



Précis Paper

The Ice Epidemic

A discussion of the ice epidemic that exists currently within Australia, focusing upon the effect of ice ingestion upon sentencing in criminal matters.

Discussion Includes

- What is ice?
- Statistics
- Government responses
- The effect of ice on sentencing
- Substantial Impairment
- Intoxication as a defence
- Calls for further response and reform

Précis Paper

The Ice Epidemic

In this edition of BenchTV, Anthony Bellanto (Barrister – Trust Chambers, Sydney) and Ye Catherine Lin (Barrister, Trust Chambers, Sydney) discuss the increasing ice epidemic that exists within our society, and the response of both the courts and the government in combatting this growing problem.

What is ice?

1. Ice is the street name for amphetamine or methylamphetamine which covers a wide range of manmade or synthetic substances. Ice is a form of methylamphetamine or methamphetamine. It is made through a manmade process that mixes methamphetamine with salt, usually hydrochloride, to produce large, irregular crystals that give the appearance of crushed ice. Methamphetamine is closely linked to amphetamine and they produce similar effects.
2. Ice is a stimulant. It releases dopamine in your brain to make you feel a number of things such as euphoria and joy, but it also causes a number of negative effects as well. At a low dose level, ice has an alerting effect on the brain, can cause disorientation and will affect thought, reasoning and psycho-motor ability. Increased doses and chronic use can produce delusions, false beliefs, and psychosis or psychotic episodes. It will severely affect the mental processes and can cause mental illness, potentially causing individuals to lose connection with external reality. There are personality changes and behavioural changes, and death can result.
3. Apart from the specific effects mentioned above, ice use can also have serious impacts on a person in a social sense within the community, as research indicates that people under the influence of ice tend to be very aggressive.
4. Ice can be ingested in a number of ways: you can smoke it, take it orally and inject it, and depending on the amount ingested, ice can stay in one's system for about 8 hours. With ice, there is no way that you can measure the level of ingestion or affectation by the drug, which is problematic because given the way the body reacts to ice, clearly the driving ability of a person under the influence of ice would be severely impaired.
5. Since the early 1990's, the use of ice or methylamphetamine was brought about by the ability to use decongestant substances like pseudo-ephedrine which were available over the counter. Following problems around the world, the World Health Organisation made recommendations, and Australia followed to replace pseudoephedrine with phenylephrine.

However, large scale production of methylamphetamine has continued and has overtaken clandestine domestic labs.

6. Since the new millennium, the amount of manufactured ice off shore and trafficked into Australia has substantially increased, and the precursor chemicals most commonly used are ephedrine and pseudoephedrine. Between 2010 and 2016, MDMA which is a variant of ecstasy, dropped off and the ice epidemic began to take over as the major drug problem in Australia.

Statistics

7. In 2011, 14 kilograms of methylamphetamine was seized in Western Australia, and in June 2011 there was a 220 kilogram seizure of methylamphetamine in New South Wales. In 2013 in the Blue Mountains, New South Wales, a clandestine laboratory was found that, at the time of arrest, had produced 30 kilograms of ice which had actually been manufactured. The prosecution estimated the monetary value that could have been produced from this lab was 60 million dollars.
8. A kilogram of ice is estimated to have a street value of 2 million dollars. In Melbourne in 2017, 903 kilograms of ice was seized. Again in 2017, there was the biggest bust in Australian history where 1.2 tonnes of ice was seized in Geraldton, Western Australia. There were 59 bags with 20 kilograms in each bag that arrived on a boat from China, and according to the prosecution this would have amounted to over 13 million individual drug deals.
9. The statistics estimate that about 1 in 70 people in the Australian population have used ice. Of that 1 in 70, they estimate that about 20% of that category use the drug on a daily or weekly basis, 10% use once a month, 24% use once every few months, and 44% use once or twice in a person's adult lifetime.
10. In terms of the correlation between ice and crime, the statistics show that on prison entrance 67% have used drugs, and 50% of those prison entrants have used ice. Violent crime is also more than 6.2 times more likely when one uses ice.
11. The amount of people seeking help from the Salvation Army for ice use has increased between 2012 and 2016 from 16% to 57%. The affordability, the availability and the addictive effect are some of the reasons that have caused this drug to be so widely taken.

Government responses

12. The law's approach has been to single out ice beyond the approach to the previously prevalent drugs of heroin and cocaine. The threshold levels within the *Drug Misuse and Trafficking Act 1985* (NSW) have been amended to reflect the growing problem. Where ice was once in the same category as heroin and cocaine, the government has halved the threshold for ice, this in turn has had the effect of increasing the penalties substantially to life imprisonment.
13. Depending upon the amount of the drug and the degree of complicity, if you are involved in a large commercial supply of ice or methylamphetamine you are facing a potential of life behind bars with a standard non-parole period of 15 years. A standard non-parole period is where the court starts to assess the objective criminality and the level of punishment. From here, a sentence can either go up or below this, depending upon whether for example, one defends the case or pleads guilty.
14. The case of *R v Fang (No 4)* [2017] NSWSC 323 is an example of a consideration of three important factors in regards to available defences whilst under the influence of a drug such as ice.
15. The first consideration is a defence under the *Mental Health (Forensic Provisions) Act 1990* (NSW). Under section 38 of the *Mental Health (Forensic Provisions) Act 1990* (NSW), there is an available defence. If you did not know the nature and quality of your act, or if you did and did not know it was wrong, or if you do have a mental illness potentially relying upon a psychosis brought about by ice, you can theoretically bring yourself within section 38.
16. The second consideration is a substantial impairment argument, which if successful will give rise to the special defense of substantial impairment and a special verdict of manslaughter on a charge of murder. Under section 23A of the *Crimes Act 1900* (NSW), if there has been a substantial impairment it can reduce a charge of murder to manslaughter, but it is not a complete acquittal.
17. Thirdly, theoretically under Part 11 of the *Crimes Act 1900* (NSW) intoxication by reason of drug ingestion causing psychosis may be raised as a defence. However as seen in *Fang*, there are difficulties in raising intoxication through drug ingestion in circumstances where you have taken ice.
18. Section 21A of the *Crimes Act 1990* (NSW) provides for intoxication/drugs to be taken into account on the question of sentence. However, one must be cognizant of ss 21A(5AA) which provides that self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor.

19. The *Fang* case relates to a man who has now been convicted of murder when he had ingested both alcohol and ice on the night in question. He stabbed the deceased in the neck and torso over 20 times. In his judgement in this case, Johnson J mentioned that where psychosis is induced by way of drug ingestion, that issue should not fall to the jury and does not fall under s 38 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).
20. There is difficulty in presenting expert evidence because the psychotic state may be longstanding or pre-existing, and there may be something that will trigger an outburst. If the accused is aware of his or her potential to react dangerously, yet self-ingests ice knowing they have that propensity or capacity - that is a reckless act. If you know this and ingest drugs, then you cannot claim the psychotic state as some sort of defence or mitigation of penalty because you are on notice that you are capable of acting in that particular way.

The effect of ice on sentencing

21. The court is faced with the problem as to how to sentence an offender who has consumed ice without knowing perhaps what ingestion will lead to, and is unable to make a value judgement as to how he or she will react.
22. In *Veen v R (No 2)* [1988] HCA 14 the High Court held that sentencing is not purely a logical exercise. Their Honours held in this case that the purposes of criminal punishment are various, including things such as the protection of society, deterrence of the offender and others who may be tempted to offend, retribution and reform. These purposes overlap and none of them can be considered in isolation when determining what the appropriate sentence is in a particular case.
23. In *Bourke v The Queen* [2010] NSWCCA 22 the Court agreed that intoxication, whether by alcohol or drugs, may explain an offence, but will not necessarily mitigate the penalty, except where the intoxication is the result of an addiction and the original addiction did not involve a free choice.
24. The case of *Director of Public Prosecution v Arvanitidis* (2008) 202 A Crim R 300 involved an offender who pulled a gun on his mother after she confronted him about his drug problem. This led to a shootout with police, during which the offender was in a drug induced psychotic state caused by ice use. The offender was delusional, paranoid, feared being attacked by terrorists and considered himself licensed by the government to possess a gun and shoot police. The Court held in those circumstances that he was not entitled to raise intoxication from ice as a matter of mitigation.

Substantial impairment

25. Substantial impairment reduces murder to manslaughter if it succeeds as self defence or more particularly, as a partial defence. To satisfy substantial impairment under subsection 23A(1) of the *Crimes Act 1900* (NSW) at the time of the act or omission causing the death concerned, the person's capacity to understand events or to judge whether a person's actions were right or wrong, or control himself or herself, must have been substantially impaired by an abnormality of the mind from an underlying condition. The impairment must be so substantial as to warrant liability for murder being reduced to manslaughter.
26. As per ss 23A(2), you cannot call an expert to give an opinion to bring yourself with the above provision. However, ss 23A(3) provides that if a person was intoxicated at the time of the act or omissions causing the death concerned, and the intoxication was self-induced, the effects of self-intoxication are to be disregarded for the purposes of determining whether the person is not liable to be convicted of murder. The above provision reflects how the law has reacted, for example since the changes in legislation in 1997 to specifically focus upon the question of intoxication.

Intoxication as a defence

27. Intoxication can be a defence, but there are practical difficulties. Part 11A of the *Crimes Act 1900* (NSW) exhaustively sets out the way self-induced intoxication applies in certain criminal offences.
28. For present purposes, self-induced intoxication may be taken into account when considering whether the accused formed the requisite intent. However, section 428C of the *Crimes Act 1900* (NSW) contains a significant restriction in that defence, that it may only be raised for crimes of specific intent. The relevant provisions of s 428B also apply, and the first question that must be asked is what the crimes of specific intent are.
29. If you do not come within the schedule of the *Crimes Act 1900* (NSW) which sets out all of the crimes of specific intent, then the defence of intoxication cannot be available. If you do fall within that schedule, you must look at all other relevant provisions under the legislation.
30. Section 428C of the *Crimes Act 1900* (NSW) provides that evidence that a person was intoxicated whether by reason of self-induced intoxication or otherwise at the time of the relevant conduct may be taken into account in determining whether the person had intention. However under subsection 428C(2), such evidence of intoxication cannot be taken into account if the person had resolved before becoming intoxicated to do the relevant conduct, or became intoxicated in order to strengthen his or her resolve to do the relevant

conduct. If you do commit a crime under a psychotic state or affected, then there will be serious qualifications as to whether you will be able to avail yourself of the defence.

Calls for further response and reform

31. The *Road Transport Act 2013* (NSW) does not really distinguish between the severity of certain drugs and alcohol. For example, if one was to drive whilst under the influence of drugs, one can be treated the same as someone who has been driving under the influence of alcohol.
32. Currently, it seems that there is no facility that allows us to judge how badly a person is affected by the ingestion of drugs, how much they have ingested or what their level of psychosis may be.
33. Sections 111 and 112 of the *Road Transport Act 2013* (NSW) only go as far to say that 'the use or attempted use of a vehicle under the influence of drugs or alcohol...', but it does not go on to distinguish severity for different types of drugs. For a first offence of driving while intoxicated, it can be 20 penalty units and/or 9 months imprisonment.
34. Before the current prescribed concentration of alcohol legislation, you could be charged with driving under the influence. The requirement was that there had to be something about your driving that would give the police cause to pull you over, and they would charge you if they thought you were affected. Theoretically we still do have this old style of driving under the influence testing, but it is hardly ever used. This demonstrates that the law is lagging far behind and highlights the need to assess and redress this serious problem. It displays how slow we are as a community to come to terms with ice, particularly ice users who drive vehicles.
35. The law has addressed the prevalence of ice and increased penalties where people are involved in large scale manufacturing, import or supply of ice, as the penalties can now be well into the double figures. However, when you think of the number of people that die on our roads and the number of drivers on our roads, this is an unfortunate area that needs to be addressed as the reality of having people affected by drugs such as ice driving vehicles is extremely confronting given all that is known about the effects it can have on a person.
36. When you consider the accessibility, affordability and the addictive effect of ice, it shows why ice is so prevalent. With the passage of time, the law will catch up, but with human nature being what it is, there cannot be a great deal of confidence that when the law does catch up, that this will be the end of current problems relating to mood altering substances and how that in turn affects individuals behaviour.

BIOGRAPHY

Anthony Bellanto QC

Barrister – Trust Chambers, Sydney

Anthony Bellanto QC was called to the Bar in 1967 and took silk in 1988. Anthony has worked as the Crown Counsel and Senior Crown Counsel in Hong Kong and as a Crown Prosecutor in Australia. He possesses extensive experience in criminal law matters, trial advocacy, sentencing and appeals. Further, Anthony is an active participant in the Bar Reading Course, Continuing Professional Development programs and has delivered a collection of papers in both NSW and abroad, making him well-recognised within the academic community as well as the court room. He was the advisory editor of *Sentencing Law: New South Wales* published by Lexis Nexis in 2003.

Ye Catherine Lin

Barrister, Trust Chambers, Sydney

Ye Catherine Lin was called to the Bar in 2013. She has a diverse practice with a particular focus on criminal law. She has appeared in a number of high profile matters including appearing as junior counsel on behalf of the New South Wales Worker's Union in the Royal Commission into Trade Union Governance and Corruption.

BIBLIOGRAPHY

Cases

R v Fang (No 4) [2017] NSWSC 323

M'Naghten's Case 1843 10 C & F 200

Veen v R (No 2) [1988] HCA 14

Bourke v The Queen [2010] NSWCCA 22

R v Rosenberger (1994) 76 A Crim R 1

Director of Public Prosecutions v Arvanitidis (2008) 202 A Crim R 300

Legislation

Drug Misuse and Trafficking Act 1985 (NSW)

Mental Health (Forensic Provisions Act 1990 (NSW) s 38

Crimes Act 1900 (NSW) s 23, Part 11, 23A, 428C, 428B

Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A, ss 21A(5AA),

Road Transport Act 2013 (NSW) s 111, 112