AVOs and Appeals to the District Court

This paper will cover two separate topics which, it is hoped, are of interest and practical utility to criminal law practitioners. As is necessitated by the allocated time, and no doubt much to the relief of the audience, the focus of this paper will be inexorably practical and pragmatic. In deference to the undoubtedly substantial experience of the members of this audience, no attempt will be made to set out the basic principles of the areas of law under consideration. Instead, the writer will endeavour to highlight aspects of each area of the two areas of law under consideration which may be less well understood of known while at the same time being of use in the everyday conduct of a criminal practice.

AVOs

Apprehended violence orders are a long standing and increasingly popular tool used by both police and private litigants alike. Despite their popularity, there is a dearth of jurisprudence concerning this important area of law. Equally, there is remarkably little in the way of commentary and analysis of the law of AVOs to guide practitioners who work at the coalface of this important area of law. This section of the paper seeks to contribute, albeit in a small way, to redressing that problem.

AVOs associated with domestic violence charges

As any criminal law practitioner will know, the vast majority of AVOs (in particular, ADVOs) are made by default as a consequence of criminal charges. This is because of the effect of ss. 39 and 40 of the *Crimes (Domestic and Personal Violence) Act* 2007 (in this section, referred to at the Act).

These two sections are broadly understood as providing that whenever a person is charged with a serious offence (as that term is defined in s40); or pleads guilty to one or is found guilty of one (irrespective of whether a conviction is recorded), the Court is obliged to make either an interim AVO (in a case where a charge is laid but not executed) or an final AVO (in the case of a plea of guilty or finding of guilt). While this understanding is mostly correct, it is incomplete. Sub section 2 of both s.39 and sub section 3 of s.40 are framed in almost identical terms. They read as follows:

"39(2) However, the court need not make a final apprehended violence order if it is satisfied that it is not required (for example, because a final apprehended violence order has already been made against the person)."

"40(3) However, the court need not make an interim court order if it is satisfied that it is not required (for example, because an apprehended violence order has already been made against the person)."

This provision is often underutilised or even overlooked altogether. There are a number of situations (beyond the example given in the section) in which this provision may be able to be deployed in order to avoid the imposition of an AVO. Most notable is the common occurrence where the protected person herself (it is usually a female) does not wish to have the protection of an AVO. In such a circumstance in the writer's view, a compelling argument can be made that the making of an AVO is not required and,

indeed, would be most inappropriate, even if the prosecution is intent on seeking it. Where the person for whose protection the AVO is sought is adamant that she does not think that an AVO is needed and does not want it to be made, absent a concern about her intellectual capacity or coercion, the imposition of an AVO is an affront to her human dignity.

Ostensibly, the subject of an AVO is the defendant it is his freedoms that it impinges upon, not those of the protected person. However, in a practical sense, the focus of an AVO is the protected person and her safety. The prohibitions in an AVO have both a real and a symbolic impact on the protected person.

The real impact is that the existence of an AVO will inevitably change the dynamics of the relationship between the defendant and the protected person. The extent of that change will depend upon the terms of the order, however, even a "minimal" AVO, that is to say one which contains only the conditions mandated by statute has the capacity to decrease the quality of an intimate relationship between the two parties (i.e. defendant and protected person) as it places a fetter on open and honest communication. During the currency of an AVO, the defendant will (or at least should) avoid any form of argument with the protected person lest he breach the prohibition against harassing her with the consequence that the kind of open and honest communication which experts endlessly tell us is essential to a healthy relationship is near impossible.

Even more important than the practical impact of an AVO upon the protected person is its symbolic effect. In circumstances where a woman who is an adult, of sound mind and free from any undue influence expresses a desire to continue to have a relationship with the defendant unimpeded by the existence of an AVO, the imposition of such an order constitutes a direct challenge to that woman's dignity. This is so because the right to self-determination, is a fundamental aspect of human dignity. An imposition of an AVO to protect a woman who does not wish to be protected deprives that woman of the capacity to choose with whom to have a relationship and how to manage it. In essence, it is tantamount to a declaration by the Court that the woman does not know what is good for her and she must be protected from her own improvident choices. In writer's view, it can be a profoundly disempowering and disenfranchising experience for the woman involved. This is why ss 39(2) and 40(3) respectively are much more important, and ought to be argued much more frequently than is presently the case.

Aspects of the test for the making of an AVO

The test for the making of a final AVO order are set out in ss. 16 for ADVOs 19 for APVOs. They differ in important respects (as will be seen below), but their structure is similar.
First there is the general test. This test is set out in sub section (1) of both sections and is almost identical. S 16 (1) reads:

6 Court may make apprehended domestic violence order

1. A court may, on application, make an apprehended domestic violence order if it is satisfied on the balance of probabilities that a person who has or has had a domestic relationship with another person has reasonable grounds to fear and in fact fears:
    a) the commission by the other person of a domestic violence offence against the person, or

b) the engagement of the other person in conduct in which the other person:
    i. intimidates the person or a person with whom the person has a domestic relationship, or
    ii. stalks the person, being conduct that, in the opinion of the court, is sufficient to warrant the making of the order.

Sub section (1) of section 19 is in identical terms, except that the reference to a domestic relationship is omitted and the reference to a domestic violence offence is replaced with a reference to a personal violence offence.

This part of the test is for the most part well known. The only aspect of it which is not often referred to is the last line. Practitioners acting for defendants to AVOs ought to consider whether a submissions is available that the conduct in respect of which there is a reasonable fear is so trivial that it does not warrant the making of an AVO. That being said, it must be recognised that it would be a rare case in which such a submission would be attended by a prospect of acceptance by the bench, particularly so in the present climate of heightened community concern about domestic violence.

What tends to be less well understood is that there is in each case a second limb to the test. While the precise content of this second limb differs between APVO and ADVO proceedings, in both cases the second limb is an exception to the requirement that the protected person in fact fears the commission of the relevant offence/conduct. In each case, the exception is contained in sub section (2).
In the case of proceedings for an ADVO ss16(2) is as follows:

2. Despite subsection (1), it is not necessary for the court to be satisfied that the person for whose protection the order would be made in fact fears that such an offence will be committed, or that such conduct will be engaged in, if:
    a. the person is a child, or
    b. the person is, in the opinion of the court, suffering from an appreciably below average general intelligence function, or
    c. in the opinion of the court:
        i. the person has been subjected on more than one occasion to conduct by the defendant amounting to a personal violence offence, and
        ii. there is a reasonable likelihood that the defendant may commit a personal violence offence against the person, and
        iii. the making of the order is necessary in the circumstances to protect the person from further violence, or
    d. the court is satisfied on the balance of probabilities that the person has reasonable grounds to fear the commission of a domestic violence offence against the person.

This provision must be read in conjunction with s16(2A) which is in the following terms:
(2A) An apprehended domestic violence order that is made in reliance on subsection (2) (d) cannot impose prohibitions or restrictions on the behaviour of the defendant other than those prohibitions that are taken to be specified in the order by section 36.

These provisions raise interesting, and as yet unanswered, questions concerning the standard of proof in relation certain aspects of the exception. In sub paragraphs (b) (c) the level of satisfaction required is “in the opinion of the Court”. This is an unusual formulation and. As a matter of statutory interpretation,

there is a powerful argument that is constitutes a deliberate departure from the need to prove the circumstances referred to in those paragraphs on the balance of probabilities. This is because this formulation stands in stark contrast to the much more orthodox requirement that the court be "satisfied, on the balance of probabilities". That letter formulation appears twice in s16, suggesting that the phrase "in the opinion of the court" was intended to convey a different standard.

To further complicate matters, it is to be noted that sub paragraph (c) (ii) introduces yet further formulations which seem to dilute the standard of proof even further. It refers to "a *reasonable likelihood* that the defendant *may* commit…". This very strongly implies a very low standard of satisfaction.

Ambiguity concerning the standard of proof aside, the second limb of the test can have significant practical implications. A recent matter in which the writer acted for a defendant to an application for an ADVO is a case in point. The police made an application for an ADVO for the protection of a female, based on allegations of long standing abuse by the defendant (her boyfriend) including assaults, malicious damage and derogatory name calling. It was conceded in the application that the protected person was prone to anger and self-harm. The defendant (the writer's client) admitted the allegations of repeated malicious damage and derogatory name calling but denied the assaults and instructed that the malicious damage and name calling was an expression of his exasperation with his girlfriend's challenging behaviour.

The defendant's admissions alone would have been sufficient to make out reasonable grounds for the protected person to have a fear of commission of a domestic violence offence (which is defined to include malicious damage) and harassment (the name calling). However, the client was also able to produce compelling evidence that the protected person did not in fact have any fear of him. For one thing, she continued to not only see him but in fact at times stalk him when he did not want to see her. More importantly, there was a Facebook conversation in which the protected person admitted that the **only** reason she wanted the AVO was to enable her to secure subsidised community housing.

Armed with such compelling evidence that the protected person is "gaming the system", one might be tempted to advise the client to defend the application. The difficulty is that, even despite the protected person's abuse of the system, a consideration of sub section 2 reveals that a defence would have been unlikely to succeed. Based on the admitted history of malicious damage and name calling, there is little doubt that, if allowed back into a relationship, there was likely to be a repetition of episodes of damage of property by the defendant and name calling undoubtedly amounting to harassment.

As to the second limb of the test for APVOs, the exclusionary rule is much more narrowly circumscribed. S19(2) provides:

2. Despite subsection (1), it is not necessary for the court to be satisfied that the person for whose protection the order would be made in fact fears that such an offence will be committed, or that such conduct will be engaged in, if:
    a. the person is a child, or
    b. the person is, in the opinion of the court, suffering from an appreciably below average general intelligence function.

The standard of proof

The standard of proof applicable to AVO proceedings receives very little attention. Putting to one side the issues raised above in relation to s16(2) (c) and (d)As the terms of ss16(1) and 19(1) make clear that the standard of proof in ADVO proceedings is the civil standard. That much will no doubt not be a revelation to any member of the audience. All is not however as simple as it seems. There is a persistent and pervasive misapprehension as to the way in which the standard of proof ought to be applied.
The question of what actually needs to be proved to the civil standard. There is a common misconception that before the Court can consider a particular allegation as supporting the existence of the requisite reasonable fear, that allegation must be proved to be true on the balance of probabilities. That is not in fact the case.

What has to be proved on the balance of probabilities is that the protected person has a reasonable fear. It may be reasonable for the protected person to harbour the relevant fear even if the individual circumstances which give rise to it cannot themselves be proved to the civil standard.
In Gianoutsous v Glykis [2006] NSWCCA 137, McClellan CJ at CL, with the agreement of the remainder of the Court made the following observation at [52] :

"… it is important to bear in mind that the court is only concerned to determine whether a person "has reasonable grounds to fear and in fact fears." Such a determination does not necessarily require a finding that any particular event has occurred (although such a finding could be made)…" There will be many circumstances in which a finding that an event did not occur will be important to the determination of the ultimate issue. For instance, where the protected person alleges that the defendant confronted her and made a threat against her, if the Court finds that the confrontation never occurred or the threat was never made that would clearly mean that this allegation could support the existence of a reasonable fear on the part of the protected person.

However, there are many situations in which an inability to prove a particular fact will not render that allegation incapable of supporting the grant of an AVO. For example, if the protected person has an argument with the defendant and then receives an anonymous message containing a threat then, depending on the precise circumstances, it may be perfectly reasonable for that person to assume that the message originated from the defendant and hence develop a fear of the defendant.

Appeals to the District Court

Appeals from the Local to the District Court are an everyday part of the practice of most criminal law practitioners. This part of the paper deals with aspects of the principles governing the determination of appeals from the Local Court to the District Court under the *Crimes (Appeal and Review) Act* 2001 (the Act). All references to legislation in this part of the paper are references to that Act (unless specifically indicated otherwise).

Leave to appeal out of time

Any appeal from the Local Court to the District Court under the Act (including application for leave

to appeal where relevant) must be made within 28 days of the finalisation of the proceedings in the Local Court (see ss. 11(2)(a), 11A(2) and 12(3)(a)). However, pursuant to s13, if the 28 day period is missed, there is still a capacity to seek the leave of the District Court to appeal out of time for three months from the date of finalisation of the Local Court Proceedings.

As to the principles relevant to the determination of an application to appeal out of time, s16(2) provide that :

"Leave to appeal must not be granted in relation to an application under section 13 unless the District Court is satisfied that tit is in the interests of justice that leave be granted."
That is the extent of legislative guidance as to the determination of applications for leave of this type. Until recently, there has been no judicial consideration of this issue by a superior court of record. In the absence of binding jurisprudence, a practice has developed in the District Court that the sole issue relevant to the grant of leave to appeal out of time was considered to be the adequacy of the explanation for the delay in the filing of the appeal. However, a recent decision of the Supreme Court has provided some, albeit brief, guidance as to the applicable principles and in so doing expanded the relevant considerations to include the merit of the proposed appeal.

In *Application by Michael Bar-Mordecai* [2016] NSWSC 1518 Wilson J had occasion to comment upon the matters relevant to the grant of leave to appeal to the District Court against a sentence imposed in the Local Court. The matter came before her honour in unusual circumstances. Mr. Mordecai pleaded guilty in the Local Court to an offence of contravening an AVO. He was dealt with by the Local Court magistrate without conviction pursuant to s10(1)(b) of the *Crimes (Sentencing Procedure) Act* 1999 on condition that he enter into a good behaviour bond. For most offenders, that would be a good outcome, however Mr. Mordecai felt aggrieved by that decision as he thought that he ought not have been subject to a bond. Accordingly, he wished to institute an appeal against the severity of sentence. Mr. Mordecai was however subject to a declaration that he was a vexatious litigant and hence needed leave of the Supreme Court in order to commence the appeal. Because his appeal to the District Court, if permitted, would have been filed out of time, the relevant question for the Supreme Court was whether he should be given leave to apply for leave to appeal to the district court.

In this context, Wilson J said (at [19]):
"Typically, in determining an application for leave, the court may have regard to two features, being the question of delay and any explanation for it, and the question of merit."
Importantly, later in the judgment her Honour seemed to qualify the above with the following additional comments (at [27]) :
"If the issue of delay in bringing proceedings in the District Court is capable of being adequately explained, and the proposed appeal is *not wholly without merit*, it would be open to the District Court to grant the applicant leave to appeal against sentence." (emphasis added)
Ultimately, the principle that emerges from this decision is that in order to satisfy the District Court that it is in the interests of justice to grant leave to appeal out of time the applicant must generally establish the following two matters:

a) That there is an adequate explanation for the delay in filing the appeal; and

b) That the appeal is not wholly devoid of merit.

In practice, the second of the above matters does not represent a very high bar, nonetheless it will necessitate that an application for leave to appeal out of time be accompanied by some explanation of the basis of the appeal. *Bar-Mordecai* was only decided in October of 2016. As yet, the writer has not seen evidence that the District Court bench is alive to this decision. Despite this, it is suggested that ignoring the merit issue in an application of the type under discussion would not be a prudent course to adopt.

Material to be considered on an appeal against severity

The decision of the Court of Appeal in *Engelbrecht v Director of Public Prosecutions (NSW)* [2016] NSWCA 290 (in which the writer appeared as advocate for the applicant) has clarified what material the District Court is obliged to consider in determining an appeal against severity of sentence.

In order to understand the decision, it is necessary to know a little of the facts and procedural history of the matter. Mr. Engelbrecht was employed as a head carer in a group home for intellectually disabled men. One of the residents of this home (a young man) made allegations of sexual misconduct against Mr. Engelbrecht. These resulted in 5 charges ranging from common assault to aggravated indecent assault. He plead not guilty in respect of all charges and the matter proceeded to a hearing before the Local Court in Parramatta. The hearing occupied some 6 days of evidence following which he was found not guilty in respect of 4 of the charges and guilty in respect of one count of an aggravated act of indecency. He was sentenced to perform 300 hours of community service.

Mr. Engelbrecht accepted the Local Courts finding of guilt, but appealed to the District Court against the severity of the penalty imposed upon him. When the matter came on for hearing before Sides DCJ, a controversy arose concerning the manner in which His Honour would determine the factual basis of the commission of the offence.

Criminal law practitioners would know that ordinarily the District Court is appraised of the facts constituting the offence through the tender of the facts sheet handed up at Local Court level. That facts sheet represents the agreed facts concerning the circumstances of the commission of the index offence. However, in a situation where the appeal follows a contested hearing in the local court, no such agreed facts sheet generally exists.

To resolve this difficulty, the DPP sought to tender the decision of the Local Court magistrate on the finding of guilty, in which his honour's findings of fact were recorded. However, the writer opposed such a course and argued that the District Court ought to receive much more than the magistrates findings of fact. It was contended on behalf of Mr. Englebrecht that the District Court ought to receive the whole of the transcript of evidence of the Local Court hearing together with the exhibits, so far as it is relevant to the charge the subject of the appeal and determine the facts of the offending afresh for itself rather than simply adopting the Magistrates findings. In support of that proposition, the writer relied on s17 which is in the following terms:

“An appeal against sentence is to be by way of a rehearing of the evidence given in the original Local Court proceedings, although fresh evidence may be given in the appeal proceedings.”
Judge sides decided that this section did not require him to have regard to the transcript of the local court hearing. His honour found that the reference to “the evidence given in the original Local Court proceedings” was a reference to the evidence in the sentencing hearing only, which included the magistrates reasons for his finding of guilt. His honour than proceeded to hear the appeal and dismiss it.

Not satisfied, Mr. Engelbrecht applied to the Court of Appeal for an order quashing the decision of the District Court on the basis of jurisdictional error. This was the first time that the provisions of s17 had been considered by a superior court of record.

Ultimately, the Court (by a majority of 2 to 1) found in Mr. Engelbrecht favour. McColl JA expressed her conclusion in this way (at [96]) :

…in determining the severity appeal, the primary judge was required to have regard to the evidence given in the original Local Court proceedings, and to such other “fresh evidence” as was adduced. As his Honour had to determine issues such as the applicant’s culpability for the crime for which he had been convicted and was to be sentenced afresh, it was essential that his Honour have regard to the evidence given in the conviction phase of the hearing, insofar as it was relevant to the sequence 3 conviction. That was the course Mr Mantaj urged upon his Honour.

Macfarlane JA came to a similar conclusion (at [118]).

It is important to understand that *Engelbrecht* does not prevent the District Court from considering the reasons of the Local Court magistrate. Macfarlane JA expressly stated that s17 “impliedly authorises their use” (at [117]) and McColl JA impliedly condoned the practice by referring to is at [97] with apparent approval. The effect of the decision is that the reasons of the magistrate are no longer determinative of the facts surrounding the commission of the offence.

Important as the decision in *Engelbrecht* is, it is unlikely to have an impact on the conduct of a typical severity appeal. The majority of severity appeals arise out of pleas of guilty in the Local Court. Since oral evidence is rarely led in Local Court pleas, the question of the admissibility of the transcript does not arise. The type of matters where the decision will be of assistance to practitioners will be confined to circumstances where there is a factual dispute at Local Court level and oral evidence is led to resolve it. This will usually be where there is a disputed facts hearing on a plea of guilty or there is a Plea of not guilty in the Local Court hearing followed by an appeal to the District Court against severity only.