"IT'S ONLY A BROKEN CHEEKBONE"

Some observations as to what amounts, in law, to grievous bodily harm and how it might impact upon your practice

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Introduction

The somewhat unusual title for this talk comes from the nature of injury with which the Court of Criminal Appeal of NSW considered in *Haoui v Regina* [2008] NSWCCA 209 and my interest in this topic as to what is or isn't grievous bodily harm came about as a result of a case which I was involved in and whether a no case submission was an appropriate application at the close of the prosecution case.

This is not some treatise on the law nor is it meant to cover all aspects of offences relating to the infliction of grievous bodily harm.

Let me first of all talk about *Haoui*. What is interesting in that case is both the analysis as to the meaning of grievous bodily harm and the disagreement between judges of the highest court in this state as regards whether a particular injury amounted to grievous bodily harm. That was an appeal against conviction in which the question as to whether the passenger in a vehicle suffered grievous bodily harm. Beazley JA determined that the passenger had not suffered grievous bodily harm whilst Johnson J and McCallum J disagreed.

Let me firstly deal with the injury as explained in that judgment and then move to the consideration as to whether that injury amounted to grievous bodily harm:

As to the injury itself Beazley JA observed the following:

> Depressed right malar (cheek fracture) at [130]
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> Surgery was required which involved the insertion of a titanium plate at [133]
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> What would have happened had there been no surgery at all [134]
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> Common injury of the kind a footballer could get from impact with a knee or elbow, could be an injury from a fall and that there were no ongoing problems in this case at [136]

Johnson J, in his reasons, made no reference to the details of the injury.

Beazley JA determined at [141] stated:

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> "In my opinion, the jury verdict that Mr Mousselamani suffered "grievous bodily harm" was an unreasonable one. The injury that he suffered was a fracture of the cheekbone. Dr Ho explained that the orbital floor fracture was necessarily coincidental with a fracture of the cheekbone. He said that the orbital fracture was minimal. The eye was not damaged and was 'red' for a short period. If the fracture had not been properly treated, it would have resulted in some ongoing disability, namely, a limitation of mouth opening and there would have been some cosmetic impact. However, it would be a matter of common experience that most, if not all, bony fractures, if not properly treated, would have some ongoing consequence. In this case, the treatment involved the insertion of a very small titanium plate to keep the bony prominence of the cheekbone elevated. The surgery required was not complicated and the period of recuperation was short. "

Her Honour continued at [142]:

> "In the appellate context in which I am considering whether the injury in this case constituted "*grievous bodily harm*", two fundamental matters have to be kept in mind. The first is that there is a range of "*really serious injury*" and that it is irrelevant that some injuries may not be as serious as others. Provided the harm is "*really serious injury*", then there is "*grievous bodily harm*". Secondly, the question whether particular harm amounts to "*grievous bodily harm*" is a question of fact for the jury."

Johnson J at [159] opined:

> "With respect, I do not agree with the conclusion of Beazley J…… In my view, the evidence revealed that Mr Mousselamani suffered a significant injury which required significant surgery."

His Honour continued at [160]:

> "[The trial judge] directed the jury that the words grievous bodily harm "*do not require that the injuries are a permanent one*" but that "*they do require that the injury is a really serious one*" (SU17). No challenge was made on appeal to the correctness of this direction, which accords with authority."

His Honour, having, at [161], noted that he agreed with the characterisation of the sentencing judge that the injuries were very much at the low end of that scale stated at [162]:

> "There is no bright-line test for determining whether a particular injury or injuries constitute grievous bodily harm. In my view, it has not been demonstrated that the finding of the jury that the injuries constituted grievous bodily harm is unreasonable and cannot be supported, having regard to the evidence: s 6(1) *Criminal Appeal Act 1912*. It was open to the jury to be satisfied

> beyond reasonable doubt that the element of grievous bodily harm had been established in this case: *M v The Queen* [1994 181 CLR 487 at 493."

What amounts to grievous bodily harm?

In *Haoui* Beazley JA considers the law on this topic. Firstly, her Honour noted at [129]:

> "….. for harm or injury to constitute "grievous bodily harm", there must be "really serious injury": see Viscount Kilmuir LC in DPP v Smith [1961] AC 290 at 334. In R v Perks (1996) 41 SASR 335, King CJ said that the meaning of "*grievous*" was to be explained to the jury, then the expression "***really serious***" rather than merely "serious" should be used."

Her Honour continues at [138] – [140]:

> "The question whether an injury amounts to "*grievous bodily harm*" has been considered in a vast number of cases. It is not difficult to determine cases at the more serious end of the scale. The following cases fall within that category: complex skull fractures: *R v Remilton* [2001] NSWCCA 546; *R v Williams* [2005] NSWCCA 14; severe multiple fractures to a leg and nerve damage to the right side of the face; a closed head injury and facial neurological damage, as well as severe injuries to a knee: *R v Shannon* [2003] NSWCCA 106 (two victims); fractures to the "*middle third*" of the face with a complicated laceration of the right ear requiring steel plates and screws, causing ongoing headaches and continuing treatment to the eyes which were sunken as a result of the injury: *R v Sumeo* [2002] NSWCCA 271; rib fractures in a child: *BJR v R* [2008] NSWCCA 43.
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> However, there are other injuries, which although "*really serious injuries*", are nonetheless less severe than those to which I have just referred. The fact that the concept of "*grievous bodily harm*" encompasses a range of injury was recognised in *R v Woodland* [2007] NSWCCA 29; [2007] 48 MVR 360 at [35]. In that case, the victim had sustained significant facial fractures, including a right orbital complex fracture. Simpson J accepted that the victim's injuries were not "*the worst case of grievous bodily harm*", but were far from the low end of the range of injuries amounting to "*grievous bodily harm*". Other examples include: a fracture to the left orbit received in a violent kicking incident where it was said that the victim was "*seriously injured*", that he had suffered "*significant injury*", and where the offence was described as involving "*gratuitous cruelty*": *Singh v Director of Public Prosecutions (NSW)* [2006] NSWCCA 333; 164 A Crim R 284; and facial fractures, including fractures to the victim's cheekbones and nose which required reconstructive surgery, extending to the insertion of metal plates under the lower eyelid and inside the lining of

the mouth the plates to remain in situ permanently: *Vann v Palmer* [2001] ACTSC 12.

It is also apposite to refer to the Local Court Criminal Practice, New South Wales (as at Service 34, May 2008, Marsic, Longville and Rattenbury (Authors), Dillon (Advisory editor)), where a comment is made at 19.140.1 that

> "It can be argued that one uncomplicated fracture of any of the limbs or the nose, jaw or cheekbone would on its own not normally amount to grievous bodily harm"

However, no authority is cited for the proposition."

Intention

It is not proposed to go into the issue of intent and recklessness in this paper but bear in mind the change in the definition of recklessness and take care to note the date of the alleged offence. However, an exposition of proof of intent can be found in the case of BJR v R [2008] NSWCCA 43 referred to by Beazley JA. In that appeal Latham considers the question of intent at [85] to [92] and at [96] to [104] and whereas and RS Hulme JJ considers that question at [38] to [44].

What it all means

In my view a proper understanding of the law has a significant impact upon the daily practice of a criminal practitioner. It will help in the following areas:

(i) Advising as to plea
(ii) Hearing or Trial – cross-examination of the medical witnesses
(iii) Committal – challenge or waive
(iv) No case submission
(v) Addressing the jury
(vi) Sentencing submissions

(i) & (ii) Advising As To Plea Or Fighting The Charge & Cross-examination

Once the brief is served, or even on the facts provided, you will have to advise the client on plea. It's a plea to the elements of the offence and one element is that grievous bodily harm is caused.

It's a judgment call for you since you have to advise the client. You have that passage from Beazley JA which should be of some help. Often the treating doctor or someone from the hospital will provide an opinion as to the nature of the injury. Often for a wound there will be an opinion as to it amounting to the legal definition of a wound.

You may want to consider obtaining an expert opinion from a forensic pathologist or other appropriately qualified expert.

The other consideration is whether to write representations at an early stage. The problem with representations is that you are likely to alert the DPP to the problem in the prosecution case and allow them to fix it!

In any event be it a hearing in the local court or a trial by jury a decision has to be made as to whether to serve your expert's report. My view is that it is preferable to give the Crown an opportunity to have their expert consider the opinion of the defence expert and deal with it in advance or at least in Crown case and not in a case in reply. It's a reasonably small field of experts out there.

(iii) Committal challenge or waiver

Just remember the test for committal and bear in mind the right for the Crown to ex-officio it and that assault occasioning can be committed to the District Court.

At the close of the prosecution case in a committal the magistrate must determine whether or not there is a prima facie case (s. 62 *Criminal Procedure Act 1986*). At the conclusion of all the evidence, the magistrate must then determine whether or not 'there is a reasonable prospect that a jury would convict' (s. 64 *Criminal Procedure Act 1986*).

If the magistrate decides that there is a reasonable prospect that a jury would convict, the defendant is committed for trial to either the District or the Supreme Court. If the magistrate decides that there is no reasonable prospect that a jury would convict, the magistrate must discharge the defendant.

Magistrates are not precluded from making their own assessment of the evidence and of the credibility of witnesses, *Saffron* (1989) 16 NSWLR 397. The assessment can take into account a prediction of whether the trial judge will exclude evidence in the exercise of his discretion: *Grassby v The Queen* (1989) 168 CLR 1.

Again you are showing your hand in mounting a challenge but you have the advantage of that bench book entry which Beazley JA observed there was no authority for!

(iv) No case submission

A no case submission is in effect an application for a verdict by direction which is made at the close of the prosecution case.

A verdict of not guilty can only be directed if there is a defect in the evidence that taken at his highest it will not sustain a verdict of guilty: *Doney v R* (1990) 171 CLR 207; 96 ALR 539.

It may be argued that the harm does not amount to grievous bodily harm. The problem with this is that whether harm amounts to grievous harm is a question of fact for the jury.

The test on a directed verdict is not the same as that on a committal. In *R v R* (1989) 18 NSWLR 74 Gleeson CJ, with whom Maxwell and Wood JJ agreed, determined that a trial judge does not have the power to direct a verdict of acquittal when the trial judge assess that the evidence is such that a verdict of guilt based upon it would be unsafe and unsatisfactory.

As I indicated at the outset what tweaked my interest in this area was a recent trial I was in where it was difficult to see how the injuries could amount to grievous bodily harm and therefore an issue arose as to whether it might be appropriate to seek a verdict by direction on the first two counts. The trial judge raised his concerns as to whether that element of the first two counts could be made out.

Notwithstanding those views the jury still convicted. Let me set out the injuries for you and the treatment:

> Right ankle metaphyseal fracture of the distal tibia and fibula that showed evidence of healing and fractures to the first and second metatarsals of the right foot that also showed some evidence of healing and finally fractures to the first metatarsal of the left foot which was a healing fracture.
>
> The fractures usually recover without any deformity because of the type of fractures they are.
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> The fractures were not displaced fractures – they were not moved out of place so they did not require plaster or any other treatment. In effect they healed themselves.

You would have thought, as a criminal practitioner, that it would be no surprise the trial judge raised some issues in relation to whether the injuries amounted to grievous bodily harm. You may be concerned the jury rejected a submission that those injuries did not amount to grievous bodily harm.

Now let me add something I have not made clear. Those injuries were to a five week old baby where the accused admitted, in his ERISP, to shaking the baby a week later, shaking the baby with a force that caused the further injuries including fractured ribs and a sub-dural haematoma as well as further fractures to the arms, wrists and feet.

To my mind the further injuries undoubtedly amounted to grievous bodily harm even though there was no medical intervention.

(v) Your argument to the magistrate/jury

The difficulty with the injury to the five week old baby in the trial I have referred to was that whilst as lawyers we might be fairly firm in the view that this could not be classified as grievous bodily harm there was always the risk a jury, applying community standards, would conclude that it was.

All you can do is focus on the injury itself, what evidence there is as to how common such an injury is in everyday situations that a juror can relate to. In *Haoui* evidence was adduced as to a similar injury being the product of something which occurred on the sports field or what might happen as a result of a fall.

Be realistic in your approach.

(vi) Sentencing

There are, of course, standard non-parole periods prescribed for both intentional and reckless infliction of grievous bodily harm. In a post Muldrock era then the seriousness of the injury will remain a relevant consideration.

It is important to note that this is there will be other matters which go to the seriousness (or otherwise) of an offence and in particular the seriousness of an offence may be assessed by reference to the viciousness of an attack. This would be in addition to the severity of the consequences.

However, in *Haoui* Beazley JA at [138] – [139] sets out a number of cases from which one can glean some idea as to the scale of injuries amounting to grievous bodily harm.

Note also what Johnson J stated at [161]:

> "I agree with the characterisation of the learned sentencing judge in his remarks on sentence that the injuries "*amounted to grievous bodily harm but very much at the lower end of that scale*"(ROS2)"

Conclusion

Practitioners may well disagree with what does and does not amount to grievous harm. No doubt there may be a degree of criticism of a practitioner who gets a client to plead to an offence of inflicting grievous bodily harm by another practitioner who does not believe the injury amounts to grievous bodily harm. What you need to bear in mind is the fact that it is only something you can advise the client on. The ultimate decision is one for the jury and a plea may be the better option in terms of making submissions as to the severity of the injury going to the objective seriousness of the offence and the obtaining of a reduction on sentence because of the plea not only in the sense of the utilitarian value of the plea but also as it going to remorse and contrition.

On the other hand it may well be that it is only through a trial that the true extent of the injuries can be established, though that is going to be a rare case.