CASE NOTE

OBJECTIVITY IN MANSLAUGHTER REVISITED: *R V THOMAS* [2015] NSWSC 537

JACINTA LANDA*

I. INTRODUCTION

The law concerning manslaughter has remained unchallenged for decades. As established in *Wilson v The Queen*,[1] a person is liable for the crime of manslaughter if it can be proven that they have intentionally and voluntarily performed a dangerous act leading to another's death. Furthermore, 'an act is dangerous if a reasonable person, in the position of the accused… would have realised that the act exposed another person... to a risk of injury.'[2] These tests are applied in cases of manslaughter to ensure objectivity and provide insight into the accused actions; that is, by disregarding the grave risks associated with an action, one's behaviour markedly deviates from what is expected of an average citizen.

However, where an accused suffers from an intellectual disability, should it be lawful to attribute the intellectual disability of the accused to a 'reasonable person' when applying the above tests? This question was addressed by the New South Wales Supreme Court in the decision *R v Thomas* [2015] NSWSC 537 where the accused, Michael Thomas, suffered from a 'moderate intellectual disability' functioning below '99.9 per cent of the population',[3] and exhibited features including 'extremely limited attention', 'extremely poor information processing speed' and 'impaired conceptual reasoning abilities.'[4]

II. FACTS

In November 2011, Susan Thomas (the victim and the accused's mother) was diagnosed with breast cancer. By November 2012, the cancer metastasised. A test performed on 24 January 2013 confirmed that her situation was dire, marked by extremely low platelet levels. Mr Thomas (the husband of Susan Thomas and the accused's father) affirmed that she had lost most of her mobility and needed assistance for showering or getting up should she fall.[5] On 31 January 2013, she was informed that she had only a few weeks left to live.[6]

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[1] *Wilson v The Queen* (1992) 174 CLR 313.

[2] Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (Judicial Commission of New South Wales, 2022) [5-6240] <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/manslaughter.html#p5-6240>.

[3] *R v Thomas* [2015] NSWSC 537.

[4] Ibid [2].

[5] Ibid [23].

[6] Ibid [3].

On 26 January 2013, the accused quit his job, citing excessive stress; however, he did not inform his parents of his resignation.[7] On 31 January 2013, Susan was too weak to get out of bed, so Mr Thomas accompanied the accused to work. After speaking to various individuals, Mr Thomas discovered that the accused had resigned. They discussed this in the car and continued the conversation at home. Susan overheard the commotion from her bed and both parents expressed their concerns in strong terms before the accused and Mr Thomas left the room.

Shortly after, Susan Thomas called out 'Michael, come here' in a tone that the accused's brother, Ben, described as 'loud and aggressive'. The accused then rushed to the bedroom where his mother was. Mr Thomas immediately heard two hits and hurried down the hallway to check on Susan, asking her if 'Michael hit her'. She replied, 'No, I'm alright.' Mr Thomas noticed a spot of blood on her cheek, and when Ben Thomas entered, he saw his mother holding her left cheek. Mr Thomas was worried about her low platelet levels and noticed she was having difficulty breathing. Soon after, she fell into unconsciousness and was rushed to Westmead Hospital where a neurosurgeon informed Mr Thomas that they could not operate due to internal bleeding and her low platelet count. She passed shortly thereafter in the hospital.

Two doctors provided medical evidence regarding the cause of Susan Thomas' death. Dr Istvan Szentmariay, who conducted an autopsy on Susan Thomas, opined that the cause of death was blunt force trauma from the three sizeable contusions, irregularly shaped around the left ear, consistent with being punched with a fist with a 'moderate degree of force.'[8] However, Dr Nicholas Wilcken viewed the main cause of death as cerebral haemorrhage, resulting from the alleged punching, combined with the low platelet count.[9]

On 29 August 2014, His Honour Bellew J in the New South Wales Supreme Court ruled that the accused was unfit to be tried pursuant to s 16 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).[10] The Director of Public Prosecutions declined to take no further proceedings and a special hearing was conducted.[11] The accused was represented by Mr Ierace SC, a senior Public Defender. Although no plea was entered, he was assumed to have pleaded not guilty to the following two offences: (1) the unlawful killing (ie manslaughter) of Susan Thomas and (2) recklessly causing grievous bodily harm to Susan Thomas.[12] The following text primarily discusses the first charge.

III. Legal Issues and Reasoning

The NSW Supreme Court was tasked with two questions when deciding on the first charge against Michael Thomas concerning the unlawful killing (manslaughter) of Susan Thomas. Specifically, (i) whether the act of the accused, if deliberate and unlawful, could nonetheless be deemed not dangerous and (ii) whether, under the principles of causation, the accused's act could be concluded to have caused the death of the deceased. The

[7] Ibid [14].
[8] Ibid [26].
[9] Ibid [27].
[10] Ibid [4].
[11] Ibid.
[12] Ibid [6]-[8].

Crown had the burden to prove beyond a reasonable doubt that the act of the accused caused the death of the deceased and that this act was unlawful and dangerous.[13]

The deliberate act in question involved the accused striking his mother at least once to the left side of her face. There was no dispute that the striking was 'unlawful', as it clearly constituted an assault.[14] However, there was some dispute as to whether the act 'caused the death of the deceased', as the two examining doctors held differing opinions regarding the cause Susan Thomas' death. Nonetheless, according to *Royall v The Queen*,[15] proving the act only requires evidence that it substantially or significantly contributed to the death of the deceased. His Honour R A Hulme J was satisfied beyond a reasonable doubt that the force applied by the accused significantly contributed to her death.[16]

The primary issue His Honour needed to resolve was thus whether the act was dangerous. Established precedents define an act as dangerous 'if a reasonable person in the position of the accused would have realised or appreciated that the act was dangerous.'[17] It does not matter whether the accused actually believed his/her act was dangerous.

The reasonable person is ascribed the age and maturity, along with the knowledge and experience of the accused at the time the act was committed.[18] There is no doubt the accused was aware of his mother's fragility; during his police interview, he mentioned that 'she was tired and weak or something'.[19] Statements from his brother and father aligned with this assertion, confirming the accused's awareness of his mother's condition. Attributing maturity is typically straightforward, usually aligning with an individual's chronological age. However, in this instance, as the court has been made aware, the accused has an intellectual disability, impacting characteristics typically associated with maturity levels. As such, His Honour concluded that both 'age' and 'maturity' are not significant factors for attributing to the reasonable person in this case.[20] He cited the propositions in *The Queen v Lavender* as the authority for this stance.[21] However, His Honour did distinguish the proposition by Layton J in *R v Edwards,*[22] who applied the *Lavender* test by considering a variety of factors personal to the accused. He argued that this approach goes a step too far and that attributing matters personal to the accused in a reasonable person test would substantially reduce the objective quality of the test rendering it subjective.[23]

The question thus moves from attributing personal qualities to attributing intellectual disability in the reasonable person test. As held in *R v Wills,*[24] the objective reasonable person test is primarily concerned with

[13] Ibid [34].
[14] Ibid [37].
[15] *Royall v The Queen* [1991] HCA 27; 172 CLR 378.
[16] *R v Thomas* [2015] NSWSC 537, [36].
[17] Trial Bench book (n 2).
[18] Ibid.
[19] *R v Thomas* [2015] NSWSC 537, [41].
[20] Ibid [40].
[21] *The Queen v Lavender* [2005] HCA 37; 222 CLR 67.
[22] *R v Edwards* [2008] SASC 303, 386-387.
[23] *R v Thomas* [2015] NSWSC 537, [48].
[24] *R v Wills* [1983] 2 VR 201.

the accused's physical acts, excluding his or her 'idiosyncrasies or ephemeral emotional or mental state.'[25] Incorporating mental state and emotions would render the test more subjective. Nevertheless, in *Russel v Rail Corp,*[26] it was determined appropriate to consider the plaintiff's mild intellectual handicap, affirming that 'intellectual disability may be idiosyncratic but it is a condition that is capable of assessment by standardised measures.'[27]

His Honour adopted this view, asserting that the intellectual disability of the accused in this instance is an objectively ascertainable attribute. Given that the accused's intellectual capacity is markedly distinct from the vast majority of the community, it would be unjust to assess him and his actions by standards he could never meet.[28] Applying such unreachable standards would inevitably stretch the distinction between 'moral culpability and legal responsibility to a point that is unacceptable.'[29]

His Honour, therefore, concluded that it would be probable that a person with intellectual disability would have realised that striking the deceased on the left side of the deceased face could lead to her demise or induce further implications. However, he was not convinced beyond a reasonable doubt that the accused had so realised. He therefore acquitted the accused on the manslaughter charge.

Lastly, regarding the second charge of reckless grievous bodily harm, the focus was on whether the act was reckless. To establish recklessness, it must be proven beyond a reasonable doubt that the accused realised, at the time he was striking his mother, that he could cause actual bodily harm and yet, he continued to strike her. As per s 35(2)(b) of the *Crimes Act*, actual bodily harm is defined as anything that interferes with the health or comfort of a person. It does not need to be permanent but must be more than fleeting or trivial.[30]

Given the context, it is evident that the accused, engaged in an argument and already agitated, still had the capacity to anticipate the possible consequences of striking his mother. Dr Pulmans corroborated this, stating 'it is likely that he understood that punching his mother would probably cause her some degree of physical pain or even result in bruising or scratches to her face, however, it was unlikely that he considered any potential complications.'[31] Based on this, His Honour was satisfied beyond a reasonable doubt that the accused struck his mother, believing it would cause her some harm. Consequently, His Honour found the accused guilty of recklessly causing grievous bodily harm based on the limited evidence available.[32]

IV. COMMENTARY AND ANALYSIS

This case heavily focuses on the correct application of the objective test in determining the dangerousness of the accused's acts. Numerous precedents have advanced the idea that an 'objective test' should always exclude

[25] Ibid 212.
[26] *Russell v Rail Infrastructure Corporation* [2007] NSWSC 402.
[27] Ibid [94].
[28] *R v Thomas* [2015] NSWSC 537, [69].
[29] Ibid [70].
[30] *Crimes Act 1900* (NSW) s 35(2)(b).
[31] *R v Thomas* [2015] NSWSC 537, [82].
[32] Ibid [84].

subjectivities including 'idiosyncrasies and ephemeral emotions which include mental state' as outlined in *R v Wills*.[33] Thus, it was intriguing to see Hulme J acknowledge this statement and precedent in his judgment, yet diverge in a completely different trajectory. Instead, His Honour explored inquiries regarding the attribution of certain qualities such as age, maturity and experience to a reasonable person for the purpose of the objective test.

His Honour was astute to underscore that the question deserving of attention was whether such attribution would compromise the objective test rendering it subjective. He contended, again correctly, that it would not impair the objective test, given the accused's intellectual capacity was significantly divergent from the vast majority of the community. Consequently, it would be inequitable to assess him by standards that would forever remain unattainable to him. This proposition and rationale align with contemporary societal perspectives, because subjecting the accused to such insurmountable standards would go against fundamental values of ensuring a fair and just trial.[34] Essentially, neglecting to consider the accused's intellectual attributes 'would widen the gap between moral culpability and legal responsibility.'[35]

His Honour also recognised the significance of an earlier case, *R v Van Gelder,* which similarly concerned an alleged manslaughter committed by a person with intellectual disabilities. However, it was distinguished on the basis that the arguments presented were not about the attribution of intellectual qualities.[36] Although the facts of the cases bore resemblances, given that the defendant in that case also had a low intellectual capacity, and the deceased in *Van Gelder* was likewise predetermined to be vulnerable, Hulme J adopted a different approach to the objective test. His focus was on examining the objective test through the lens of attribution, whereas the judges in *Van Gelder* adhered to the approach outlined in *R v Wills,*[37] maintaining complete objectivity.

Ultimately, the final verdict rendered by Hulme J in this case appears just and equitable, though it would be interesting to see whether the approach of attribution may theoretically yield fair and reasonable outcomes more broadly. Further, the defendant in this case was deemed 'unlikely to have considered the potential consequences of his actions'[38] in relation to the charge of manslaughter. It remains ambiguous whether his Honour perceived this as a defence sufficient to exonerate an accused from full criminal liability for a person's death.

What remains noteworthy, however, is that under section 25A of the *Crimes Act 1900* (NSW),[39] assault causing death does not necessitate satisfying the element of foreseeability. In fact, subsection (4) explicitly states that proving the death was reasonably foreseeable is not requisite.[40] Yet, the accused was not charged under Section 25A of the *Crimes Act 1900* (NSW) with assault causing death and it would be interesting to see how Hulme J would have decided the charge under section 25A by taking the accused intellectual disability into account.

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[33] *R v Wills* [1983] 2 VR 201, 212.
[34] *R v Thomas* [2015] NSWSC 537, [84].
[35] Ibid [63], [70].
[36] *R v Vangelder* (Court of Criminal Appeal (NSW), 28 February 1994, (unrep)).
[37] *R v Wills* [1983] 2 VR 201.
[38] *R v Thomas* [2015] NSWSC 537, [82].
[39] *Crimes Act 1900* (NSW).
[40] Ibid s 25A(4).

V. Conclusion

As society has progressively come to recognise and accept intellectual disabilities and mental illnesses as more prominent characteristics that affect a substantial segment of the population, the issue of incorporating intellectual disabilities into the reasonable person test is likely to gain prominence. As such, this case can create a precedent for judges to follow. However, as this case only dealt with an accused that was functioning below 99.9 per cent of the population, there is still a wide range of those with intellectual disabilities that are not included in this percentage. The lingering question remains is the extent to which Hulme J's reasoning can be extrapolated, considering the broad spectrum of intellectual disabilities.