PCAs, Drugs and Domestic Violence.

Introduction

This paper, and the presentation which it accompanies, will cover three distinct areas of the criminal law, specifically: drink driving , drugs and domestic violence.

It will no doubt be immediately obvious to the reader that each of these topics covers a very wide field within the criminal law. It would be possible to write a whole text book on each topic. Clearly, to attempt any kind of comprehensive analysis of any of these subject areas within the confines of one third of one presentation would be foolish. And that is just as well for, as the writer understands, most practitioners in the audience are experienced criminal lawyers. In those circumstances, a lecture on the basics of criminal law is likely to be as welcome as Tony Abbot at the Mardi Gras.

For these two reasons the writer has tried to focus on aspects of the three different topics which are the subject of this paper which are less well understood and/or represent "out of the box" thinking. In this way, the writer hopes that the presentation (and this paper) will be both of interest and practical utility to the audience. As a consequence, the structure of this paper will necessarily be somewhat discursive and will focus mostly on defences rather than sentencing (because it is the formulation of a strategy for a defence that presents the greatest opportunity for innovative thinking).

Before proceeding to the substantive portion of this paper it is important, for the sake of precision, to clarify that the word "defence" is here used rather loosely to denote a possible ground of exculpation or a strategy or argument which can be deployed to show that the Crown has not proved a particular element of a particular offence. It is not suggested that the defences described below are necessarily defences in the strict legal sense – being matters which exculpate an otherwise guilty accused, proof of which lie on the defence on the balance or probabilities.

1. Drink Driving

Honest and reasonable mistake and PCA charges

The defence of honest and reasonable mistake of fact (also often referred to as the *Proudman and Dayman* defence) applies to PCA charges. In *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002) [2004] NSWCCA 303* Howie J twice affirmed that PCA offences are offences of strict liability (see paragraphs 40 and 101). Moreover, in *DPP v Bone* (2005) 64 NSWLR 735, Adams J expressly rejected the DPP's submission that PCA offences are absolute liability offences, and affirmed the availability of the defence of honest and reasonable mistake.

The effect of this is that if the accused raises the issue that he/she honestly and reasonably believed that he/she was not over the legal limit at the time of driving then, unless the prosecution can negative that issue beyond a reasonable doubt, the accused is entitled to be acquitted.

In practice, the most obvious application of this defence to PCA matters is in relation to the so called "morning after" offence. That is, where the accused is detected with typically a very low blood alcohol concentration after having consumed alcohol the previous night.

In such a case, it is almost always the situation that the accused thought that he/she was not over the legal limit and was very much surprised when told by police that he/she was in fact over. For a lay person (without the benefit of the accrued wisdom about how alcohol is metabolised by the human body which most magistrates and criminal practitioners acquire during their career) such a mistake is (in the writer's view at least) quite a reasonable one to make. Indeed, there seems to be an implicit recognition of this fact within the profession and amongst members of the magistracy. This is evidenced by the common practice of dismissing charges in these circumstances under the provisions of section 10 of the *Crimes (Sentencing Procedure)* Act 1999. What is missing however is widespread recognition of the applicability of the honest and reasonable mistake issue.

Another good candidate for this defence is the accused who in his/her drinking has been scrupulous to count their drinks and ensure that they stayed within the

familiar guideline which was until recently promulgated by the RTA of "two standard drinks in the first hour and one every hour thereafter", and then before driving waited some time to allow a further margin for abundant caution. Again, in that situation one would have thought that the accused was operating under and honest and reasonable belief that he/she was under the limit.

It is worth noting that the RMS no longer promulgates the guideline referred to above. Instead, the current road user's handbook makes the following statements:

"The easiest way to accurately measure a person's BAC [blood alcohol concentration] is with an Australian Standards approved (AS3547) breath testing device."

And:

"Even when you know how many drinks you have consumed you will not be able to calculate your BAC without taking a breath test…"

This advice is in the writers view next to useless in a society in which the consumption of alcohol is very much a part of the culture and where personal breath testing devices are not widespread. Worse still, if followed, it is liable to mislead.

Pharmacologists tell us that a person's BAC can continue to increase for up to one and a half hours after the last drink is consumed. Consequently, even undergoing a self administered breath test at the commencement of driving is no guarantee that one will not find oneself over the limit during the course of the journey. Accordingly, the implication conveyed by the advice quoted above - that if a breath test returns a negative reading than its OK to drive- is wrong.

Some magistrates before whom the writer has run this defence have made much of the fact that the RMS has not, for some years now, made reference to the guideline mentioned above. They reason that the fact that this guideline has not been promoted to the community for many years negates the reasonableness of an accused person relying on it. This however ignores the fact that the guideline still holds currency in other sections of the community. For instance, some clubs and pubs still have signs posted around the bar which repeat this guideline. Not only that, the NSW department of Health to this day publishes the guideline on its website (annexure A is a print out of the relevant web page – see top of page 5).

All of this serves to underscore the complex task that it is to accurately judge ones BAC at any given point in time. Seen in this light, the defence of honest and reasonable mistake assumes particular relevance.

Below is a suggested checklist of some of the matters with respect to which instructions should be obtained when considering a defence of honest and reasonable mistake for a PCA matter:

1. What drinks where they, in particular, were they standard size?

2. Is there any possibility that some drinks might have been spiked without the accused's knowledge?

3. What method was the accused using in an effort to ensure that he/she was under the limit at the time of driving?

4. Was the accused ever previously subjected to an RBT after having relied on this method and if so:
    a. What was the result of the RBT
    b. What conclusions did the accused draw about the reliability of that method from that experience?

5. Did the accused rely on the 'rule of thumb' referred to above?

6. If so,
    a. how did the accused become aware of that rule
    b. when did the accused obtain his/her drivers license (i.e. Was it at a time when the RTA was still promulgating the rule of thumb).
    c. did the accused allow a margin for error before commencing the journey.

7. How did the accused feel before commencing the journey?

8. Was there any facility for checking ones BAC at the venue where the accused was consuming alcohol?

9. Did the accused in fact undergo a breath test before commencing driving?

Lastly, it should be noted that the defence of honest and reasonable mistake almost certainly also applies to drug driving offences under s111 of the *Road Transport Act* 2013.(RT Act). Whilst there is not appellate authority for this proposition as yet (no doubt because of the relative novelty of this offence), it is

so closely related to PCA offences that, until and unless the appellate courts say otherwise, there is a very strong argument that a drug driving offence is also in the category of strict liability offences.

The *Jiminez* "defence"

In *Jiminez v R* [1992] HCA 14, the High Court held that a person cannot be said to be driving while unconscious at the wheel. In a joint judgment the majority said at paragraph 9 :

> "If the applicant did fall asleep, even momentarily, it is clear that while he was asleep his actions were not conscious or voluntary (an act committed while unconscious is necessarily involuntary) and he could not be criminally responsible for driving the car in a manner dangerous to the public. The offence of culpable driving is, in this respect, no different to any other offence and requires the driving, which is part of the offence, to be a conscious and voluntary act"

This does not mean that a person who has fallen asleep at the wheel will always escape criminal liability. The Court went on to hold that, while a person cannot be said to be driving while unconscious, their driving leading up to falling asleep can be said to be dangerous if they were driving in a condition which gave rise to a danger that they may fall asleep (or lose consciousness for some other reason). The plurality said at paragraph 13:

"so far as "driving in a manner dangerous" is concerned, the issue is …whether the driver was so tired that, in the circumstances, his driving was a danger to the public."

The most obvious application of this principle is in respect of charges of drive manner dangerous and negligent driving. However, this is not the only scenario in which *Jiminez* can be useful to a traffic lawyer. Used imaginatively, it can be utilised (in appropriate cases) in relation to any charge which has driving as an essential element, including a PCA charge.

By way of ilustration, the writer had acted for a person charged with high range PCA. The client was found by passers-by slumped over the wheel of his car. He was asleep, the engine was running, his car was in gear and resting up against a parked car with which it had obviously collided. After being woken up, he was subjected to a breath analysis and returned a reading in the high range. Perhaps not surprisingly, he was charged with high range PCA.

He entered a plea of not guilty. The basis of the plea was that in accordance with the *Jiminez* principle, he could not have been said to be driving whilst unconscious. Therefore, since driving is an essential element of a PCA offence, he could not have committed the offence while asleep. While it was clear that the client had driven to the site of the accident at some earlier time, there was no way to ascertain when that was. This meant that the prosecution could not prove what his blood alcohol concentration would have been at that time, nor could they prove that the 2 hour rule was in fact complied with (see below). Following some last minute discussions with the prosecutor, the charge was withdrawn and a charge of negligent driving proffered (to which a plea of guilty was entered and, dealt with by way of fine only).

The 2 hour rule

The so called ‘2 hour rule’ holds that the breath analysis must be carried out within 2 hours of the last act of driving. In actual fact, there are two limbs to this rule.

The first limb arises out of the provisions of clause 31(3) of schedule 3 to the RT Act. This is a facilitative provision. Its effect is that, as long as the breath analysis was conducted (or blood sample taken) within 2 hours of the last act of driving (or other activity referred to in clause 3) than the reading it produces is rebutably presumed to be the reading at the time of driving (or other activity referred to in clause 3).

This provision is intended to overcome the difficulty which would otherwise exist in proving the blood alcohol concentration (BAC) of the accused. Given that BAC is not constant, but fluctuates with time, the result of a breath analysis conducted even 30 mins. after the last act of driving does not, in truth, accurately represent the BAC at the time of driving. By utilising clause 31 the prosecution is relieved of the burden of extrapolating the BAC at the actual time of driving from a reading taken at some later time.

In order to avail itself of clause 31 (3), the prosecution must prove (beyond a reasonable doubt of course) that the breath analysis or blood sample was in fact taken within 2 hours of the last act driving. If this proof is not available, the prosecution must prove the BAC at the actual time of driving or else the prosecution fails.

Whilst it is not impossible, with the assistance of expert pharmacological evidence, to extrapolate the BAC at the time of driving, to do this requires information which may not be available to the prosecution or, if it is available,

may not be sufficiently reliable to ascertain the BAC beyond a reasonable doubt. This information includes the time of first and last drink, the amount of alcohol consumed and the alcoholic content of the drinks. In a practical sense therefore, if the prosecution is unable to utilise the presumptive effect of cl.31(3) the result is usually that is fails to make out the offence.

The second limb of the 2 hour rule arises out of the provisions of clause 2(c) schedule 3 to the Act.

This provision reads as follows:

"A police officer cannot require a person to submit to a test, analysis or assessment, or to provide a sample, under this Schedule:

…

(c) at any time after the expiration of the relevant period (if any) for the test, analysis assessment or sample concerned."

In turn, the "relevant period" is defined in clause 2(2). In relation to a breath test or analysis, that period is 2 hours from the time of the event in clause 3(1) which enlivens the power to conduce a breath test.

Under this limb, a breach of the two hour rule can be even more problematic for the prosecution. This is because the consequences of a breach of the 2 hour rule under this limb is illegality of the breath analysis leading to an application to exclude evidence of its result under s138 of the *Evidence Act* 1995. If that application is successful, it is fatal to the prosecution case.

Clearly, it is generally preferable to utilise both limbs of the two hour rule. However, before deciding to utilise the second limb, a number of strategic considerations should be resolved.

First, when asserting the inadmissibility of evidence, the onus of proving the facts which make the evidence inadmissible is on the person seeking exclusion of the evidence (to the civil standard - see s.142 *Evidence Act* 1995). Sometimes the accused is not in a position to discharge that onus in relation to the 2 hour rule but is simply relying on the fact that the prosecution cannot come up to proof either.

Second, reliance on the second limb of the 2 hour rule must generally be flagged earlier in the proceedings than reliance on the first limb. If objection is taken to the admission of evidence of the reading on the basis of a breach of clause 2, it must be taken at the time that the prosecution tenders that evidence.

This gives rise to a possibility that once the prosecution is alive to the fact that there is a problem in their case, an application for adjournment could be made to allow the police to carry out further investigations with a view to ascertaining the time of driving. On the other hand, reliance on the firs limb need not become obvious until after the prosecution closes its case, at which point it is much more difficult for it to seek to adduce further evidence. Accordingly, if there is a possibility that further investigation could produce evidence of the time of the last act of driving which may not be favourable, it may be prudent to forgo reliance on the second limb.

In the writer's experience, the 2 hour rule can be very useful in defending matters. This is particularly so in cases where the accused is apprehended as a result of a collision. In these circumstances, the police are not at the scene at the time of the collision and therefore it can be difficult to prove what time it occurred. Further, even where there is good evidence of the time of the collision, by the time the police are called, arrive at the scene, deal with any injuries and convey the accused either to a police station for a breath analysis or a hospital for a blood sample, more than 2 hours has often elapsed. The point here is that whenever one obtains instructions that the offence involves a collision, alarm bells should start ringing as to whether there is a potential defence based on a breach of the 2 hour rule.

2. Drug Offences:

The label "Drug Offences" covers a very wide field of the criminal law. From relatively minor offences (such as drug driving) which do not attract a custodial penalty at all to extremely serious offences (such as supply large commercial quantity of drug) which attract the most severe penalty know to our criminal justice system- life imprisonment. It is an area of law to which is the subject of many a book. What follows below is a small selection of tips which and suggestions which, the writer hopes, may be of interest and assistance to seasoned criminal law practitioners.

There is a plethora of ways in which a drug charge can be defended. As in all areas of the criminal law, it is vital when advising a client that the practitioner pay very careful attention to any possible defences which may be available. Too often, a client is advised to plead guilty to what are often very serious drug charges in circumstances where, with some careful analysis and innovative

thinking, a defence may well have been mounted. Below is a description of some defences which (hopefully) illustrate this point.

The "Carey defence":

The so called "Carey defence" arises out of the principle enunciated in *R v Carey* (1990) 20 NSWLR 292. Shortly stated, that principle is that the concept of supply, for the purposes of the *Drugs Misuse and Trafficking Act* 1985 (DMT), does not extend to the return of drugs to their original owner.

In *Ceary* Hunt J expressed the principle in this way:

> "The word "supply" where secondly appearing in s29 of the Act therefore does not include the mere transfer of the physical control of the drugs from a person who has had the drugs deposited with him to their owner or the person reasonably believed to be such. Although the issue does not directly arise in this appeal, it is clear (and indeed conceded by the Crown) that the same construction must also be applied to the word "supply" in the phrase "having in possession for supply" in the definition of supply in s3".

The principle can be more easily understood by reference to a factual scenario. In *Carey* the accused was charged with supplying cocaine and hashish. The Crown case, which was not in dispute, was that the accused had in her possession trafficable quantities of each drug, which were located on the top of a chest of drawers located next to her bed. She told police that the drugs belonged to her sister who gave them to her to mind overnight (because the sister's premises had been the subject of a police search that morning). The accused had planned to return the drugs to her sister the following day or, if her sister did not collect them, to flush them down the toilet. It was held that this meant that the accused's possession of the drugs was not for the purpose of supply.

It should be noted that the length of time for which the accused had possession of the drugs does not seem to be material. In *R v Liberti* (1991) 55 A Crim R 120, it was held that the *Carey* defence was available in circumstances where the accused was in possession of the drug for almost 32 months.

There are a number of situations in which this *Carey* defence can be deployed. The first relates to situations such as that in *Carey*. That is, to what is commonly referred to as a "deemed supply"- where a person who is found to be in possession of a trafficable quantity of drug and is charged with supply by virtue of the deeming provision is s29 of the DMT Act. In that situation, the statutory presumption that the accused had the drug for supply can be rebutted by the accused if he or she persuades the tribunal of fact, on the balance of probabilities, that he or she had the drug deposited with them with the intention that they be returned in due course to their original owner.

At first blush it may seem that the *Carey* defence is not likely to be very useful. Circumstances such as those in *Carey* might be sought to arise only extremely rarely. However, in the writer's experience, the occasion for the consideration of this defence arises more often than one might think.

Specifically, it is not all that uncommon to come across situations where a group of friends is heading to a music festival or a party and ask one person in the group to hold drugs for them. Often the person who ends up with the drugs is a female in the group because she is sought to be less likely to attract the attention of police and/or because she has a purse in which to put the drugs whereas the males may not have any place to secrete them. This is a classic case where the *Carey* defence may well be applicable.

It is also important to understand that the *Carey* defence can apply to only part of the drugs in the possession of a person. In *Alliston v R* [2011] NSWCCA 281 the Court held that the *Carey* defence could apply to the drugs in the Accused's purse, but not to those located in her car. The significance of this point is three-fold.

First, in the situation of a group of people going out together described above, some of the drugs in the possession of the accused will usually be genuinely hers (or his). However, once the quantity of drug which is the subject of the *Carey* defence is taken into account, what is left will often be under the trafficable quantity and hence not capable of supporting a deemed supply charge. In this way, the *Carey* defence may in a practical sense be a complete defence to a charge of supply.

Second, even where the amount of drug left over after the application of the *Carey* principles is in excess of the trafficable quantity, the reduced amount can make it much easier to run a defence based on personal use.

Thirdly, even where the matter proceeds to sentence, the *Carey* principles can be used to reduce the quantity of the drug for which the offender is sentenced- thus reducing the penalty.

Whilst, to the writer's knowledge, the *Carey* defence has only ever been used in relation to deemed supply charges, the principle must be equally applicable to actual supply. That is, were there is an actual 'supply', if the transfer of physical possession which is the alleged supply was for the purpose of depositing the drug with another person for its eventual return; or where it is the actual returning of the drug to its original owner, the *Carey* principles would also apply to exculpate the accused from criminal liability for that "supply".

The *Carey* defence, useful as it is, does have its limitations. In *Carey*, at 297 Hunt J was at pains to narrowly circumscribe the principle he was laying down:

> "I should also refer to one very common situation which that construction [being the construction cited above] should not be understood as including. That is the situation where one person has obtained a quantity of drugs on behalf of another person or on behalf of a group of persons (which may or may not include himself) and where he transfers physical control of those drugs (or some portion of them) to that other person or to those other persons. That is in no sense analogous to the "bailment" situation as is that with which the present appeal is concerned, and in my view such a situation would necessarily fall within the ordinary meaning of the word 'supply'."

Further, in *R v Blair* [2005] NSWCCA 78 the Court (at [16]) held that where a person is a "link in the chain" of supply, he/she can not avail themselves of the *Carey* defence.

The result of these two qualifications is that the *Carey* defence is limited to a situation in which there is a transfer of control from the 'owner' of the drug to a custodian with the intention of eventual return to the same original 'owner'. It does not apply to the common situation wherein a group of people pool their funds and nominate one member of the group to source drugs on their behalf. Nor does it apply to a drug courier who is simply facilitating the passage of the drug from one person to another, without ever having 'ownership' of them.

Medicinal use of drugs and the defence of necessity

A novel, but in the writer's view very important, approach to defending against various drug charges (from possession, through cultivation to supply) in circumstances where the drug is intended to be used for its medicinal properties, is the defence of necessity. It is well known in the community that various drugs, and cannabis in particular, have medicinal properties. They are, in varying degrees, useful for the treatment of a wide variety of illnesses such as HIV, caner, epilepsy, and ADHD to name a few. Unfortunately people who use drugs to treat their illnesses or relieve their symptoms continue to be criminalised by our criminal justice system. The circumstances of some of these cases may prove fertile ground for the application of the defence of necessity.

Admittedly, what is being proposed here is to a large extent uncharted legal territory. The defence of necessity is very rarely raised in any circumstance, and to the writer's knowledge it has never been used in cases of medicinal use of drugs. Indeed, it has only come to the writer's attention recently in the context of a matter being conducted by the writer's business partner, Manny Conditsis, who deserves credit for being the originator of the idea.

Necessity has long been recognised by the criminal law as a defence against criminal liability, but it is so rarely raised that there is little in the way of jurisprudence about it. The only NSW authority which the writer was able to locate as to the elements of necessity is *Mattar v R* [2012] NSWCCA 98 where at [7] Harrison J, with the concurrence of Beazley JA adopted the dictum of the Supreme Court of Victoria in *R v Loughnan* [1981] VR 443 at 448 and formulated the defence in the following way:

> "The three elements of the defence are:
>
> 1. that the criminal act was done in order to avoid the infliction of irreparable evil on the accused, or others that he or she was bound to protect;
>
> 2. that the accused honestly believed on reasonable grounds that he or she was placed in a situation of imminent peril; and
>
> 3. that the acts performed to avoid that peril were not disproportionate to the peril to be avoided"

As to the onus in relation to establishing the defence, His Honour said the following (also at [7]) :

"The accused bears the evidentiary onus of raising the evidentiary basis of the defence but the Crown bears the legal onus of negativing the defence to the criminal standard".

Because of the dearth of authority on the defence of necessity its limits are not well defined, making it difficult to make any firm predictions about what factual scenarios may fall within its purview. None the less, it appears to the writer that there is substantial scope for the application of these principles, in appropriate circumstances, to a situation involving medicinal use of drugs.

In considering the application of the defence, the first hurdle to overcome is to show that the harm sought to be avoided was "irreparable evil". There is no jurisprudence illuminating the question of what constitutes irreparable evil. It is likely however that, as the law presently stands, it would not avail a person using drugs as a means of pain relief or relief of some other temporary symptom of an illness which could not properly be characterised as being- or leading to- "irreparable" harm. On the other hand, where the drug is used to treat potentially life threatening aspects of an illness, such as the growth of cancer cells or severe epileptic fits, the argument for the application of the defence is much stronger.

The next question is what constitutes "*imminent*" peril for the purposes of the second limb of the defence. In the case of an illness such as cancer prognosis may differ. One person may be in the final stages of cancer and have days to live, another may have many years. One would have thought that a Court would find it difficult to take away from an accused the defence of necessity merely because his/her illness is protracted.

The other question is the extent to which the test is objective and the extent to which it is subjective. It is more convenient to consider this question in relation to each of the three limbs of the defence in reverse order. The third limb is purely objective. This appears not only from the formulation of that limb, but also from what was said by the Supreme Court of Victoria in *R v Loughnan* [1981] VR at 448 :

> "The element of proportion simply means that the acts done to avoid the peril must not be out of proportion to the peril to be avoided. *Put another way, the test is : would a reasonable man in the position of the accused have considered that he had any alternative to doing what he did to avoid the peril?*" (emphasis added).

The second limb is clearly a mixed subjective/ objective test. It is analogous to the well known *Proudman and Dayman* test discussed above in the context of PCA charges.

As to the first limb, it is not immediately obvious whether the question of necessity is to be determined subjectively or objectively. Is it enough that the accused subjectively believed that the impugned act was necessary to avoid the evil in question; or it is necessary that it actually, objectively, was an effective means of avoiding it. It is suggested that the better view is that the first limb is a purely subjective test. There are two arguments in support of that contention.

Firstly, the formulation "on reasonable grounds", which is employed in the Court's description of the second limb to import an element of objectivity into the test, is conspicuously absent from the first limb. There is a very strong argument to be made that this omission was deliberate in order to make it clear that the first limb is purely subjective.

The second argument proceeds from an analogy between the common law test for necessity and the statutory defence of self-defence. The concepts of necessity and self-defence are very closely related. In fact, as a matter of logic, the defence of self-defence is really a species of necessity. It is therefore desirable that the tests for the two defences be as consistent with each other as possible.

Indeed an examination of the test for necessity reveals that it is very similar to the statutory defence of self-defence contained in s418 of the *Crimes Act* 1900, except that the test for necessity includes an additional element of immediacy which is not required for self-defence. It can be coherently argued that the first limb of the test for necessity is very much analogous to the first limb of the test for self-defence (that is, that the accused believed that the impugned act was necessary in order to defend themselves or others). It is of course well settled that the first limb of the test for self-defence is purely subjective. Hence, by analogy, the first limb of the defence of necessity ought to also be purely subjective.

These principles are rife for application to certain cases of medicinal use of drugs. This is best illustrated by reference to the case of Mr. Adam Koessler, which has received media attention in the recent past. Mr. Kossler gave his 2 year old daughter medical grade cannabis oil in a desperate attempt to save her life after she was diagnosed with being in the final stages of an aggressive cancer. Despite the fact that his daughter's condition improved substantially after receiving the cannabis, he was charged with supplying a drug to a minor. It seems that his case would likely meet all of the requirements of the defence of necessity.

3. Domestic Violence

Assault and stalk/intimidate

For the sake of completeness, but at the risk of patronising experienced criminal law practitioners, it is useful to state some basic propositions concerning the offence of Common Assault (being the most "basic" form of an assault offence) and the offence of stalk/intimidate.

The contemporary offence of assault is an amalgam of two separate common law offences of assault on the one hand and battery on the other. Consequently, an assault is can be made out in one of two ways.

An assault simpliciter (that is to say the old offence of assault) is an act by which the accused intentionally or recklessly causes another to apprehend immediate and unlawful violence. An assault with battery (that is, the old offence of battery) is the intentional or reckless application of force to the body of another.

There is a whole family of assault based offences created by various provisions of Divisions 8, 8A, 8B and 9 of the *Crimes Act* 1900 (the act). This paper will be confined to consideration of the offences of common assault (s.61) and assault occasioning actual bodily harm (s.59).

As to the offence of stalk/intimidate, this is a relatively new offence created by s13 of the *Crimes (Domestic and Personal Violence) Act* 2007. It requires either an intention to cause the relevant fear or recklessness as to inducement of such fear in the mind of the complainant, but the degree of recklessness is that required at common law for the offence of murder (s13(3)) in that what is required is the appreciation of the *likelihood* (as opposed to a mere possibility) that fear will be induced.

Defending against a charge of assault and stalk/intimidate

Mens rea – It is sometimes easy to focus exclusively on the *actus reus* of an offence and overlook a careful consideration of the *mens rea* aspect of it. Yet, the *mens rea* element not infrequently provides fertile ground for mounting a defence to a charge of assault (particularly assault simpliciter) or a charge of stalk/intimidate.

In order to secure a conviction in respect of an offence of assault simpliciter, the prosecution must prove not only that the act of the accused in fact induced in the mind of the complainant an apprehension of immediate violence, but also that the accused intended his actions to have that effect or, at the very least, was reckless that they may have that effect. Where the charge is one of stalk/intimidate – proof is required that the accused either intended to produce the relevant fear in the mind of the complainant or was reckless (to a high degree) that this would be the outcome of his actions. This can be very difficult to prove.

Before proceeding to illustrate this point, it is useful to digress briefly to the topic of recklessness. In law, the concept of recklessness has a very specific and narrowly circumscribed meaning. Only *advertent* recklessness (as distinct from *non-advertent* recklessness) is sufficient to ground criminal liability. Advertent recklessness requires that the accused actually turn his/her mind (i.e. advert) to the possibility that his/her actions will produce the *actus reus* of the offence but go ahead with those actions despite that possibility.

The concept of advertent recklessness was discussed by Hunt J in *Stokes v Difford* (1990) 51 A Crim R 25. At 40 his honour cited with approval the following passage from an earlier decision of *Coleman* (1990) 19 NSWLR 467 at 477:

"... in statutory offences other than murder, the degree of recklessness required ... was a realisation on the part of the accused that the particular kind of harm in fact done... *might* be inflicted (that is, may possibly be inflicted) yet he went ahead and acted".

Or as was put succinctly by Beazly JA in *Blackwell v R* [2011] NSWCCA 93 at [76]:

"where the mental element of an offence is recklessness, the Crown must establish foresight of the possibility of the relevant consequence."

The significance of this principle is sometimes not properly appreciated. What this means is that it is not sufficient in order to establish recklessness to show that the accused should have appreciated that their actions would lead to the relevant consequence or that a reasonable person in the position of the accused would have had that appreciation. It is necessary for the prosecution to prove,

beyond a reasonable doubt that the accused actually subjectively did turn his mind to the possibility of the relevant outcome at the time of acting.

The following passage from *Difford* (at 30) is useful in persuading the court of the correctness of this proposition:

> "The danger of the presumption that every person intends the natural consequences of his acts is that it produces an illegitimate transfer of the burden of proof upon the issue of intention from the Crown to the an accused"

In the context of an allegation of an assault simpliciter, this means that the prosecution must establish that when the accused uttered the impugned words, or made the impugned gesture she did so either:

- With the intention that by those words and/or gestures he put the complainant in fear of immediate violence; or
- With the relisation that the impugned actions or words could make the complainant fearful of immediate violence and went ahead anyway.

It is therefore not enough to prove that the accused should have understood that his actions were threatening or that a reasonable person in her position would have know that, the actual state of mind of the accused him-self must be established beyond reasonable doubt if the prosecution is to succeed. In the absence of clear words to that effect (e.g. "you are not so brave now are you") this element can very difficult for the prosecution to establish. This is because it is axiomatic that people often act instinctively and without thinking. An utterance of a threat or a threatening gesture can be merely an instinctive reaction to feeling of frustration or anger rather than a calculated attempt to induce a state of fear in another person.

For this reason, whenever an allegation of assault is based on words or gestures, without physical contact, the question of whether the prosecution can discharge its onus of proof in relation to the mental element should be carefully considered. The less conducive the circumstances of the offence are to reflection, the more likely it is that the prosecution will fail to establish this

element. It is suggested that the following matters may be useful indicia that the mental element of assault in not present:

- The alleged act (including words) was a spontaneous reaction to a provocation of some type.
- The alleged act was a single gesture or utterance rather than a sustained course of action.
- In the case of words, the alleged threat was so serious and so out of proportion to what had provoked it that it is likely to have been a hyperbole.

The above points apply equally to charges of stalk/intimidate, with the exception that the element if immediacy is not required in order to sustain this charge.

In addition to the matters discussed above which arise out of an analysis of the law of recklessness, the writer has some practical suggestions as to how to prepare and run a case based on an absence of proof of *mens rea.*

The writer has in the past found it useful in submissions to point the Court to the simple fact that it is a well recognised phenomenon of human nature that sometimes people act without considering the consequences of their actions. This can be demonstrated vividly by reminding the Magistrate (assuming the matter is being deal with summarily), that in all likelihood he or she not infrequently makes reference to that phenomena him or herself in sentencing remarks. How often does one hear magistrates say to an offender who raises a need for a license or a clean record something like: “you should have thought of that before you committed the offence”? Additionally, at least at present, a magistrate has only to walk into the foyer of the court house to see a poster advertising an anger management course with the heading “Do you act without thinking?”. A copy of this poster is annexure B to this paper. Practitioners might consider going as far as providing a copy of this to the Magistrate as part of closing submissions.

The last practical suggestion to make is to sound a note of caution about too readily dismissing the possibility of a defence based on absence of intent or recklessness because of some statement the client has made in an ERISP which, at first blush, looks like an admission that he (or she) was alive to the possibility that their conduct would have scared the complainant. Some police are aware of the need to prove intent or recklessness and try to extract admissions as to these

elements from the accused during an ERISP. Any such supposed admissions need to be carefully scrutinised. In the writer's experience they are often misleading because the questions from police are framed in the wrong tense.

By way of an illustration, the writer was recently involved in a case where the charge was stalk/intimidate and the following exchange appeared in the ERISP:

"Q: How do you think [name of complainant] would have felt in that situation?

A: I believe that yeah, frigging, yeah, she was frightened."

It may be thought that this exchange forecloses any possibility of an argument that the accused did not advert to the possibility that his conduct induced fear in the complainant. Yet, more careful analysis, and comprehensive instructions, reveals that this interpretation is misleading.

The problem is that the question was framed in the present tense. The accused was asked what he thought of the situation at the time of giving his answer, that is to say as he was sitting in the ERISP room, sometime after the incident. As a result he was giving his answer with the benefit of hindsight, a benefit not available to him during the commission of the alleged offence. The correct question to have asked the accused would have been: "when you were chasing the complainant, did it occur to you that she may have been scared by your actions?" Had he been asked that question, his response would have been very different.

While police never asked the actual relevant question, other answers thought his ERISP supported the proposition that, at the time of the incident, he did not intend to intimidate the complainant: "If I intended to hurt or intimidate her I would keep running."

It is the role of the criminal defence lawyer to be vigilant and ensure that such misleading questions put by investigating police are not allowed to be used as a death nail of a viable defence case.

Consent – Another potential source of defences to a charge of assault is the issue of consent. This issue is somewhat complicated by the uncertainty as whether absence of consent is a necessary element of the offence of assault.

The point of departure is the general principle that lack of consent is a necessary element of the offence of common assault and therefore it is incumbent on the prosecution to negative consent beyond reasonable doubt in order to succeed in a prosecution (see *R v Bonora* (1994) 35 NSWLR 74). However, where bodily harm is occasioned, consent may not vitiate criminal liability for assault depending on whether the court considers it in the public interest to criminalise the infliction of such harm in the circumstances of the case in question. In *Department of Health an Community Services (NT) v JWB (Marion's Case)* 1992 CLR 218 at [11] the Court said the following:

> "Consent ordinarily has the effect of transforming what would otherwise be unlawful into accepted, and therefore acceptable, contact. Consensual contact does not, ordinarily, amount to assault. However, there are exceptions to the requirement for, and the neutralising effect of, consent and therefore qualifications to the very broadly stated principle of bodily inviolability. In some instances consent is insufficient to make application of force to another person lawful and sometimes consent is not needed to make force lawful."

This very nebulous pronouncement makes it difficult to advise clients about the prospect of securing an acquittal on the basis of consent. None the less, the general principle remains that absence of consent is an essential element of the offence of assault. The upshot is that whenever there is doubt about whether the prosecution can prove absence of consent the issue should be relied upon as a ground for a defence.

In practice, the question of absence of consent can arise in a number of circumstances:

In domestic violence cases, where the alleged victim is not co-operating with police, the prosecution sometimes relies on third party witnesses and/or admissions made by the accused during a record of interview. In such cases, the brief of evidence ought to be scrutinized carefully to determine whether there is any indirect evidence from which the court can readily infer an absence of consent (e.g. a witness who heard the alleged victim say "stop it") if there is no such evidence (or if there is a prospect that the court may not accept such evidence as there is) the issue should be raised as a ground of defence.

Sometimes, the defence is in a position to lead positive evidence of consent on the part of the alleged victim. Consider for instance the case of a fight where

the accused strikes the complainant following an invitation to a fight from the victim e.g. “Come on, you want to fight? Let’s fight” or similar words.

Actual bodily harm. The offence of assault occasioning actual bodily harm has all of the elements of assault, with an additional element that the assault occasioned actual bodily harm. It should be noted here that the element of occasioning actual bodily harm is an absolute liability element. That is to say, the prosecution does not have to prove that the accused either intended to inflict actual bodily harm upon the alleged victim or even that she was reckless as the possibility of such harm resulting from his actions (see *R v Williams* (1990) 50 A Crim R 213).

There is a tendency on the part of police to charge actual bodily harm whenever there is even the slightest injury. It is important to appreciate that nor every injury is capable of satisfying the definition of actual bodily harm. While an injury need not be either permanent or grievous in order to constitute actual bodily harm, it must be more than transient and trifling (see *r v Donovan [1934]* 2 KB 498 at 509). What is transient and trifling is, of course, a question of fact to be decided on the facts of the case. However it is strongly arguable that injuries such as slight bruising or redness of the skin do not amount to actual bodily harm. All too often police charge this offence (and defendants plead guilty to it) in circumstance where there is a serious question as to whether the injury complained of amounts to actual bodily harm.

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