

Autism Spectrum Disorders and the Criminal Law

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1. Introduction

While criminal offending by persons with Autism Spectrum Disorders is rare (see *R v George*, 2004: at [44]; see also Bishop, 2008), the symptoms of such disorders have the potential to be relevant to almost every aspect of the criminal justice process from interviews with suspects by the police, to accused persons' fitness to stand trial, a variety of defences to which accused persons may be entitled, especially self-defence, mental impairment/insanity, provocation and diminished responsibility, and to the sentencing process. For over 20 years there have been suspicions (see eg Tantam, 1988) that persons with such disorders may not just be alienated from the general community, but have been over-represented in the criminal justice population. "In 2004 the National Autistic Society in the United Kingdom (2004: 4) stated: "There is (sic) no data on the proportion of people with autism in the prison population. The NAS is aware of reports from families of distressing encounters with the police where an individual's condition has not been recognised, or where their needs are not properly understood in prison. Without an informed and flexible approach to management custodial sentences can be highly punitive and completely unproductive for a person with autism, and it is important that their increased vulnerability to abuse is recognised.""

Recent court decisions in the United Kingdom, Australia, New Zealand and Canada are notable for their exploration of ways in which such disorders, especially Asperger's disorder, have the potential to exclude or mitigate criminal responsibility and culpability.

This chapter explores issues arising in the criminal law for persons with the Autism Spectrum Disorder that most often arises in criminal law proceedings: Asperger's disorder, often described as high functioning autism. It does so by analysing recent court decisions in a number of countries and reflecting upon the extent to which expert evidence is enabling courts to evaluate effectively the ramifications of the disorder within the context of determining criminal responsibility and culpability.

1.1 Autism spectrum disorders and criminal offending

The link between Autism Spectrum Disorders and conduct with the potential to engage the criminal justice system dates back to the early research in the area during the 1940s. Dr Asperger described one of the children whom he assessed in his landmark study, Fritz V, as quickly becoming "aggressive" and "attacking other children", while he observed Harrow L

to attack other children, to gnash his teeth, to hit out blindly and to show “social unconcern in sexual play with other boys”, allegedly going as far as attempted homosexual acts (Asperger, 1994; see though Miller and Ozonoff, 1997). Dr Asperger identified as features that his subjects had in common impairments in social maturity and social reasoning, as well as in communication and control of emotions. Amongst other reasons, this led him to propose for their pathology the term “childhood autistic personality disorder” (Autistische Psychopaten im Kindesalter) (see also Chawarska, Klin and Volkmer, 2006; Carly, 2008; O’Reilly and Smith, 2008; Patrick, 2008; Freckelton, 2011).

An issue that goes to the heart of Autism Spectrum Disorders and to their relevance to criminal conduct is the propensity of those with them to act in a socially unacceptable and/or criminal manner (see [Langstrom et al, 2009](#); Warren, 2006). More research in this regard is needed with most analyses being based on small and potentially unrepresentative samples. As noted above, Dr Asperger himself identified within his seminal study a variety of forms of antisocial behaviour. Wing (1981) noted that four of the 34 cases to which she referred in her research had a history of bizarre antisocial acts. Mawson, Grounds and Tantam (1985) four years later explored the link between violence and Asperger’s in a case study. Simblett and Wilson (1993) in 1993 described three persons diagnosed with Asperger’s as having “severe temper tantrums” and two with violent behaviour (see too [Everall and Lecouteur, 1990](#)). Barry-Walsh and Mullen (2004) accepted that “Given the low prevalence of Asperger’s Syndrome, it is not clear how commonly violent and potentially criminal behavior occurs” but contended that “Consistently a direct relationship between the offending and the clinical features of the syndrome has been identified. This is usually placed in the context of deficits in social relatedness or rigidity in thought and behavior.” [Freckelton and List \(2009\)](#) commenced a process of analyzing court decisions in which Asperger’s had figured, arguing for the need for better forensic understanding of the disorder.

Relatively little attention has been given as yet to the forensic repercussions of Autism Spectrum Disorders (see though [Murrie et al, 2002](#); [Silva, Ferrari and Leong, 2003](#); [Barry-Walsh and Mullen, 2004](#); ; [Haskins and Silva, 2006](#); [Langstrom et al, 2009](#); [Freckelton and List, 2009](#), [Freckelton, 2011](#)). An important aspect of the link between them and violence may be the fact that around 65 per cent of adolescents diagnosed with Asperger’s disorder, for instance, also have a mood disorder, generally an anxiety disorder, but also a higher than normal incidence of depression and bipolar disorder (see [Ghaziuddin, Tsai and Ghaziuddin, 1991](#); [Gillot, Furniss and Walter, 2001](#); [Duggal, 2003](#); [Volkmar, State and Klin, 2009](#); for a forensic example see *Chandler v The Queen*, 2010).

Interaction with the criminal justice system for those with such disorders is not only as offenders. Klin, Volkmar and Sparrow (2000: p6) have observed that those with Asperger’s syndrome are the “perfect victims” for criminal or tortious bullying behaviour in a variety of contexts (see eg *R v EH*; 2008 *R v JO*, 2008). They are also less likely than their peers to report such victimisation “as they have impaired Theory of Mind abilities; that is, they have difficulty determining the thoughts and intentions of others in comparison to their peers” (Atwood, 2007: 109). A consequence of this is that they may be particularly vulnerable in custodial environments, although, ironically, they are likely to adapt well to penitential routines (Paterson, 2005). They can become unusually anxious and depressive in either the work or residential contexts if they experience change; they tend to be somewhat inflexible and to be poor adaptors to new situations. Their propensity to situation-generated distress raises the potential for those with Autism Spectrum Disorders to respond to stimuli in what appear to be excessive or anomalous ways.

The limitations of complainants with Autism Spectrum Disorders can also lead to the contention on behalf of defendants that such witnesses are unreliable in their evidence (see [Paterson, 2008](#)). On occasions, this will be a legitimate concern but, often, those with the disorder will be guileless, accurate, albeit unadorned, historians in their accounts. In short, they may be punctiliously reliable in their narratives, although the impression that they create in what they say may be otherwise..

However, the greater prominence of those with Autism Spectrum Disorders in the criminal justice system is as defendants. In this regard it could be argued that the deficits that are intrinsic to such disorders are particularly pertinent to capacity to be interviewed and function effectively within the trial process, their ability to foresee the possibility or probability of the effects of their behaviour, as well as their capacity to cope with stressors in traumatic situations and interpret others' behaviour (see *R v Mueller*, 2005: [92]; see too *McC v Regina*, 2007).

In Australia forensic attention came to be given to Asperger's after the forensic psychiatrist, Dr Sale, concluded that Martin Bryant, the murderer of 37 people at Port Arthur in Tasmania in 1996, had Asperger's (Mullen, 1996). Since that time in both Australia and other countries increasing attempts have been made to argue on behalf of accused persons with Asperger's disorder that they either lack criminal responsibility or that their criminal culpability is of a lesser level than that of "normal" defendants. It is apparent from many of the courts' decisions over the past decade that judicial officers at first instance and on appeal have had very limited familiarity with Autism Spectrum Disorders and have required expert assistance from psychiatrists and clinical psychologists with expertise in the area not just to disabuse them of the potential for drawing wrong inferences but to enable them to factor symptoms informedly into their instructions to juries and into their own decision-making.

More to the point, however, is the fundamental relationship between the deficits associated with Autism Spectrum Disorders and functional vulnerabilities in relation to criminal behaviour. Anecdotally, there are at least preliminary data to support a portrait of autistic offending, characterised by criminal activities that tend to be engaged in: physical violence, sexual assault, stalking, arson, and computer and internet offences ([Freckelton, 2011](#)).

In evaluating whether such a portrait is accurate, it is important to have regard to the social deficits inherent in Autism Spectrum Disorders, and the consequential limitations of socialisation associated with those deficits. For example, in relation to sexual assault, there is evidence that sexually assaultative behaviour occurs in the context of the inability of a person with an autistic disorder to interpret the victim's negative response to sexual overtures. The offender experiences normal sexual impulses, as well as a desire to interact socially with the object of such impulses. The offender attempts to engage the target of his (occasionally her) affection by physical touching or direct sexual contact, but is unable to interpret the other person's facial expression, tearfulness, or verbal response as being threatened or repelled by such a direct, possibly sudden, advance. In that context, the object of affection feels intimidated and frightened, even terrified, by what to the initiator is a benign, even affectionate, overture. The initiator is puzzled, even distressed, by the realisation that "something is seriously wrong", struggling to interpret the meaning of verbal or non-verbal cues or running away. He understands that he has committed a social offence, but is unable to construct a coherent whole from the signals he has received ([Freckelton and List, 2009](#)).

Similarly, in relation to physical violence, the clinical picture is not of a reservoir of simmering rage, or of an acute persecutory oversensitivity to imagined slights. It is, rather, more likely to occur in face of what is experienced as a sudden, distressing invasion of personal space (Freckelton and List, 2009). The reaction by the person with an autism spectrum disorder can be instant and intense, reflecting a primitive fight or flight response to threat. It is not connected with dislike, or with emotionally experienced interpersonal rage; it is, rather, an impulsive response arising from highly attuned personal radar to what is experienced as a repugnant, intolerable intrusion. In that context, what is to the perpetrator a reflexive self-protective stance is, to the object, an experience of physical, even violent, assault. The person with an autism spectrum disorder may well be perplexed by the intensity of the reaction by the other person, although distressed that he or she had caused such an unexpected, confusing, and severe response.

In the context of the arsonist with an Autism Spectrum Disorder, there is often an obsessive preoccupation with flames, cinders, colours and heat, rather than an intention to damage property or put lives at risk. There is a gulf between the focus of the perpetrator and the distress and anger of the property owner. Similarly, for the person with an Autism Spectrum Disorder who engages in stalking whether in person or by the internet, the intention is often to learn more about the person or to communicate with them than to cause distress or to harass.

For those with an Autism Spectrum Disorder computer access to the internet creates a world of intellectual stimulation with few emotional demands. It also affords a forum for working through obsessions and interests that has few boundaries. However, boundaries in terms of precluded access to some sites and the risk for cyberstalking impose limitations that can create legal difficulties.

In each of these cases, there tends to be no malice involved and little by way of mischievous or destructive impulse. In each, the person with an Autism Spectrum Disorder tends to be acting reflexively, but without the capacity to synthesise, interpret, and appropriately respond to such signals. Often there is impairment of inhibitions which would in others moderate such conduct.

In making clinical or forensic findings about such behaviour, it is necessary to draw a fundamental distinction between the social deficits of a person with an Autism Spectrum Disorder and those associated with psychopathy.

In psychopathy, there is a genuine lack of empathic attachment to others, who are viewed instrumentally rather than as equivalent humans with whom it is possible to develop a genuine relationship. The psychopath is motivated by self-interest or unexamined impulse, unmitigated by the governance of intrinsic morality or the concern for the consequences to victims of criminal acts (Freckelton and List, 2009). The person with an Autism Spectrum Disorder, by contrast, seeks relationships (sometimes inappropriately) and can maintain a precise, if narrowly eccentric, moral framework, even though the behaviour and framework may be misconstrued by reference to ordinary community and legal standards.

As illustrations of the potential significance of Autism Spectrum Disorders for both the determination of criminal responsibility and for the sentencing process, the following sections of this paper analyse important decisions in the United Kingdom, New Zealand, Australia, and Canada in which Asperger's disorder has figured prominently.

2. The United Kingdom

a. The Sultan decision

In *Sultan v The Queen* (2008) a man with Asperger's disorder appealed to the United Kingdom Court of Appeal against findings of guilt by a jury on counts of rape and indecent assault of his wife.

The Trial. Mr Sultan had been diagnosed prior to his conduct the subject of the charges with a morbid jealousy disorder and his wife, from whom he was alienated, had taken an intervention order against him. It was common ground that sexual interaction took place on the evening in question. Mr Sultan's wife maintained that it had been wholly non-consensual. Mr Sultan contended that it had been consensual and initiated by his wife. Certain of Mr Sultan's conduct at the trial, including overtly reading a book during his wife's evidence was odd and would have been difficult for the jury to interpret informedly. Put another way, there was a risk that they would misinterpret it and draw adverse inferences from it.

The New Evidence. Subsequent to the trial and the sentence of four years imprisonment imposed upon Mr Sultan, he was diagnosed with Asperger's disorder. On appeal he sought to adduce evidence of this diagnosis as further evidence on the basis that "a sufferer, such as the appellant, is liable to misunderstand in real time the signs and even straightforward indications of those with whom he comes into contact" (*Sultan*, 2008: at [10]) and that, had the diagnosis been known at the time of the trial, the issue of intention would have been contested.

The Appeal. The Court of Appeal accepted (*Sultan*, 2008: at [19]) that:

Asperger's Syndrome is a developmental disorder which begins to manifest itself sometime in the early childhood of the patient. Its precise cause is unknown but genetic factors and peri-natal trauma are thought to be possible contributory causes. Because it is a developmental disorder its presence is constant: unlike psychotic illness it does not come and go. It is a disorder which has only become understood in recent years. Its essential features are severe and sustained impairment in social interaction and restricted, repetitive patterns of behaviour, interests and activities. It causes clinically significant impairment in social, occupational and other important areas of functioning. In contrast to autistic disorder, there are no clinically significant delays or deviance in language acquisition, although more subtle aspects of social communication may be affected.

It observed a significant discrepancy between Mr Sultan's verbal IQ (117) and performance IQ (87), which was said to be consistent with Asperger's, and heard evidence from a psychologist that Mr Sultan's "speech had an odd prosody with an almost telegraphic quality; his language was formal and tangential, displaying an apparent inability to understand the needs of the listener; his discourse was repetitive and returned to preoccupations which superficially resembled delusions; he struggled with non-literal uses of language, having difficulty in understanding metaphors, irony, sarcasm or humour." (*Sultan*, 2008: at [20]) An assessing psychologist observed (*Sultan*, 2008: at [21]):

The period of inpatient assessment has demonstrated the extent to which problems in executive function and understanding others' beliefs can disable someone who is otherwise intellectually very able. Thus his rigid belief in his illegal detention has resulted in long periods of time when Mr Sultan has refused to interact with members of the multidisciplinary team. He has refused to read letters sent to him by his legal team, maintaining that he is already a free man and that these letters have no interest or

value to him (despite patient explanation that they related to the ongoing appeal process)...maintaining instead that our only function was to 'appraise the trauma suffered by an innocent man in prison'...

The Court of Appeal accepted that the new evidence could have affected the trial in one or more of three ways (*Sultan*, 2008: at [34]): "First, it would have enabled a defence for the first time to be based on the requirements of mens rea. Secondly, it would have enabled the jury to view the defendant before them not solely on the basis of whether what he said happened was at all credible, but more importantly on the basis of whether he was honest about what he believed to have been the situation, even if the facts were otherwise as [his wife] said them to be. Thirdly, it might have gone some way to explain to the jury why the appellant was behaving so oddly at trial, such as reading a book during [his wife's] evidence." Accordingly, the court quashed the convictions and ordered a new trial. For accused persons with Asperger's this is a most important decision.

b. The McKinnon saga

The saga of Gary McKinnon is illustrative of a number of issues in relation to the Autism Spectrum Disorders and the criminal law. McKinnon is a British subject who, between 2001 and 2002, gained unauthorised access to computers belonging to the United States Army, Navy, Department of Defense and the National Aeronautic and Space Administration. In the course of his access he installed a suite of hacking tools and deleted a range of data which caused large numbers of computers variously to shut down, to become inoperable, and to become vulnerable to other intruders. It was alleged that his conduct caused risk to the United States defence system. In addition, he copied files onto his own computer system. It was alleged against him that his conduct was intentional and calculated to influence and affect the United States government by intimidation and coercion, damage being caused to computers "by impairing their integrity, availability and operation of programmes, systems, information and data on the computers, rendering them unreliable. The cost of repair totalled over \$US700,000." (*McKinnon*, 2007: [6]).

The computer compromises were traced to computers in Mr McKinnon's house and forensic analysis identified him as the perpetrator. He was interviewed under a request for legal assistance and admitted responsibility for the conduct. He stated that he had copied files onto his computer from American computers and had deleted log files on the American computers so as to conceal his activities. He stated that his targets were high level United States Army, Navy and Airforce computers and that his ultimate goal was to gain access to the United States military classified information network. He admitted leaving a message on one computer that read:

US foreign policy is akin to Government-sponsored terrorism these days. ... It was not a mistake that there was a huge security stand down on September 11 last year ... I am SOLO. I will continue to disrupt at the highest levels (*McKinnon*, 2007: [8]).

In 2006 an application was successfully made before the Bow Street Magistrates' Court to extradite Mr McKinnon to the United States to stand trial for a range of criminal offences. He lodged an appeal to the High Court (*McKinnon v USA*, 2007) on many legal grounds. It was unsuccessful, as was a further appeal to the House of Lords (*McKinnon v The United States of America*, 2008). In 2009 he took an action for judicial review (*McKinnon v Secretary of State for the Home Department*, 2009) on the basis that within weeks of the House of Lords

decision Mr McKinnon, for the first time, was diagnosed with Asperger's syndrome. Accordingly, representations were made to the Secretary of State that she should not proceed with the extradition on the basis that she held a residual discretion to decline the application because Mr McKinnon's health condition would make his extradition to the United States oppressive. She did not accede to the submissions and the High Court found by application of principles of statutory construction that she had not made an error. However, it was also contended on Mr McKinnon's behalf that the Secretary did not do justice to the submission on his behalf that if convicted he faced a real risk of imprisonment in a "super-max prison" in Colorado where he would be subject to conditions that would infringe his entitlements under the *Human Rights Act 1998* (UK).

Expert evidence was given by a psychologist, Dr Berney, that "It would be consistent with this diagnosis that Mr McKinnon does not appreciate the relative priorities of societal rules and so has difficulty in judging what is serious offence and what is minor and balancing this against the perceived rightness of his cause. The nature of Asperger syndrome is to hinder the development of the close, confiding relationship that would allow him to test his perception of his activities and behaviour against the way that they might be seen by others. Although he does discuss the possibility of conspiracy, he is less able to accommodate conflicting opinions and to modify his views so leaving him with a rather black-and-white perception of his world." (*McKinnon v Secretary of State for Home Affairs*, 2009: [15])

He asserted too that Asperger's syndrome left Mr McKinnon vulnerable to the "stress of social complexity" and "if he finds himself in circumstances where he is unable to withdraw from complex environments into something more autism-friendly, he is likely to develop a pathological anxiety state and, given the presence of the developmental disorder he will be prone to develop an acute, psychotic disorder" (*McKinnon v Secretary of State for the Home Department*, 2009: [12]) Dr Berney suggested that other prisoners were unlikely to have sympathy for Mr McKinnon's difficulties and that transplanting him into the culture of a United States prison would be particularly difficult for him. Professor Baron-Cohen, a psychologist, expressed the view that there was "a high risk of serious deterioration of Mr McKinnon's mental health if he were to be incarcerated in the USA pre-trial or post conviction. It is also important to bear in mind that if separated from his parents and partner and put into the traumatic environment of prison, there is a risk that he would attempt to take his own life." (*McKinnon v Secretary of State for the Home Department*, 2009: [12]) He subsequently reported that:

[Mr McKinnon's] difficulties in relation to possible detention in prison may relate to his social awareness and empathy difficulties but in my mind they relate more to his current depression and anxiety. The latter centres on his fears of being raped by other prisoners of being physically assaulted by prison guards and he has talked about preferring suicide as an option rather than being put in such a threatening environment. It is not about the environment (I have no idea if his fears are based on any real risks of this) but about his perception of what prison would be like. My previous report identified that he is suffering from an anxiety disorder (panic attacks) over and above his AS. If Gary were subject to long-term detention in solitary confinement it is my view that it will likely to exacerbate his depression and increase the risk of suicide. I would also add that in my view Mr McKinnon does not have the social skills to cope with prison. He is unlikely to be able to negotiate his way through a social group of other prisoners in such a way as to be accepted. Nor is he likely to be able to make

relationships, and may offend others through expressing his opinions in a very blunt and direct undiplomatic fashion. But as stated under point 2 above, I don't think it is his social skills that are the main risk factor for his mental health. Rather, his mental health is already very poor from having suffered from anxiety and depression over many years at not knowing what is going to happen to him. Dislocation from the support of his family and girlfriend may be other key risk factors that might exacerbate his already poor mental health. I would anticipate that the particular features of a prison environment that would be traumatic for Mr McKinnon as a person with AS is that he would suffer from the following:

1. Aggression from other prisoners
2. Aggression from prison guards
3. Being expected to share a cell with someone
4. Loud noise and other forms of sensory overload which he would find aversive
5. Having to live in a large group of people when the natural state of people with AS is to withdraw.

I also anticipate that if Mr McKinnon was presented with any sensory sensitivities then that would exacerbate the impact of prison conditions on him such as harsh lighting, loud noises etc. I have a real concern that he would not survive a term of imprisonment. I am stating this as strong assertion because to put a vulnerable adult who has a disability into a situation of imprisonment when that adult has [stated] that suicide would be preferable, to avoid the suffering that he fears he will experience in a prison, is a decision that should carry with it some responsibility for any consequences. The courts for example, should not be able to claim that they were unaware of the risks prison might pose to Mr McKinnon if he suffers a complete psychiatric breakdown or commits suicide. The courts should have it on their record that if they order him to be detained, it is in the full knowledge that this outcome is a serious and dangerous possibility. My impression is that even being put on a plane to stand trial in the US, even if he were not imprisoned, might be too traumatic for him to manage. Inevitably it would involve some detention whilst awaiting a court hearing in the USA, which may push his already high anxiety to intolerable levels. (*McKinnon v Secretary of State for Home Affairs*, 2009: [23])

However, the submissions fell on unsympathetic ears both before the Secretary of State and the High Court. In October 2008 the Treasury Solicitor on behalf of the Secretary of State acknowledged that Dr Berney and Dr Baron-Cohen had identified the stressful and destabilising effects of extradition, and the likely consequences on Mr McKinnon's mental health. However, he observed that they had provided no explanation as to why it was said that proceedings in the United States would be of such a different order of magnitude in terms of their effect as to be likely to lead to a significant deterioration in his mental health. The information in relation to Mr McKinnon's Asperger's syndrome might lead a United States court to grant him bail. However, if he failed in a bail application, the Secretary commented that "he is to be extradited to a country with a highly developed awareness of psychiatric illness and which has procedures for ensuring that those in custody receive appropriate care." Therefore, although extradition to the United States would cause him "certain stress and may exacerbate any illness from which he currently suffers", The Secretary of State did not accept that his condition could not be appropriately treated.

Lawyers acting on behalf of Mr McKinnon then urged the DPP to prosecute Mr McKinnon in England. When the DPP declined, they challenged this decision, as well as that of the

Secretary of State. The Court declined to entertain the application insofar as it pertained to the potential for Mr McKinnon to be detained in a supermax prison. It held that the decision about whether to prosecute was that of the DPP and could not in these circumstances be challenged.

In considering the expert evidence in relation to Mr McKinnon's Asperger's syndrome it observed that it was important to place it in perspective:

...despite having had AS in childhood his condition has, so far, not necessitated any type of treatment or medical intervention. He is aged 42. He faced arrest and interview by the police, arrest on an extradition warrant, an extradition hearing, the order for his extradition, and litigation in the High Court and House of Lords, all no doubt deeply stressful events without this leading to any acute events requiring intervention. Although the symptoms of his undiagnosed AS would have been manifested throughout the proceedings, there was no suggestion (until very recently) that the act of ordering, or effecting, extradition would give rise to any type of acute event (as has been the case in some of the cases dealing with severe depression). Neither the symptoms of his disorder, some of which were apparent to his close family and loved ones, nor his depression (which, according to his mother, was diagnosed "some time ago") have, until very recently, led to the Claimant being treated or to being the subject of investigation or of medical reports, let alone to an application under section 91 of the 2003 Extradition Act.

The difficulties encountered by the Claimant "not being able to cope with sharing a cell or fitting in with a group and being traumatised by the loud noise" apply to "many adults" with AS, yet they too may face the possibility of prison. According to the National Autistic Society, 1 in 100 children has ASD, and over 300,000 adults in the UK have ASD (which includes more serious disabilities than AS). The availability of appropriate expertise is patchy in this country, and it is not to be supposed that a prison sentence served by the Claimant in this country would not present him with difficulties. The availability of appropriate expertise here is described as "patchy", and the same is probably true of the USA; and in both countries, it is likely that services in prison are not as well resourced as those in the community. (*McKinnon v Secretary of State for Home Affairs*, 2009: [78]-[79])

The Court was satisfied that any United States sentencing court would properly take into account Mr McKinnon's condition in terms of the nature and extent of any sentence of imprisonment imposed, as well as where it should be served. In addition, it was satisfied that if the United States authorities were not prepared to agree to his repatriation, that was a matter which the sentencing court would take into account. It noted that United States prisons were serviced by both psychologists and psychiatrists and took into account evidence that a treatment plan may well be prepared "geared primarily to assisting with adaptation to the correctional environment specifically relating to institution rules, disruptive or potentially disruptive behaviour, and functioning within the prison culture, particularly communication issues within the prison setting. It may well be determined that Mr McKinnon will need to learn a completely different set of communication strategies for the prison setting compared with the normal social setting." (*McKinnon v Secretary of State for Home Affairs*, 2009: [79])

The Court treated the assurances of various United States witnesses about how Mr McKinnon would be looked after in the United States penitential system "as having substantial value.

Certainly, the Secretary of State was and is entitled to do so. Of course, these assurances do not amount to cast-iron guarantees of appropriate care during the Claimant's sentence. But they are the considered assurances of a friendly state, indeed of a state with which this country has close relations. (*McKinnon v Secretary of State for Home Affairs*, 2009: [79])

The Court stated that:

it had no doubt that he will find extradition to, and trial and sentence and detention in the USA, very difficult indeed. His mental health will suffer. There are risks of worse, including suicide. But if I compare his condition with those considered in the authorities to which I have referred above, even taking full account of the (in my view undesirable) possibility of his being prosecuted in this country, his case does not approach Article 3 severity. .” (*McKinnon v Secretary of State for Home Affairs*, 2009: [89])

It determined that it had not been established that the Secretary of State's decision letter contained any error of law. The McKinnon series of decisions highlight complexities about the impact that imprisonment may be regarded as having for those with Autism Spectrum Disorders, depending on both its harshness and the extent of available psychiatric care (see Freckelton 2011a).

3. New Zealand

a. Glover v Police

New Zealand's major decision on the significance of Asperger's disorder for the criminal law is the High Court's decision in *Glover v Police* (2009). Mr Glover had damaged Mr Bauer's property on two separate occasions in July and November 2008. He described himself as a "road safety activist". He was of the view that a footpath was needed to run past the front of Mr Glover's property. However, to his considerable consternation the Council had licensed Mr Bauer to use a garden area at the front of Mr Bauer's property as part of his front garden.

In purported assertion of his and others' rights to the use of the area in front of Mr Bauer's house, Mr Glover interfered with and caused damage to Mr Bauer's garden area. At his summary trial Mr Glover argued that he had acted with lawful justification, excuse or a "claim of right" to do what he had done. However, his defence was not accepted and he was convicted and ordered to pay \$NZ30 reparation and to undertake 40 hours' community work. He appealed against the sentence.

The issue before the court at first instance and then on appeal was the relevance of the fact that Mr Glover suffered from Asperger's disorder. It was argued that both the gravity of his offending and the direct and indirect consequences of a conviction needed to be considered in light of the nature of the disorder and its effects on his behavior. Professor Attwood had originally diagnosed his condition and contended that a conviction would lead to an increase in Mr Glover's alienation, frustration and despair.

The sentencing judge had regarded Mr Glover's offending at the more serious end of the scale, having regard to the fact that the conduct was repeated, the victim was 86 years of age, the distress caused to the victim and the degree of premeditation on the part of Mr Glover. He declined to place much weight on Mr Glover's Asperger's disorder. He took into account Mr Glover's three previous convictions and a previous discharge without conviction, as well as the fact that Mr Glover had exhibited no remorse, indicating that he would continue his conduct, regardless of the orders of the court.

On appeal Clifford J was provided with a report from a forensic psychiatrist, Dr Justin Barry-Walsh. He accepted that the syndrome was relevant for the assessment both of the gravity of his offending and of the consequences for him of conviction. Justice Clifford concluded that Mr Bauer's rigidity of thought and inflexibility contributed to Mr Glover's offending. He proceeded from this proposition to the finding that Mr Glover's offending "must be regarded as significantly less than that of a healthy and rationally thinking person." (*Glover v Police*, 2009: [21]; see too possibly *R v Burkett*, 2006) He found Mr Glover's strong interest in road safety to be a manifestation of his "syndrome" and concluded that Mr Glover was not motivated by criminal intent or malice (see also *R v Walker*, 2008) but by his ideological position on road safety matters.

Justice Clifford also found that Mr Glover's Asperger's went "a considerable way to explain his failure to express remorse or to offer to make amends, which appear to be a result of his rigidity of mind and egocentric perspective."

All told, he found that the property damage was "in effect minor and easily remedied" and that his offending was of relatively minor gravity. Dr Barry-Walsh expressed the view that:

He is vulnerable to depression and more sensitive to apparently minor grievances and setbacks than other people. His response to such setbacks may be disproportionate and severe. It is likely Mr Glover would have difficulty in accepting a conviction was reasonable and further in accepting the reasonableness of any sentence. Further, he lacks the capacity to adopt a pragmatic, flexible approach to the circumstance and therefore I think it unlikely he would put aside his strong sense of entitlement and injustice. Consequently I believe it likely that the impact of a sentence upon Mr Glover would be greater than it would be towards other people. It is possible he would experience an increase in frustration and despair as speculated by Prof Attwood; it is also plausible that he would not be able to accept the conviction or sentence and would continue to consider he had been wronged and to ruminate upon such findings. It is possible that he would become depressed. (*Glover v Police*, 2009: [27])

Justice Clifford also heard from Mr Glover's parents who emphasised the significance for their son of his efforts in relation to road safety and concluded that "A conviction against him for these activities would therefore be regarded by him as a matter of considerable significance." (*Glover v Police*, 2009: [28]) He noted that Dr Barry-Walsh's views about depression were conditional, in the sense that he was expressing no more than the potential for depressive consequences to flow from a conviction for Mr Glover. He stated that he had been informed that the incidents had occasioned the opportunity for Mr Glover to consider carefully his behaviour and to ensure that his road safety initiatives in the future would be carried out within a lawful framework - "notwithstanding his subjective views as to the appropriateness of that framework." (*Glover v Police*, 2009: [30]) Accordingly, he determined that given the centrality to Mr Glover's life of those interests, it was appropriate to place considerable reliance on the significance of Asperger's disorder in assessing the consequences to him of the imposition of a conviction. He held that convictions would have an effect "out of all proportion to the gravity of his offending" and discharged him without conviction, thereby quashing the order for community work. The case exemplifies scenarios in which obsessive anti-social behaviour, which is also technically criminal, may be generated for a person with an Autism Spectrum Disorder by virtue of their disorder. In

such a situation, only a moderate emphasis on punishment by a sentencer is clinically legitimate.

b. R v Walker

In a 2008 case before the New Zealand High Court at first instance (*R v Walker*, 2008) the accused's Asperger's disorder once more was central to the sentence imposed upon him. Owen Walker pleaded guilty to a series of computer fraud offences committed when he was aged between 16 and 18 years of age. Mr Owen developed and used software that enabled him to remotely control infected computers which collectively formed a robot network, known as a "bot net". He installed his bot code on tens of thousands of computers. The code automatically disabled antivirus software. The court was informed that Mr Walker's code was considered by international cyber crime investigators to be amongst the most advanced bot programming encountered. While his software had the potential to be used to conduct fraudulent financial transactions, there was no evidence that it had been employed for that purpose.

Mr Walker had no previous convictions and had a good background and reputation. He had been tentatively diagnosed as having a mild form of Asperger's syndrome as a child, although latterly his symptoms had decreased in conjunction with his being encouraged to socialize more. He described his offending as having been motivated principally by curiosity – "to see what he could do." He showed signs of remorse and was prepared to pay reparation. A psychologist, Mr Laven, classified him as being of low to medium risk of reoffending.

Justice Potter accepted that Mr Walker had a "diminished understanding in relation to the nature of his offending" (*R v Walker*, 2008: [17]), partly because of having Asperger's disorder. He concluded that Mr Walker's conduct was carried out simply to demonstrate to himself that he could inflict the kind of harm that resulted – "he was unaware of the nature of the harm that his activities could cause and was immature to the extent that he was unable, or failed, to set proper boundaries for himself in relation to his undoubted ability and expertise in the use of computers." (*R v Walker*, 2008, at [25]). He also took into account that Mr Walker had received offers of employment from large corporations active outside New Zealand and also that the New Zealand Police were interested in employing him. Justice Potter formed the view that Mr Walker had a "potentially outstanding future" (*R v Walker*, 2008: [37]) and discharged him without conviction. The decision is an example of pragmatic sentencing of a person with an Autism Spectrum Disorder factoring into a sentence the potential for a person's skills (and obsessions) to be constructively directed.

4. Australia

a. The Parish decision

In *Parish v DPP* (2007) a person with Asperger's disorder appealed against a decision of a magistrate to find him guilty of two common assaults upon a woman whom he met on a train.

Proceedings before the Magistrate. At first instance, a Magistrate accepted the complainant's evidence, which was to the following effect. She said that on 6 January 2006 at about 5.00pm she took a train from the city to Box Hill after spending time in the city with her boyfriend. Prior to entering the train, she noticed Mr Parish looking at her. On entering a relatively

empty carriage, Mr Parish sat diagonally opposite her. Very soon after the train started its journey, Mr Parish pushed his calf against hers. She tried to move her leg away from his. He also changed positions and sat directly in front of her, with his hands over his knees. He then placed his hands on top of her knees. At this stage she was looking out the window, trying to ignore him. He then rubbed his hands on top of her knees. She did not speak to him or attempt to change seats.

When she got to Box Hill Station, she waited back and allowed Mr Parish to alight first. She then stood beside the train to make sure that Mr Parish was away from her. She then proceeded to take the escalator but felt a hand on top of her hand. She turned around and noticed that it was Mr Parish. He was standing on the step below her and, as the escalator was going up, he rubbed her lower back and her upper buttocks. She gave evidence that she was scared and was unable to move through the people surrounding her on the escalators. Again she said nothing to him.

After alighting from the escalator, she went to look for her sister and broke down in tears when telling her what had happened. On the recommendation of family members, she made a complaint to the police. Mr Parish was identified from CCTV photographs.

On being interviewed, Mr Parish denied any recollection of the events and said he had no memory of the alleged incident with the complainant. However, he did admit, in his record of interview, that he had rubbed his leg against girls on trains before. He said:

I put my leg close to her and see if she doesn't mind. And if she kind of does then I won't do it anymore. She didn't seem I suppose at the time she didn't seem she probably didn't seem to mind. (*Parish*, at [10])

He was asked whether it had occurred to him that perhaps the complainant might have been frightened and not known what to do? He answered: "Err no at the time it didn't" (*Parish*; at [11]). He was further asked: "Why did you rub her leg with yours?" His answer was: "It was kind of ... I'm not as you say a very confident person, I'm more of a touchy feely sort of person and that was kind of my way of trying to get to know her a little bit" (*Parish* at [11]). He was then asked if such behaviour excited him and he responded: "It wasn't, it wasn't sexual. It wasn't for excitement or sexual. It was more a way of me trying to get to know her, to see if something would come out of it; a relationship or something" (*Parish*: at [11]).

The following exchange took place:

Question: "How many women have you tried to meet by rubbing their legs?". Answer: "I don't know. Maybe four". Question: "Have you ever had any success?". Answer: "Err, once". Question: "Yeah? What, that turned into a relationship, did it?". Answer: "Not exactly, but ...". Question: "Did you see this woman to be scared, quite frightened as to a person she doesn't know by this sort of thing happening to her on the train?". Answer: "Yes, I can see that". Question: "Especially on the escalator as well, the same person gets off and rubs her on the bottom. Can you see she may be frightened and may be feeling a bit violated?". Answer: "Yeah". (*Parish*: at [12])

Mr Parish was charged with a counts of indecent assault and 2 counts of indecent assault.

Mr Parish's defence arose out of his having been recently diagnosed with Asperger's disorder. Evidence was given by Dr Nicole Reinhardt, who had been treating Mr Parish, about the nature of the disorder, including that "a person born with Asperger's (sic) is born without the brain capacity to understand, interpret and act in the social world - they have to be taught in a concrete way the rules of social behaviour." Further, she said, people affected

by the disorder are unable to pick up non-verbal cues – a subtle cue probably would not even register. Dr Reinhardt expressed the view that Mr Parish would have been unlikely to have been aware that the complainant was not consenting to his actions.

During her evidence-in-chief, Dr Reinhardt said as follows (*Parish*: at [16]):

Question: “Can you say what level of sexual understanding or development from your dealing with Mr Parish in the light of his condition, what level of understanding, appreciation, development he had in that area?”.

Answer: “At the time that I assessed Phillip and subsequent appointments I have had with Phillip, overseeing his treatment, Phillip had no understanding of how ... he has no understanding of how to make same sex friends, just in a friendship way. For example, he doesn’t know how long it is you have to speak to somebody before they might be your friend. Or is that they have to offer their phone number to establish that they might be your friend. In terms of meeting a potential partner of the opposite sex, Phillip has no idea how that would happen or how he would come to have a sexual encounter with a person of the opposite sex. He had this idea that perhaps ... he’s not good, he knows he’s not good at expressing himself verbally. Pragmatics, part of the disorder, he was aware he’s not good with words, so had an idea that perhaps the way that you do it is you might use your hands ... and that might be a way of ... and if somebody doesn’t object, that might mean that they want to be your girlfriend. He didn’t know, when he had discussions about this, that you would interact with that person verbally, and that all the sophisticated steps that are involved in meeting a potential partner. He had no idea, so again, an early primary school aged concept.”

Under cross-examination, Dr Reinhardt was asked a question in relation to the fact that the complainant moved away from Mr Parish and there was a break before she had gone up the escalator. Dr Reinhardt said (*Parish*: at [17])

The interpretation of that behaviour for a person with Asberger’s disorder ... might be: M’hm, she might be interested, she might have enjoyed sitting next to me, em, I’ll follow her and see if I can get any more data to enter into my information about that social interaction ... em ... again unless there was this pronounced verbal and non-verbal communication that this isn’t OK in concert ... would he have understood that this wasn’t OK for that person. Remembering at the same time that a person with Asberger’s disorder cannot interpret and understand other subtle cues that we would have. So, for example, tense body posture that the person, the victim, would have been no doubt showing ... where her eyes were looking ... all of that would have just been ... it wouldn’t have even gone into Phillip’s thinking, ... (indistinct) (long pause). I might just add, I’m giving you clinical anecdotes and observations, but em there are hard empirical data to show that people with Asberger’s disorder cannot pick up cues.”

The magistrate found Mr Parish not guilty of the first charge of indecent assault as the prosecution had not established a sexual connotation to the assault or that Mr Parish’s intent was sexual. He also found in relation to the further charge of indecent assault that the prosecution had not proved beyond reasonable doubt that Mr Parish did not believe that the victim was consenting or might have been consenting to his overtures. However, he found the common assault to be in a different category and, while consent can be a defence to common assault, such as sporting contact or perhaps restraint of liberty, the case did not fall into these areas and the charges were made out.

The Appeal. On behalf of Mr Parish it was argued on appeal on a question of law that in the circumstances of the case the prosecution had failed to negative a consent element in the charges of assault. Justice Robson accepted on the basis of authorities that in the case of common assault a distinction should be drawn between contact of such a nature that if done to another person consent is no answer and those cases where the prosecution bears the burden of negating consent (*Parish*: at [117]). He found that he was dealing with the latter category and that “where assault is being used to include battery, the definition of the offence is the actual intended use of unlawful force to another person without his consent or any other lawful excuse.” He concluded that the prosecution, therefore, bore the onus of establishing that Mr Parish intended to use force on the complainant without her consent – this was necessary to establish the necessary intentional element to the criminal conduct. He found that Mr Parish had raised the issue of consent but, even if he were wrong in that, the prosecution still bore the onus of establishing that Mr Parish was aware that the complainant was not consenting or might not be as it bore the onus of establishing that the complainant did not consent. The result of this was that Robson J found that the magistrate had made an error of law in finding the common assault charges made out. He allowed the appeal and quashed the finding of guilt in relation to the escalator assault but proceeded to hear further submissions about the train assault in respect of which the magistrate made no finding related to Mr Parish’s awareness. He stressed that his decision was confined to the circumstances of Mr Parish’s disability – “his being a sufferer of Asperger’s (sic) Syndrome and the unfortunate impact that it has on Mr Parish’s ability to deal with other people. I would expect that in the case of a person who was not suffering from Asperger’s Syndrome or having a similar disability, that the prosecution would be able to easily establish the necessary awareness on the part of any person who did what Mr Parish did” (*Parish*: at [126]).

The decisions both at first instance and on appeal, therefore, constitute important examples of how the symptomatology of Asperger’s can impact upon the capacity of a defendant to form the necessary intent for criminal offences to be established.

b. The HPW decision

In *DPP v HPW* (2011) the Victorian Court of Appeal heard an appeal brought by the prosecution contending that the sentencing judge at first instance had wrongly found a causal connection between HPW’s Asperger’s disorder and his sexual offending, had erred in imposing a manifestly inadequate sentence and had inadequately cumulated the penalties he imposed for a significant number of sex offences. HPW was found guilty at first instance of eight charges, three of which were representative of many instances of offending, committed against his biological daughter during a time when she was aged 11 and 12. They involved multiple instances of oral, digital and anal penetration as well as instances of masturbation and of encouraging the family dog to lick his daughter’s vagina.

When interviewed by the police, HPW admitted sodomising his daughter and explained that it was “just as an experiment”. He said by way of explanation that “it was just sexual gratification for myself” and commented that he was “probably a psycho”. HPW was aged 47 at the time of sentencing and without prior convictions. He had served a lengthy period of time in the army until he was discharged in 2007 for not handing back some hand grenades. He had two children from a marriage that lasted over a decade, after which he formed a relationship that involved bestiality and anal sex with another woman. A

psychologist who examined him concluded that the offending with his daughter concluded when “he realized what he was doing”.

HPW’s Asperger’s Disorder went undiagnosed until after the criminal charges were laid. A psychologist who assessed him concluded (HPW, at [37]) that he had “significant deficits in social interaction; restricted behaviour, interests and activities; clinically significant impairment in social or other important areas of functioning; no apparent language impairment; and no apparent cognitive impairment. He is somewhat atypical on his awareness of his deficiencies in empathy and friendship skills.”

Dr Kennedy, a psychologist whose report was tendered at the plea hearing, stated (HPW, at [47]):

In this case, victim empathy should be commented on for specific reasons, particularly in relation to [HPW]’s cognitive distortion associated with the offences. In this matter, he has reported that while carrying out the sexual offences he considered that [his daughter] *was experiencing the sexual abuse in a matter-of-fact way* as if the activities were normal, and nothing more than her daily activities.

Discussion of this issue occurred at some length. I should note that [HPW] did not appear to be attempting to minimise this behaviour in this [sic], but *was attempting to explain how he saw [his daughter’s] response to the sexual abuse*. He thought at the time for her, it was “something to do ... as if it was an activity such as playing cards or watching TV” that *had no impact on her at an emotional level*. When asked about his understanding of the effects of the sexual abuse on [his daughter], he reported in a very distinct way that the impact has been “huge ... I think I’ve ruined her ... she’ll never be able to see me in the same light ... it will be very difficult for her with partners in the future”.

He added (HPW, at [50]) that:

[There is a] focus on deficient empathy, which is clearly relevant in this case, interpersonal naivety which appears to be the case in this matter, sexual frustration which is clearly relevant in this case, and immediate confession, which from my understanding, is also present. Additionally, there are sexual preoccupations, which do appear relevant in this case.

Dr Kennedy expressed the view that at the time of his offending HPW was unaware of the distress he was causing to his daughter but contended that since that time he had acquired genuine empathy and remorse. He observed that there had been no grooming process, as is often seen in sex cases.

The Court found that the evidence of the expert gave no support for the foundation of the plea made on HPW’s behalf, and which was (wrongly) accepted by the sentencing judge that HPW misread his daughter’s behaviour as providing encouragement to him by hints or signals, to engage in the sexual offending (cp *Hopper v The Queen*, 2003, at [40], [54], [68]).

Tate JA (HPW, at [53]) found that the psychologist’s opinion:

suggested that the sexual offending occurred in a context in which (1) the respondent had sexual preoccupations with his daughter, fantasising about her in a manner reflective of his previous unusual sexual relationship with an earlier partner of whom his daughter reminded him; (2) he was sexually frustrated with his current partner; (3) his level of alcohol abuse led to disinhibition; and (4) his deficient empathy meant that he believed that his sexual offending was having no emotional impact on his daughter. Dr Kennedy’s

opinion did not provide a proper evidentiary base supporting the finding of the sentencing judge that the respondent 'may have misinterpreted [his] daughter's cues'. She found that the plea by counsel misrepresented the expert report. To the extent that Dr Kennedy had commented "it is highly likely that [HPW's] behaviour is best explained by the presence of an Autism Spectrum Disorder", Tate JA found that it could not support the proposition that there was a causal connection between his conduct and his misreading of his daughter's behavioural cues. This led Tate JA (with Neave and Mandie JJA agreeing) to find a sentencing error. They also found that HPW's Asperger's disorder should not have led to a significant moderation in the sentence imposed upon him, and that his sentence was not sufficiently cumulated to reflect the "debased and humiliating nature of the offending, the core breach of trust, or the effect of the offending upon [HPW's] daughter" (at [82]). While the Court did not generally find that HPW's Asperger's reduced his moral culpability for the purposes of sentencing, it did accept that it was appropriate to view his disorder as a mitigating factor to the extent that it was likely to make his service of a sentence in prison more burdensome. It ordered his sentence to be increased from seven and a half years' imprisonment with a non-parole period of five years and six months to nine years and six months' imprisonment with a non-parole period of six years and six months. The appellate decision makes the important point that the fact alone that a person has an Autism Spectrum Disorder does not necessarily exculpate or even mitigate an accused person's conduct.

5. Canada

5.1 The *R v Kagan* decision

In *R v Kagan* (2007) McDougall J of the Supreme Court of Nova Scotia in a judge-alone trial heard a charge that Mr Kagan committed an aggravated assault contrary to s268 of Canada's Criminal Code. It was incumbent on the prosecution under Canadian law to prove that a reasonable person, in the circumstances, would inevitably realise that the force Mr Kagan applied would put the complainant (Mr Kinney) at risk of suffering some kind of bodily harm. Mr Kagan accepted that he had used "bear spray" – a form of repellant containing certain active ingredients called capsaicin and dihydrocapsaicin, often referred to as pepper spray – on Mr Kinney. He also conceded using a pocket knife to stab Mr Kinney in an area of his back which caused him to suffer significant and potentially life-threatening injuries, including a punctured lung. Mr Kagan maintained that he had acted in self-defence. Under Canadian law, to determine whether Mr Kagan acted in lawful self-defence the following three issues had to be considered:

1. Was Mr Kagan unlawfully assaulted by Mr. Kinney?
2. Did Mr Kagan use force against Mr Kinney because he reasonably feared that Mr. Kinney would kill or seriously injure him?
3. Did Mr Kagan use force against Mr Kinney because he reasonably believed that he could not otherwise save himself from being killed or seriously injured by Mr Kinney?

The issue was not what an outsider would have reasonably perceived but what the accused reasonably perceived, given his situation and his experience. Expert evidence was adduced for Mr Kagan to explain that he suffered from Asperger's disorder and the effects that the disorder might have exercised upon his perceptions in the circumstances of conflict with Mr Kinney.

Dr Glancy, a psychiatrist, gave evidence (*Kagan*: at [28]-[30]) that:

Persons suffering from Asperger's quite often have difficulty developing peer relationships. This is noticeable at any early age. They are usually slow in reaching developmental milestones. They seldom develop long-lasting peer relationships. They appear strange or odd to others. They fail to maintain eye-to-eye contact in conversation with others. They have difficulty feeling and expressing emotions and understanding the emotions of others. They can be quite blunt which can be perceived as rude by those they interact with. They tend to suffer from mild paranoia and have a lower tolerance of change which can lead to frustration. They develop anxiety when things are not the way they fervently wish them to be.

Asperger's patients are typically loners. They can be awkward or clumsy when they are young but they can develop quite good motor skills as they get older.

Since they do not normally develop long-lasting or warm relationships with others, they are usually distrustful of others. Asperger's sufferers like structure and routine in their lives. In stressful situations they can develop a heightened level of anxiety.

Defence counsel put to Dr Glancy a bare hypothetical scenario which included the events that took place on the day that Mr Kagan sprayed Mr Kinney with bear spray and then stabbed him. In Dr Glancy's opinion the hypothetical person with Asperger's would have felt a rising level of paranoia and anxiety. He would have felt increasingly persecuted as tensions escalated between him and the other hypothetical figure. He would have felt trapped. As the perceived intimidation continued, he would have become fearful for his life. The escalation of the tension would have made him feel that an attack was becoming more imminent. The hypothetical assailant would have felt that the bear spray would only provide temporary protection from attack and thus he would feel it necessary to use the knife to protect his own life.

In cross-examination by Crown counsel, the issue of moving from the hypothetical to the specific scenario arose. Dr Glancy expressed the opinion that Mr Kagan's mental condition would not have prevented him from knowing that what he did was wrong. He felt that Mr Kagan was capable of making rational choices but if he was paranoid then he would have been extremely sensitised to the feeling of being trapped. Dr Glancy likened the situation to that of a battered woman and her distorted perceptions of threat. However, he said that his views were dependent upon evidence that Mr Kinney was a violent man and that living with him was a negative experience for Mr Kagan. The evidence as to this was dubious.

Justice McDougall commented (*Kagan*: at [34]) that "These insights into the mind of a person suffering from Asperger's and specifically the mind of Mr Kagan at the time of the incident are helpful in assessing the evidence provided by the accused." (cp *R v Tarr*, 2009L at [34]) He noted that Dr Glancy had warned of the risks of drawing adverse inferences from the obsessiveness and pedantry of Mr Kagan. Ultimately, however, McDougall J concluded that he was an unreliable witness and preferred the account of Mr Kinney. He stated that he made his evaluations mindful of the Asperger's syndrome of Mr Kagan:

In the case of Paul Kagan's testimony his demeanor on the witness stand and the answers he provided to questions put to him by both defence and Crown counsel has to be evaluated taking into consideration Dr Glancy's diagnosis. Dr Glancy described Mr Kagan as being pedantic. Indeed, he exhibited this characteristic by repeating most every question that was put to him by counsel before attempting to answer it. On occasion he would ask the question to be repeated over and over again before offering a

response. On other occasions he would seek clarification of a question to the point where he appeared to be searching for the reason or purpose for the question. In many instances this left the Court with the impression that Mr Kagan was attempting to provide an answer that he thought would be better for the Court to hear. This, in my opinion, has affected his credibility. This, and the numerous inconsistencies in his testimony between this trial and the first trial have left me in doubt as to the truthfulness of some of the answers he has given. (*Kagan*: at [37])

Justice McDougall found that a variety of Mr Kinney's habits irritated Mr Kagan and prompted confrontations between the two men, initiated by Mr Kagan. However, he concluded that it would not have been reasonable for Mr Kagan to fear that Mr Kinney was about to either kill him or cause him grievous bodily harm. He also found that it was not reasonable for Mr Kagan to have used the force that he did against Mr Kinney on the assertion that he could not otherwise save himself from apprehended death or grievous bodily harm. There is no indication, therefore, that McDougall J accepted that Mr Kagan's perceptions may have been distorted at the relevant time by his Asperger's symptomatology. His reasons for this are not articulated, leaving the potential that the expert evidence did not effectively educate the court about the potentially relevant effects of the disorder upon the accused man's perceptions and anxieties.

However, at the sentencing hearing, McDougall J imposed a non-custodial sentence to be served in the community, having heard evidence not only about Mr Kagan having Asperger's but about the "steps taken by the offender to follow the recommended counselling and other treatment devised to help him better understand and to deal with the symptoms of Asperger's Syndrome" (*Kagan*: at [22]) and his successful attendance at university in the period between the offending and the date of imposition of sentence. Although he rejected the defence of self-defence based upon Asperger's, he explicitly accepted that "The condition ... does affect the way the offender interprets the words and actions of those he might encounter. His condition must be considered in arriving at an appropriate sentence in this particular case." (*Kagan*: at [37])

Like the decision of the Victorian Court of Appeal in *DPP v HPW* (2011), the decision of McDougall J constitutes an important reminder that the mere presence of Asperger's disorder in a defendant will not automatically exculpate them or even, necessarily, reduce their moral culpability for criminal conduct.

6. Forensic issues

By virtue of Autism Spectrum Disorders being a pervasive developmental disorder, it is apparent that they have the potential to impact upon almost every aspect of criminal responsibility and also to raise the likelihood of certain kinds of offending. As already indicated, reported cases in which the defendant has Asperger's have tended particularly to include offences of physical violence, sexual violence, fire-setting, stalking and computer offences. In respect of each of these impoverished empathy, poor sensitivity, low responsivity and obsessionality have the potential to lay the groundwork for the commission of the offending. In turn, this has ramifications for both the criminal responsibility and culpability of the conduct.

Those with Autism Spectrum Offences are likely to be found fit to be interviewed by police more often than they should be (see eg *R v Maxwell*, 2007: at [43]). The difficulty is that while

such persons may be intellectually capable of understanding questions and giving articulate answers, they may be more compliant and deferential than other interviewees (see North, Rissell and Gudjonsson, 2005), and may also be particularly fearful of figures in authority who place them under what they experience as pressure by their authoritarian manner and their questioning style. A difficult issue in evaluating the voluntariness of a police interview that has taken place with a person with an Autism Spectrum Disorder is to assess their capacity to make an independent and free decision as to whether or not to participate in such an interview. Expert evidence on the issue from a mental health professional with knowledge of the disorder is necessary (see Freckelton and Selby, 2009). Another forensic issue is the need for provision of counter-intuitive guidance to decision-makers (judges, juries and magistrates) about the risks of drawing over-ready (and inaccurate) inferences from the unusual manner of interviewees with Autism Spectrum Disorders. This consideration applies both to interview and trial behaviour by those with Autism Spectrum Disorders.

Finally, the language of persons with Autism Spectrum Disorders can be eccentric, tangential, formal and easily capable of misinterpretation. The following is an example of questioning in court to a person with Asperger's disorder who had assaulted someone invading their space, as in the following hypothetical dialogue:

Q: So when he wouldn't leave, you decided to attack him?

A: I wanted to be left alone.

In this example, an inference of intention could easily be made, when no such intention actually existed (see Freckelton and List, 2009).

Those with Autism Spectrum Disorders are generally likely to be accounted fit to stand trial as in most jurisdictions the threshold for fitness is quite low (see Freckelton and Selby, 2009). Those with the disorder will often be able to understand the nature of a trial, the various participants in it, will be able to follow the evidence, albeit with some limitations, and will be able to give instructions to their legal representatives. It is only in cases of considerable complexity or where (usually because of particular stress) their paranoia is close to pathological levels that their ability to participate in the criminal justice system will become legally problematic. Where it is their distress levels that are highly elevated and impacting upon their capacity to participate in the proceedings, medication may be able to play a constructive role. Importantly, given the lifetime nature of the disorder, and the limited extent to which it is responsive to clinical intervention, a decision of unfitness to stand trial may not be attractive to those providing legal advice to defendants with Autism Spectrum Disorders (as in the case of persons with intellectual disability or personality disorders) because of the draconian consequences that follow from such a decision. This is especially so when the charges preferred are not serious.

The most controversial forensic issue in relation to Autism Spectrum Disorders is the capacity of those with such disorders to be able to appreciate the nature and quality of their conduct or that it is wrong – the orthodox tests for insanity and mental impairment. In this regard, the disorders share some features with the developmental deficit that enables children over the age of criminal responsibility in some circumstances to plead as a defence that, although they committed the criminal act, nonetheless they were not criminally responsible on the basis that they were *doli incapax* (see *R v M*, 1977; *R v Whitty*, 1993; *C v DPP*, 1995; Blazey-Ayoub, 2003) – they did not know that what they did was wrong.

Those with Autism Spectrum Disorders tend to be preoccupied with constituent elements of behaviour (their own and others') and sub-tasks, with limited capacity to foresee the

consequences of their behaviour and also its likely impact upon their victims. They are more likely than others to be obsessed by a perceived grievance (see eg *Glover v The Police*, 2009) or by a characteristic of the victim or something associated with the victim. This tends to deny or at least reduce for them the inhibiting mechanisms that militate against other members of the community engaging in socially unacceptable behaviour. They can be capable of thoughtful deliberation before acting, but under conditions of stress or, if feeling overwhelmed or confused, can behave impulsively and erratically (see Attwood, 2007: p234). Barry-Walsh and Mullen (2004: at p104) have appropriately raised this question: “if social conventions and connectedness are opaque to them how can they authentically appreciate that their actions are morally wrong (as opposed to a concrete understanding that certain behavior may provoke a predictable and unpleasant response from others?” However, as with the issue of fitness to stand trial, there are good strategic reasons why those representing defendants with Autism Spectrum Disorders may be loathe to raise a defence of insanity/mental impairment because of the grim consequences in terms of custodial detention that follow from such a determination.

It is possible that Autism Spectrum Disorders may constitute an “abnormality of mind” for the purposes of a partial defence of diminished responsibility to murder (see *R v Reynolds*, 2004), where such a defence exists. The main issue will be the extent to which the symptomatology affected the defendant’s thinking at the relevant time.

It has been argued on occasions that because of having an Autism Spectrum Disorder a defendant was prone to misinterpret the behaviour of another as threatening (see eg *R v Mrzljak*, 2004: at [88]). This has the potential, for instance, to enable a defence of self-defence or provocation (where it exists) if latitude is given to take account of the peculiar characteristics of a person with the disorder. However, it remains incumbent upon the defendant in such matters to establish the preconditions for the defence (see eg *Kagan*, 2007). Alternatively, it has been argued that because of such a disorder defendants failed to appreciate cues and communications which would have alerted others that their behaviour was distressing or not resulting in consent (see eg *Parish*, 2007; *Sultan*, 2008; *Hopper*, 2003). This has the potential to constitute a full defence if the prosecution cannot adequately prove the intentional element of the offending. The existence of an Autism Spectrum Disorder in an accused can go to the issue of either the basic intention to commit the relevant act at all (eg, due to motor clumsiness or diminished appreciation of exactly what the person was doing) or to the specific intention to cause any required results (due to a lack of thought about consequences). Another relationship between Asperger’s disorder and criminal offending can be the development of obsessions and fixations. Example in this regard are to be found especially in computer offending such as that engaged in by McKinnon in the United Kingdom and Mr Walker in New Zealand, Barry Walsh and Mullen (2004) described:

- an arson offender with Asperger’s who had an unusual facility for mathematics and became absorbed in the flickering of different forms of flames;
- a stalker who became fixated on professionals who had been involved in his care;
- an arson offender with a fascination for moving objects, Second World War aircraft and then a radio station – when he could no longer hear the radio station clearly he set fire to the organisation that interrupted his access to his favoured station, displaying no regret for his behavior;
- an arsonist with a preoccupation with electronics who assaulted his father when confronted with his fire-setting behaviour; and

- a child sex offender with repetitive and obsessive behaviours.

On a significant number of occasions the submission has been put at the sentencing stage of criminal proceedings that offenders with Asperger's disorder have reduced levels of culpability for their offending (see eg *R v Petroulias*, 2008; *R v Walker*, 2008: at [17]; *DPP v HPW*, 2011). This has potential repercussions for the imposition of a sentence that has as its objectives punishment, specific deterrence (deterrence of the individual concerned) and general deterrence (deterrence of others in the community). It is also pertinent to the ongoing need of the community to be protected from the person to be sentenced. However, the relevance of Asperger's depends upon the circumstances of offending and whether there is a causal nexus between the disorder and the conduct of the offender. There are occasions where such a nexus will not be established and the only impact of the disorder for the purposes of sentence will be its effect upon the burdensome nature of imprisonment as many persons with the disorder will struggle with the dynamics of jail (see eg *DPP v HPW*, 2011, see also Freckelton, 2011).

It is important for courts to be informedly assisted by suitable expert evidence by psychiatrists and psychologists in cases where the person charged (or found guilty) has an Autism Spectrum Disorder so as to appreciate better what can be the subtle repercussions of the disorder for the conduct in which the person has engaged. The consequences of Autism Spectrum Disorders for persons' states of mind in different situations and also for the effect that imprisonment may have upon them lie outside the realm of competence of many mental health practitioners meaning that suitable referral and commissioning of forensic opinions is fundamentally important if courts are to be adequately guided and assisted.

As Debbaut (2002: 16) observed: "Recognition and response is the key for law enforcement professionals to understand the needs of the rising autistic population. Most importantly, law enforcers need to recognise the signs of autism in order to provide for the welfare and safety of all citizens and to avoid needless litigation".

7. Cases

C v DPP [1995] 2 All ER 43

Chandler v The Queen [2010] VSCA 338

DPP v HPW [2011] VSCA 88

Glover v Police [2009] HC 1150

Hopper v The Queen [2003] WASCA 153

McKinnon v USA [2007] EWHC 762 (Admin)

McC v Regina [2007] NSWCCA 25

McKinnon v The United States of America [2008] UKHL 59

McKinnon v Secretary of State for the Home Department [2009] EWHC 170 (Admin)

McKinnon v Secretary of State for Home Affairs [2009] EWHC 2021 (Admin)

Parish v DPP [2007] VSC 494

R v Burkett [2006] NZHC 800

R v EH [2008] QCA 67;

R v George [2004] NSWCCA 247; (2004) 149 A Crim R 38

R v JO [2008] QCA 260.

R v Kagan (2007) 261 NSR (2d) 285; (2008) 261 NSR (2d) 168.

R v M (1977) 16 SASR 589

- R v Maxwell* (2007) 314 NBR (2d) 191
R v Mrzljak [2004] QCA 420.
R v Mueller [2005] NSWCCA 47
R v Petroulias (No 36) [2008] NSWSC 626
R v Reynolds [2004] EWCA Crim 1834
R v Tarr, 2009 NSPC 2
R v Walker [2008] NZHC 1114
R v Whitty (1993) 66 A Crim R 462
Sultan v The Queen [2008] EWCA Crim 6
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