soliman*.⁶²

Under this analysis, it is difficult to think of a principled reason to restrict expert evidence to the question of mental impairment. The law regarding when evidence is relevant is settled. Evidence is relevant if it can ‘rationally affect ... the probability of the existence [or non-existence] of a fact in issue’.⁶³ The threshold question is whether there is a logical connection between the evidence and the existence of the fact.⁶⁴ Expert evidence about whether the accused was unable to appreciate the nature and quality of his or her actions, or reason that his or her actions were wrong, may well pass that test. If it does, the evidence is admissible. Whether that results in an outright acquittal instead of a supervision order may be less important than the freedom of an individual to defend him- or herself fully, within the confines of the law. The defence urged this approach in *Soliman*. Counsel argued he wanted ‘both ends and the middle’ in terms of what the jury would be asked to consider.⁶⁵ Somewhat ironically, he relied on *Hawkins*, where the High Court clearly found that ‘[e]vidence of mental disease that is incapable of supporting a finding of insanity or that does not satisfy the jury that the accused was insane when the incriminated act was done ... is relevant to and admissible on the issue of the formation of a specific intent’.⁶⁶ In *Soliman*, her Honour considered that this was ‘pluck[ing] an appealing aspect from a different approach in a bid to achieve a complete acquittal’.⁶⁷ But the principle remains. If the evidence is relevant and admissible on the question of intent, there is a strong argument the accused should be permitted to rely on it.

B *Splitting Intent*

There is other jurisprudence that adopts a more nuanced, complex approach. The common law has long recognised that there are different claims of non-responsibility because of a person’s mental state at the time of an otherwise criminal act. There is, perhaps, a spectrum of non-responsibility, from those acts that are completely involuntary,⁶⁸ to acts that are carried out in a state of

60 Ibid 365 (Dixon CJ, Webb and Kitto JJ).

61 *Stiles* (n 6) 22 (Crockett, Murphy and Cummins JJ).

62 *Soliman* (n 33) [42]–[47] (Cannon J).

63 *Evidence Act 2008* (Vic) s 55(1).

64 *Papakosmas v The Queen* (1999) 196 CLR 297, 322 [81] (McHugh J).

65 *Soliman* (n 33) [53] (Cannon J).

66 *Hawkins* (n 7) 517 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

67 *Soliman* (n 33) [53] (Cannon J).

68 Involuntary acts are, of course, not strictly mental state defences. A claim that the act is involuntary is a claim that goes to the physical element of the offence. See *Ryan v The Queen* (1967) 121 CLR 205; *R v O’Connor* (1980) 146 CLR 64 (*O’Connor*); *R v Falconer* (1990) 171 CLR 30 (*Falconer*); *R v Marijancevic* (2009) 22 VR 576.

automatism (both ‘sane’ and ‘insane’),⁶⁹ through to those that are deliberate, carried out knowing that the conduct is wrong, but which are the product of some delusional belief. Even the defence of mental impairment envisions two separate bases for non-responsibility — not knowing the nature and quality of an act, and not being able to reason that the act is wrong.⁷⁰ The law also recognises that there are different types of crimes. Some crimes require proof of a specific intent to cause a particular result.⁷¹ Some require proof of only a ‘basic’ intent to do the act that constitutes the crime.⁷² Some jurisdictions take a different approach to both the question of how mental impairment should be considered and the admissibility of psychiatric evidence, depending on the crime alleged.⁷³

A version of this split intent approach was adopted in the Australian Capital Territory (‘ACT’) decision of *R v Ardler* (‘*Ardler*’).⁷⁴ The accused was charged with rape.⁷⁵ He was unfit for trial.⁷⁶ He was acquitted at a special hearing before a single judge because the court was not satisfied the mental element of the offence was proved. This was partly because of the accused’s mental dysfunction.⁷⁷ The prosecution appealed. After dealing with whether it was possible to appeal an acquittal,⁷⁸ the Supreme Court considered the question of exactly what the prosecution had to prove at a special hearing.⁷⁹ The relevant legislation required the court to consider whether the accused ‘committed the acts that constitute the offence charged’.⁸⁰ The Court rejected the view that the legislation required proof of the physical act only, with no intent.⁸¹ It contrasted the ACT provision with the equivalent provisions in South Australia.⁸² The legislation there explicitly splits the inquiry into the ‘objective elements’ of the offence and the defendant’s mental competence.⁸³ The legislation gives the trial judge a discretion regarding whether to determine the objective elements of the offence first or the defendant’s mental competence.⁸⁴ If the court decides to proceed first with the trial of only

69 The doctrine of automatism is beyond the scope of this article. However, ‘insane automatism’ results from a disease of the mind and will lead to a mental impairment defence but ‘sane’ automatism, if proved, will result in an acquittal: see *Falconer* (n 68).

70 *CMA* (n 32) s 20.

71 *O’Connor* (n 68).

72 *DPP (UK) v Majewski* [1977] AC 443.

73 See below nn 74–87 and accompanying text.

74 (2004) 144 A Crim R 552 (‘*Ardler*’).

75 *Ibid* 554 [2] (Higgins CJ, Gray and Whitlam JJ).

76 *Ibid* 554 [3].

77 *Ibid* 556 [25].

78 *Ibid* 559 [44]–[45]. The Court found it was not, but the Director of Public Prosecutions (ACT) lodged a reference appeal that allowed the question to be ventilated.

79 *Ibid* 559–60 [46]–[47].

80 *Ibid* 560 [47], citing *Crimes Act 1900* (ACT) s 317(3), as at 1 March 2004 (‘*Crimes Act* (ACT)’).

81 *Ardler* (n 53) 567 [90] (Higgins CJ, Gray and Whitlam JJ).

82 *Ibid* 560 [51]–[52].

83 *Criminal Law Consolidation Act 1935* (SA) s 269E(1).

84 *Ibid* s 269E(2).

the objective elements, inquiries about subjective elements, including intent, are excluded.⁸⁵ If the objective elements are proved, the court then enquires into the accused's 'mental competence', which includes the current equivalent of an insanity defence.⁸⁶ In *Ardler*, the ACT Supreme Court found this was a 'far more elaborate and deliberate definition' designed to achieve the result that all the prosecution had to prove was the physical act.⁸⁷ The ACT provision did not contain this elaborate division.

But the Court also rejected the view that the legislation required proof of all specific mental elements. If that were the case, the legislature could have simply used the word 'offence' rather than 'acts that constitute the offence'.⁸⁸ Proving the entire offence would make the words 'acts that constitute' superfluous.⁸⁹ The result was a more nuanced, but also more complex, view of intent. The Court decided the legislature broadly intended to remove the requirement to prove intent, but stated it was 'too simplistic a categorisation of the spectrum of offences encompassed by the criminal law' to decide that all forms of intent were excluded.⁹⁰ The Court arrived at the following conclusions:

- The prosecution had to prove the acts charged took place and that they were intentional and voluntary.⁹¹ There is no legal presumption that acts are voluntary and intentional, but this can be inferred where there is no evidence to the contrary.⁹²
- If the offence charged required a specific intent necessary to constitute the offence (the Court suggested arson to endanger the life of another person, for example) then that specific intent had to be proved 'in order that the "acts" proved will constitute that offence rather than a lesser offence'.⁹³
- Where specific intent is proved, the defence cannot argue that intention or knowledge was the result of the mental impairment.⁹⁴ Where the charge is sexual intercourse without consent, it is no defence to say the accused mistakenly, but insanely, understood or believed the complainant was consenting.⁹⁵

85 Ibid s 269G(3). Subjective elements are 'voluntariness, intention, knowledge or some other mental state that is an element of the offence': at s 269A (definition of 'subjective element').

86 Ibid s 269G.

87 *Ardler* (n 53) 561 [55] (Higgins CJ, Gray and Whitlam JJ).

88 Ibid.

89 Ibid.

90 Ibid 561 [56].

91 Ibid 566 [81].

92 Ibid 566 [84].

93 *Ardler* (n 53) 565 [77] (Higgins CJ, Gray and Whitlam JJ), discussing *Crimes Act 1900* (NSW) s 117.

94 Ibid 565 [78].

95 Ibid 564 [69], discussing *A-G's Reference (No 3 of 1998)* [2000] QB 401, 411 (Judge LJ for the Court) (*'A-G's Reference (No 3)'*).

- However, the mental impairment was relevant to the accused person's capacity to form the specific intent and whether it was, in fact, present.⁹⁶

Splitting intent in this way clearly reflects a concern to preserve the mental element where it is necessary either to make the impugned act a crime at all or to make the act the charged crime and not some lesser one. The mental element is rebranded as a conduct element to achieve this purpose. This avoids some of the excesses of the *Hawkins* approach. But it is complex and abstract. It is also potentially unpredictable. The distinctions about which mental states should be treated as 'acts' will not always be clear. The approach carries a real risk the law will develop idiosyncratically.

C A Pragmatic Approach

The justifications for the *Hawkins* approach are, essentially, pragmatic. The first is that it is artificial to consider the mental element of an offence before considering the defence of mental impairment. Both are questions about mental states. Both are subsets of one essential question about responsibility. As the High Court, succinctly, put it: '[t]he basic questions in a criminal trial must be: what did the accused do and is he criminally responsible for doing it?'⁹⁷ Expressed in this way, the inquiry is simpler. If the defence claims the accused is not responsible because he or she was mentally impaired, that is investigated first. The inquiry about the mental element of the offence arises only if that claim of non-responsibility fails.⁹⁸ This requires the accused to make a more strident claim about why he or she is not responsible. Mental impairment becomes more prominent because, if it is successful, there is no need to consider intent. It may also be more consistent with the way the evidence is presented. If the accused relies on mental impairment, it is almost inevitable there will be expert evidence regarding that defence. There is highly likely to be expert evidence from the prosecution regarding the same thing. That is likely to be evidence of delusional beliefs relevant to whether the accused understood what he or she was doing was wrong.⁹⁹ The *Hawkins* approach puts evaluating that evidence, which is likely to be prominent in the trial, front and centre. There is a distinct appeal in this more simplistic approach. Jury directions are notoriously complex. The express purpose of the *Jury Directions Act 2015* (Vic) is to reduce complexity and simplify the issues

⁹⁶ *Ardler* (n 53) 565 [78] (Higgins CJ, Gray and Whitlam JJ).

⁹⁷ *Hawkins* (n 7) 517 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

⁹⁸ *Ibid.*

⁹⁹ The proportion of people who rely on this limb of the mental impairment defence appears to be high. One South Australian study estimates 87% of all 'mental incompetence' findings were based on the second limb that the accused did not know their conduct was wrong: Sentencing Advisory Council of South Australia, *A Discussion Paper Considering the Operation of Part 8A of the Criminal Law Consolidation Act 1935 (SA)* (Discussion Paper, July 2013) 24.

to be determined.¹⁰⁰ Integrated directions are permitted.¹⁰¹ There is important evidence that juries often fail to understand many legal concepts, including the true meaning of mental impairment.¹⁰² The *Hawkins* approach has true pragmatic value in this sense.

It also appears to be the preferred approach in New South Wales. The decision was first raised in that jurisdiction in *R v Toki*.¹⁰³ The Court of Criminal Appeal noted the potential importance of the decision, but decided it was not necessary to ‘plumb the depths of the High Court’s reasoning’ in the context of that case.¹⁰⁴ But *Hawkins* was clearly applied in *R v Minani*.¹⁰⁵ The accused stabbed the victim during an argument at a hostel.¹⁰⁶ He was charged with malicious wounding with intent to cause grievous bodily harm.¹⁰⁷ He was found unfit to plead.¹⁰⁸ There was evidence of serious mental illness.¹⁰⁹ The question of when intent had to be considered arose. Applying *Hawkins*, Hunt AJA stated that it was not necessary to consider whether the accused had the intent to cause grievous bodily harm because the trial judge found mental illness was established.¹¹⁰ The *Hawkins* approach was applied again in *R v Stables*¹¹¹ to the offence of murder.¹¹² It was adopted once more in *R v Brewer (No 2)*.¹¹³

The second justification is that it dramatically reduces the possibility that an accused might be fully acquitted because he or she did not have the requisite intent, rather than made subject to supervision because of mental impairment. Society’s entitlement to be protected from those who may be dangerous influences many leading judgments. In the United Kingdom, in *Attorney-General’s Reference (No 3 of 1998)* (*A-G’s Reference (No 3)*),¹¹⁴ the Court of Appeal considered the case of a man who, trying to protect himself from evil, broke into a house and seriously assaulted the occupier.¹¹⁵ The relevant legislation required the jury to consider

100 *Jury Directions Act 2015* (Vic) ss 1(a)–(b).

101 *Ibid* s 67.

102 See Australian Clinical Psychology Association, Submission No 4 to Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (21 August 2013).

103 [2003] NSWCCA 125.

104 *Ibid* [16] (Hidden J, Levine J agreeing at [1], Smart JA agreeing at [35]).

105 (2005) 63 NSWLR 490.

106 *Ibid* 492 [4] (Hunt AJA, Spigelman CJ agreeing at 491 [1], Howie J agreeing at 500 [42]).

107 *Ibid*.

108 *Ibid* 492 [8].

109 *Ibid* 495 [19].

110 *Ibid* 498 [32].

111 [2014] NSWSC 697.

112 *Ibid* [28]–[32] (Hidden J). Hidden J stated that the question of whether the reasoning in *Hawkins* applied to malicious wounding was not clear: at [30].

113 [2015] NSWSC 1547, [102] (Bellew J).

114 *A-G’s Reference (No 3)* (n 95).

115 *Ibid* 401.

whether the accused ‘did the act or made the omission charged’.¹¹⁶ The Court examined the legislative history of that provision and concluded ‘nothing in the legislation suggests that if the jury has concluded that the defendant’s mental state was such that ... his mental responsibility for the crime was negated, it should simultaneously consider whether the necessary mens rea has also been proved’.¹¹⁷ If insanity is established, ‘mens rea becomes irrelevant’.¹¹⁸ The Court said this in relation to public safety:

A person with a mental disability, swimming in an overcrowded public pool, should not be at risk of the consequences of a finding of insanity when the alleged indecent touching of another swimmer may well have been accidental, or non-deliberate. On the other hand, where an apparently deliberate touching takes place in what on the face of it are circumstances of indecency, the individual in question (arguing that he was insane at the time) should not avoid the appropriate verdict on the basis of his own mistaken perception, or lack of understanding, or indeed any defences arising from his own state of mind.

The difficulties are, if anything, greater where the alleged crime is more serious. Where on an indictment for rape it is proved that the sexual intercourse has taken place without the consent of the woman, and the defendant has established insanity, he should not be entitled to an acquittal on the basis that he mistakenly, but insanely, believed that she was consenting.¹¹⁹

The House of Lords considered this decision in *R v Antoine* (‘*Antoine*’).¹²⁰ *Antoine* was also a murder case. The accused and another person killed the victim, apparently as a sacrifice to the devil.¹²¹ The accused was found unfit to plead.¹²² The legislation required a special hearing regarding whether the accused ‘did the act or made the omission charged against him as the offence’.¹²³ The House of Lords considered whether the prosecution was required to prove the mental element of murder. Lord Hutton stated that where insanity is established ‘the jury should no longer be concerned with the mental responsibility of the defendant for that offence and ... should not consider ... mens rea’.¹²⁴ His Lordship rejected the recommendation of the high-profile Committee on Mentally Abnormal Offenders

116 *Trial of Lunatics Act 1883*, 46 & 47 Vict, c 38, s 2(1).

117 *A-G’s Reference (No 3)* (n 95) 409 (Judge LJ for the Court).

118 *Ibid.*

119 *Ibid* 411.

120 [2001] 1 AC 340 (‘*Antoine*’).

121 *Ibid* 343 (Lord Bingham).

122 *Ibid.*

123 *Criminal Procedure (Insanity) Act 1964* (UK) s 4A.

124 *Antoine* (n 120) 374 (Lord Hutton, Lord Nicholls agreeing at 363, Lord Mackay agreeing at 363, Lord Nolan agreeing at 363, Lord Hope agreeing at 363).

that the mental element should remain.¹²⁵ His Lordship stated that concerns ‘it would be unrealistic and contradictory’ to consider intent were ‘well founded’.¹²⁶ He stated:

The purpose of section 4A, in my opinion, is to strike a fair balance between the need to protect a defendant who has, in fact, done nothing wrong and is unfit to plead at his trial and the need to protect the public from a defendant who has committed an injurious act which would constitute a crime if done with the requisite mens rea. The need to protect the public is particularly important where the act done has been one which caused death or physical injury to another person and there is a risk that the defendant may carry out a similar act in the future. I consider that the section strikes this balance by distinguishing between a person who has not carried out the actus reus of the crime charged against him and a person who has carried out an act (or made an omission) which would constitute a crime if done (or made) with the requisite mens rea.¹²⁷

These remarks reflect this utilitarian analysis. Protecting others from potentially dangerous individuals is paramount. The statement of priorities is explicit. In this formulation, the existence of the special hearing procedure to determine only the physical element of the offence is sufficient protection for an innocent, but impaired, accused person.

IV HOW SHOULD THE PROBLEM BE RESOLVED?

If nothing else, the discussion above demonstrates that compelling arguments exist for both approaches. Those arguments quickly raise fundamental questions about the purpose of the criminal law. Classical liberalism holds that the freedom of the individual from undue interference by the state should triumph over the apparatus of the state or wishes of the majority.¹²⁸ Relieving the prosecution of the burden of proving intent where mental impairment exists is, by this standard, an affront to liberty. Freedoms should not be steamrolled for the sake of convenience or simplicity, even less because we are uncomfortable with the potential consequences of where those freedoms lead.¹²⁹ Putting intent behind mental impairment may create miscarriages of justice because it may invite the jury to make a qualified acquittal when they may have returned an unqualified one.¹³⁰ A qualified acquittal carries its own stigma because it may imply the

125 Ibid 374–5, discussing Committee on Mentally Abnormal Offenders, *Report of the Committee on Mentally Abnormal Offenders* (Report, October 1975) 150 [10.24].

126 *Antoine* (n 120) 375 (Lord Hutton).

127 Ibid 375–6.

128 See generally Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977).

129 See Paul Roberts, ‘Taking the Burden of Proof Seriously’ [1995] (October) *Criminal Law Review* 783.

130 Wheeler J recognised this specific possibility in *Ward v The Queen* (2000) 23 WAR 254, 280 [131] (‘Ward’). Her Honour noted this was also the subject of concern in *Falconer* (n 68).

jury found that the accused would have been convicted, but for his or her mental impairment.¹³¹ The consequences of being placed on a supervision order are extremely serious. The orders are onerous and can be hard to get off.¹³² The person often has to prove a negative — that members of the public will not be seriously endangered¹³³ — which means excluding an unlikely but disastrous possibility that something similar may happen again. This is likely to take the form of ‘testing by steps’,¹³⁴ where the person subject to the order earns increased liberty by demonstrating increasing socialisation, insight, medication compliance, acceptance of supervision and monitoring, stable housing, abstinence from drugs and alcohol and a decrease in symptoms associated with the offending, such as command hallucinations.¹³⁵ Those things can be near impossible for a person with, for example, treatment resistant schizophrenia. The idea that nobody should be subject to this if they might not have committed the offence is powerful.

Even if we retreat a little from an individual concept of freedom to a broader type of civic freedom, adopting *Hawkins* is still difficult to justify. A ‘republican’ theory of criminal law, for example, aims for a type of freedom and empowerment within a city-state its proponents call ‘dominion’.¹³⁶ Changing the prosecutorial process for one class of citizen against another is difficult to reconcile with this. This is especially true when there is a sophisticated process of civil commitment for members of the community who may be so ill they are dangerous.¹³⁷ Antony Duff argues society should be a kind of liberal community, ‘a polity of citizens whose common life is structured by such core liberal values as autonomy, freedom, privacy and pluralism, informed by a conception of each other as fellow citizens in the shared civic enterprise’.¹³⁸ Criminal liability in that context depends on responsible agency. A person must be ‘capable of recognising and responding to the reasons that bear on his [or her] situation’.¹³⁹ This involves ‘recognising reasons as reasons’, having a grasp of why they are relevant and being able to weigh them and deliberate about them before deciding how to act.¹⁴⁰ It may even

131 *Ward* (n 130) 280 [133] (Wheeler J).

132 In some jurisdictions, custodial supervision orders result in indefinite, grossly disproportionate terms of detention in prison: see Ian Freckelton, ‘Indefinite Detention in Australia: The Ongoing Risk of Governor’s Pleasure Detention’ (2014) 21(4) *Psychiatry, Psychology and Law* 469.

133 *CMLA* (n 32) s 35(3).

134 Ian Freckelton, ‘Applications for Release by Australians in Victoria Found Not Guilty of Offences of Violence by Reason of Mental Impairment’ (2005) 28(4) *International Journal of Law and Psychiatry* 375, 387.

135 See generally Freckelton, ‘Applications for Release by Australians in Victoria Found Not Guilty of Offences of Violence by Reason of Mental Impairment’ (n 134).

136 See John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford University Press, 1990) ch 5, 56.

137 Compulsory treatment orders can be made to prevent serious deterioration in a person’s physical or mental health or to prevent serious harm to the person or another person. See *Mental Health Act 2014* (Vic) s 29.

138 RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford University Press, 2007) 11, discussed in Jamie Walvisch, Submission No 11 to Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (26 August 2013) 3–6.

139 Duff (n 138) 39.

140 *Ibid.*

require the ability to recognise ‘how reasons fit together’ and understand how ‘one [set of reasons] is stronger than another’.¹⁴¹ The Australian legal system aims for some version of this liberal community. Intent is the inquiry the law prescribes to make this judgment.¹⁴² It is different to the inquiry about insanity.¹⁴³ It is difficult to justify demoting this inquiry precisely when the law is required to examine a person whose capacity for rational judgment may be compromised.

It is also significant that proving intent often involves a reconstructive analysis. Where there is no direct evidence of what a person intended, such as an admission or evidence from the accused, a decision-maker is invited to make a finding regarding intent by drawing inferences.¹⁴⁴ The relevant intent can be formed in a very short space of time. This short time frame often means that analysing intent in terms of formulating a plan and executing it, or becoming aware of a risk and taking it, may, in fact, misrepresent human experience.¹⁴⁵ The inquiry about intent may be, in the context of ‘fleeting mental states’, ‘a component in a social practice of allocating responsibility and blame’.¹⁴⁶ It may be an interpretive exercise — a relational account of responsibility between accused persons, victims and the wider community — as much as a literal inquiry into what a person actually thought at the time of the impugned act.¹⁴⁷ This exercise is likely to be ‘based on a judgment about the way people normally (ought to) behave’.¹⁴⁸ Deciding the question of mental impairment before intent deprives the accused and the fact finder of the opportunity to exercise this relational judgment. It may sideline an assessment of the full context for the accused person’s behaviour. Even if one adopts a ‘retributivist’ view that criminal law exists solely to punish wrongdoers, it is moral blameworthiness that legitimises punishment.¹⁴⁹ Intent can, in that context, be seen as an essential inquiry.

For these reasons, this article argues that *Stiles* is the better approach. The linear process, though involving some level of abstraction, is logical in relation to the burden of proof. Reversing it to place insanity before specific intent may create confusion because the burden — which entails proof to two different standards —

141 John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge University Press, 1998) 71.

142 Many ideas about individual responsibility were a response to problems of coordination and legitimation, often borrowed from contemporary philosophy. See Lacey, ‘In Search of the Responsible Subject’ (n 2); Lindsay Farmer, ‘What Has the Philosophy of Punishment Got to Do with the Criminal Law?’ (1992) 3(2) *Law and Critique* 241.

143 See Paul Ames Fairall, ‘Voluntariness, Automatism and Insanity: Reflections on Falconer’ (1993) 17(2) *Criminal Law Journal* 81.

144 See generally *Shepherd v The Queen* (1990) 170 CLR 573.

145 Peter Cane, ‘Fleeting Mental States’ (2000) 59(2) *Cambridge Law Journal* 273, 273.

146 *Ibid* 274.

147 See Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002).

148 *Ibid* 47, citing Daniel C Dennett, *The Intentional Stance* (MIT Press, 1987) 17, 25–6, 39–40.

149 See Michael Moore, *Placing Blame: General Theory of the Criminal Law* (Oxford University Press, 1997).

shifts back and forth.¹⁵⁰ *Stiles* also removes the need to split intent. The decision in *Ardler* was a valiant attempt to deal with the inevitable problems that arise if the mental element is stripped away. But the fact is many crimes are crimes precisely because of the mental element. Problems have arisen from the UK approach. In *R (Young) v Central Criminal Court*¹⁵¹ an unfit accused was charged with dishonestly concealing material facts in relation to investment bonds. The question was whether the prosecution had to prove the accused's intent at the time of the acts, or whether that was not required because of *Antoine*. The Court held that the prosecution had to prove more than simply physical acts. They had to prove the accused's 'present intentions' at the time of the offence (that he intended to reduce the value of certain bonds) but did not have to prove dishonesty, or intention to induce the trustees to make an investment.¹⁵² After the decision in *Ardler*, the ACT legislature changed the relevant legislation to replace the words 'committed the acts that constitute the offence charged' to 'engaged in the conduct required for the offence charged'.¹⁵³ The explanatory statement makes it clear that the purpose of the amendment was to eliminate the requirement to prove any intent at all.¹⁵⁴ There has still been difficulty separating what is a physical act and what is a mental 'act'. On a charge of burglary, for example, intention to commit theft is a 'conduct' element that must be proved, intention to permanently deprive must be proved to establish theft, but dishonesty need not be.¹⁵⁵ This is a somewhat absurd result.

The justifications for the *Hawkins* approach are utilitarian. The paramount consideration is the prevention of harm to others.¹⁵⁶ But there are other ways to achieve this balance that infringe less on the fundamental institutions of the criminal law. The Victorian Law Reform Commission ('the Commission') examined the problem in its most recent review of the *CMIA*.¹⁵⁷ Generally, it proposed that the *Stiles* approach should be maintained and that the jury should consider evidence of mental impairment if it is relevant to the fault element of the offence.¹⁵⁸ But it qualified this approach. The qualification was based on why the fault element might not be made out.¹⁵⁹ The Commission drew a distinction based on the two limbs of mental impairment in s 20(1) of the *CMIA*. It distinguished

150 *Ward* (n 130) 281–2 [139] (Wheeler J).

151 [2002] EWHC 548 (Admin).

152 *Ibid* 188–9 [34]–[35] (Rose LJ, Burnton J agreeing at 189 [37] and Leveson J agreeing at 189 [38]).

153 *Crimes Amendment Act 2004* (ACT) s 7, amending *Crimes Act* (ACT) (n 56) s 317(3).

154 Explanatory Statement, *Crimes Amendment Bill* (No 2) 2004 (ACT) cl 4.

155 See *R v Williams (No 2)* [2011] ACTSC 77; *R v Dunn* [2011] ACTSC 84.

156 John Stuart Mill, *On Liberty* (John W Parker and Son, 2nd ed, 1859) 21. See also Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (Oxford University Press, 1984).

157 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Report No 28, June 2014).

158 *Ibid* 252 [7.145].

159 *Ibid* 252 [7.147].

between mental impairment because the accused did not know the nature and quality of his or her conduct, and mental impairment because he or she did not know that the conduct was wrong.¹⁶⁰

The Commission took the view that it should not be possible to achieve a complete acquittal where the reason intent could not be proved was because the accused did not understand the nature and quality of his or her act.¹⁶¹ Where a person acted voluntarily, knowing what they were doing, but did not understand the nature and quality of the act (the Commission gave the example of knowing that they were cutting, but not knowing they were cutting a person's neck) or where a person acted voluntarily, but with no understanding of what they were doing or the nature and quality of the act (the example was thinking they are taking a photograph of a person when in fact they are shooting them),¹⁶² then the prosecution should be required to prove only the physical element of the crime before the jury considered the question of mental impairment. The Commission recommended this should be dealt with as a threshold question for the judge, which would determine whether the mental element of the offence would be put to the jury.¹⁶³ There is much to commend this approach. It preserves the essence of the common law and eliminates abstractions, but places a primacy on community protection where it is probably beyond argument that it is required.

V CONCLUSION: A PREDICTION

This issue clearly raises a number of difficult normative questions. It is also important to acknowledge that the emotional toll of these matters can be extremely high.¹⁶⁴ However, this article predicts these matters are unlikely to feature prominently in the way the question is resolved. If it is tested on appeal, this article predicts another, essentially conservative, analysis will prevail. The provisions of the *CMA* replaced the common law. The question is likely to be resolved using the principles of statutory construction. And there can be little doubt that we live in an era where a literal, textual approach to statutory construction prevails. The High Court has stated that the task of statutory construction begins with the text itself.¹⁶⁵ Not only does it begin with the text, it ends with the text.¹⁶⁶ This view is well supported in Victorian authority. The Court of Appeal in *Director of Public*

160 Ibid.

161 Ibid.

162 Ibid.

163 Ibid 253.

164 See generally Duncan Chappell, 'Victimisation and the Insanity Defence: Coping with Confusion, Conflict and Conciliation' (2010) 17(1) *Psychiatry, Psychology and Law* 39.

165 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 26, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

166 *Federal Commissioner for Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

*Prosecutions (Vic) v Leys*¹⁶⁷ stated:

The process of construction must always begin by examining the context of the provision with the object of adopting an interpretation that is consistent with the ordinary and natural meaning of the words derived from the context in which they appear and having regard to the legislative purpose of all of the provisions of the statute.¹⁶⁸

The Court of Appeal restated the rationale for adopting this textual primacy approach in *Treasurer (Vic) v Tabcorp Holdings Ltd.*¹⁶⁹ The majority stated that not only does the separation of powers require this approach, but it also ‘avoids the twin dangers of a “court construct[ing] its own idea of a desirable policy”, or making “some a priori assumption about its purpose”’.¹⁷⁰ The court ‘must strive to give meaning to every word of the provision’,¹⁷¹ and to the provision as a whole.¹⁷² The Court of Appeal is unlikely to do anything that might be perceived as legislating. This strict legal approach was the basis for the recent decision that the so-called ‘baseline sentencing provisions [in Victoria] were incapable of being given any practical operation’.¹⁷³ That legislation required judges to impose a sentence for a number of specific offences ‘in a manner that is compatible with Parliament’s intention’ that certain pre-determined values should become the median sentence for those offences.¹⁷⁴ The legislation did not contain a mechanism to achieve the intended future median sentence.¹⁷⁵ The Court found this was an incurable defect because ‘the Court ha[d] no [legislative] authority to create one’.¹⁷⁶ The *CMIA* provisions are also to be interpreted consistently with the principle of legality. That includes a presumption that Parliament does not intend to invade fundamental rights and freedoms unless they have included in the legislation unambiguous language showing a conscious decision to do so.¹⁷⁷

167 (2012) 44 VR 1.

168 Ibid 16 [46] (Redlich and Tate JJA and T Forrest AJA), citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ) (*Project Blue Sky*) and *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642, 649 [5] (French CJ and Bell J).

169 [2014] VSCA 143.

170 Ibid [101] (Maxwell P, Beach JA and McMillan AJA), quoting *Australian Education Union v Department of Education and Children’s Services* (2012) 248 CLR 1, 14 [28] (French CJ, Hayne, Kiefel and Bell JJ) and *Certain Lloyds Underwriters v Cross* (2012) 248 CLR 378, 390 [26] (French CJ and Hayne J).

171 *Project Blue Sky* (n 168) 382 [71] (McHugh, Gummow, Kirby and Hayne JJ), citing *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ), 419 (O’Connor J) and *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 12–13 (Mason CJ).

172 *Commissioner of State Revenue (Vic) v EHL Burgess Properties Pty Ltd* [2015] VSCA 269, 334 [74] (Tate and Kyrou JJA and Robson AJA).

173 *DPP (Vic) v Walters (A Pseudonym)* (2015) 49 VR 356, 357 [5] (Maxwell P, Redlich, Tate and Priest JJA) (*Walters (A Pseudonym)*).

174 *Sentencing Act 1991* (Vic) s 5A(3)(a), as at 14 October 2015.

175 *Walters (A Pseudonym)* (n 173) 360 [8] (Maxwell P, Redlich, Tate, Whelan and Priest JJA).

176 Ibid.

177 *Al-Kateb v Godwin* (2004) 219 CLR 572, 577 [19] (Gleeson CJ); *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

Penal statutes are to be interpreted in a way that favours liberty.¹⁷⁸

The *CMIA* uses the words ‘the conduct constituting the offence’.¹⁷⁹ ‘Conduct’ includes ‘doing an act and making an omission’.¹⁸⁰ ‘Offence’ includes ‘conduct that would, but for the perpetrator’s mental impairment or unfitness to be tried, have constituted an offence’.¹⁸¹ There is nothing in these provisions that unambiguously removes the need to prove intent. The provision does not refer to different elements of criminal offences at all. The provision appears in pt 4 of the *CMIA*. That part establishes the mental impairment defence,¹⁸² states who can raise it,¹⁸³ establishes a presumption of non-impairment and standard of proof¹⁸⁴ and sets out the consequences of a finding of mental impairment.¹⁸⁵ There is every indication that the words ‘conduct constituting the offence’ means all the constituent parts of the offence, but for the specific defence of mental impairment. Generally, acts or omissions are not offences if they are not committed with the necessary criminal intent.¹⁸⁶ Some offences contain fault elements that are not linked to any physical element, such as, for example, assault with intent to commit a sexual offence.¹⁸⁷ The elaborate separation in the South Australian legislation is not part of Victorian law. Neither formulation of the ACT legislation has been enough to completely displace intent. The court in *Soliman*, while reluctant to engage in statutory construction, found that the *Stiles* approach was ‘not inconsistent’ with the legislation.¹⁸⁸ For these reasons, this article concludes that, however important the normative questions might be, *Stiles* will prevail with the current legislation because there is simply not enough to displace it.

178 *Beckwith v The Queen* (1976) 135 CLR 569, 576–8 (Gibbs J).

179 *CMIA* (n 32) s 20.

180 *Ibid* s 3 (definition of ‘conduct’).

181 *Ibid* (definition of ‘offence’).

182 *Ibid* s 20(1).

183 *Ibid* s 22(1).

184 *Ibid* s 21.

185 *Ibid* s 23.

186 *He Kaw Teh v The Queen* (1985) 157 CLR 523, 565–5 (Brennan J).

187 *Crimes Act* (Vic) (n 51) s 42.

188 *Soliman* (n 33) [24] (Cannon J).