

IN THE COUNTY COURT OF VICTORIA

Revised  
Not Restricted  
Suitable for Publication

AT MELBOURNE  
APPELLATE JURISDICTION

AP-19-2047

THE DPP

v

JAMES HABERFIELD

---

JUDGE: HIS HONOUR JUDGE TINNEY  
WHERE HELD: Melbourne  
DATES OF HEARING: 19 Nov 2019, 11 Dec 2019  
DATE OF SENTENCE: 16 Dec 2019  
CASE MAY BE CITED AS: DPP v HABERFIELD  
MEDIUM NEUTRAL CITATION: [2019] VCC 2082

REASONS FOR SENTENCE

---

Subject: Directors' Appeal. Section 18 *Crimes Act 1958* recklessly cause injury to female on duty paramedic going to the assistance of Haberfield. Very sizeable victim impact. Paramedic not able to return to work as at the date of appeal. Section 31(1)(b) *Crimes Act 1958* assault of the other on duty member of the crew. Section 10AA(4) minimum of 6 months unless special reason exists. Special reasons defined in section 10A. 22 year-old with no prior or subsequent criminal history. Very strong evidence of rehabilitation since. Attack in the course of a psychotic episode. Diagnosis of schizophrenia. Expert evidence from psychiatrist and other experts of the sizeable risk of significant deterioration in custody including heightened suicide risk. Special reasons exist under both 10A(2)(c)(i) and (ii). Availability of mandatory treatment and monitoring order pursuant to section 44A. Whether such an order is appropriate.

---

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Director of Public Prosecutions	Ms Parkes 19 Nov Mr Glynn 11 Dec	Office of Public Prosecutions
For the Offender	Mr Hallowes SC with Mr A Halphen	Stary Norton Halphen

JUDGE TINNEY:

- 1 James Haberfield, this is an appeal brought by the Director of Public Prosecutions (DPP) against the sentence imposed at the Melbourne Magistrates Court on 28 August 2019. On an earlier date, you had pleaded guilty to two offences. One was a charge of recklessly causing injury (RCI) which related to violence inflicted against the female member of an ambulance crew coming to your assistance. I will refer to that victim only as Monica as it is her preference not to have her surname used.
- 2 The male member of the crew, Sam Smith, was also assaulted as he went to the aid of his offside. That conduct is covered by a charge of assault emergency worker on duty laid under section 31(1)(b) of the *Crimes Act 1958*. Each charge has a maximum prison term of 5 years when dealt with on indictment in this Court but as it was dealt with in the Magistrates Court and this is an appeal from that Court, there is a jurisdictional maximum of 2 years in each case. That is because when sitting as a Judge in an appeal to this Court, I exercise the powers of a Magistrate.

### **Director's appeal**

- 3 The Magistrate convicted and admitted you to an 18 month mandatory treatment and monitoring order on both charges. That is a new and intense form of Community Correction Order. The Director appeals against that sentence. She does that as of right, the only precondition being that she is satisfied that the appeal should be brought in the public interest. She is so satisfied or she would not sign the notice and I am not free to look behind that notice or to query that decision. Directors' appeals are in fact quite rare.

### **Procedure on Appeal**

- 4 The requirement then is for me to set aside the Magistrate's orders and rehear the matter myself. Incidentally, that is exactly what I would need to do in the setting of a defendant appealing to this Court against the severity of sentence. So in either case, a rehearing is conducted and that is what commenced on 19 November and continued on part heard on 11 December. It now draws to a close.

5 As it is a rehearing, there is no requirement to point to some mistake or error of law on the part of the Magistrate. Unusually here, the notice of appeal asserts that there were errors of law made. The Director asserts that there was no basis at law for the Magistrate to have placed you on the mandatory treatment and monitoring order given the findings he made. That is common ground. It would have been open to, and in my opinion preferable for the DPP to have taken the matter on review to the Supreme Court to have it remitted back to the Magistrate to sentence according to law. It would have gone back to the same Magistrate who had made the findings he had made. Instead for whatever reason, it is brought before me by way of Appeal. I am engaged in a process where I simply set aside the result and then rehear the entire case myself. I must then exercise my own sentencing discretion. It doesn't matter what happened in the Magistrates Court. That outcome in no way guides me in my task. It is irrelevant. It is after all my sentencing discretion that has to be exercised and I must do that in light of the evidence placed before me which differs in some respects from the evidence placed before the Magistrate. I rehear the entire case and then impose what I judge to be the appropriate sentence. Subject to following the legislative framework, in terms of the ultimate sentencing outcome, you can do better, worse or the same.

### **Complex sentencing exercise**

6 Before moving further into the appeal, let me say what I would hope is perfectly obvious to anyone who has observed this hearing. It is far from being a simple sentencing exercise. That is something of an understatement. I will come to discuss the quite complex legislative framework in play in relation to the RCI charge as a result of Monica's status as an on-duty paramedic. However even without those provisions, it would hardly be a simple case. That is because there is always a level of complexity when sentencing a youthful first offender for a crime of violence which has had a significant impact upon a totally innocent victim. This case has significant complexities, with competing factors stretching me in each and every direction. Anyone who says sentencing is easy has either never done it or has long since ceased doing it and is forgetful of the tensions at play.

7 In this case it is accepted that you have been of excellent behaviour in the past and since

the offence and that there has been a large amount of treatment engaged in since the very nasty events of 29 January 2019. It is accepted that you have favourable prospects of rehabilitation subject to continued treatment and desisting from any illegal drug use. It is accepted that custody for one such as you would come at a very large cost. The DPP makes those concessions and yet the Director is calling for just such an outcome; Prison. Why is she?

- 8 It all comes down to the need for general deterrence to be adequately reflected in any sentence imposed and the particular sentencing legislation that comes into play owing to the major victim's status as an on-duty emergency worker. But for her status and those provisions, I don't think anyone would be submitting that a 22 year old remorseful first offender such as you with favourable prospects of rehabilitation and a low risk of ever re-offending should wind up behind bars for a charge of RCI. That is because of course, ordinarily the rehabilitation of a youthful first offender is so highly valued by the Courts.
- 9 I will come back to discuss some of these matters in more detail including the principles of sentencing at play when dealing with youthful first offenders but I recognise that there is little point in me talking about what might happen in another case, one not involving a victim who is an emergency worker on duty. This case does and that is why we all sit here in this Court. It is why the special provisions apply. It is why the Director appealed and why she calls for your imprisonment.

### **The Magistrate's decision**

- 10 Let me also say before I go any further that I have had the advantage of reading the Magistrate's sentencing reasons. I don't think anyone who read them or heard them pronounced could have any doubt about the fact that the Magistrate worked his way diligently through the matters in aggravation and mitigation and grappled with this relatively complex new legislation in what was, and remains, a very difficult sentencing exercise. Now the ultimate sentence is not one which is in any way binding upon me, nor his thought processes or findings on the evidence, but it strikes me reading his lengthy reasons, that they are virtually a model or exemplar of the way one would hope a modern

day judicial officer would conduct themselves. You can agree with the sentence he imposed or disagree with it, the choice is yours, but no one could really be left asking why he saw fit to act in the way that he did. He sets out chapter and verse exactly why he did what he did. He had an impressive grasp of the facts and the voluminous materials placed before him. His remarks span over 10 pages going into the law, the facts and the evidence and submissions placed before him. He sets out for all to see the special reason he found established on the materials. His thought processes are set out clearly. It is all there. He could not have been more thorough or even handed. As I say, I am most impressed by his efforts in such a difficult case, and make no mistake, it is a very difficult case.

- 11 He was very heavily criticised. Misinformation flowed liberally including the suggestion that he had ignored the so called 'mandatory' minimum prison term, all of this despite the fact that he had gone into such great detail in open Court explaining why he found that a special reason existed here and why he was not imprisoning you, Mr Haberfield.
- 12 In the light of some of that publicity, it would be no wonder if members of the general public had a sense that a Magistrate had for some strange and unknown reason blatantly disobeyed the law in not imposing the so called 'mandatory sentence'. He had of course done no such thing.

### **The new provisions**

- 13 The Magistrate's obligation was to apply the law and to explain why he dealt with you in the way that he did. He did exactly that. In truth, it is not a mandatory sentencing provision. A mandatory provision would say that if 'crime X' is committed, 'sentence Y' is the invariable, the only result. No ifs. No buts. Every person committing that crime gets at least that 6 month minimum period. That is not the position here at all and never has been. There are a very limited number of special reasons deliberately inserted into section 10A of the *Sentencing Act 1991*. If a special reason is established by an offender on the balance of probabilities, then there is no requirement to impose a 6 month term at all, and in one particular setting contemplated by the legislation, there is no requirement to imprison at all.

## **Obligation to apply the law**

- 14 I want to make one thing very plain. Magistrates and Judges do not make the law. Our elected representatives in Parliament make the law. Judicial officers interpret the laws when that is necessary, but often it isn't necessary. What we must do is apply the law.
- 15 The Magistrate did just that. He applied the law to the facts as he found them and in a setting where I believe that no other Magistrate or Judge had previously dealt with these amended provisions. He was the first to do so. He found a very sizeable increased custodial burden here and hence a special reason existed. He rejected the other special reason relating to impairment of mental functioning at the time of the act. Though in no doubt that you had that impaired functioning, he was satisfied that it was caused solely by your drug use. He should have been told that such a finding could not spare you at least some jail for that is the effect of the various provisions I will shortly turn to. No-one told him. He had sailed forth into these totally uncharted waters with very little assistance from the prosecutor or from defence counsel. The Police prosecutor acquiesced in this sentence and yet now it is the prosecution who appeal the outcome. When I quizzed Mr Hallows as to why the Magistrate was permitted to proceed in this fashion, there was no real response. True it is, neither defence counsel nor the prosecutor could have known what findings lay ahead as the Magistrate started to deliver his reasons, but there were ample occasions in the course of the reasons demanding intervention once it was apparent that the Magistrate had reached that positive finding as to the impairment being caused solely by self-induced intoxication. Mr Hallows urges me not to be distracted by what occurred and he is right as I am engaged in a rehearing. Mr Glynn concedes it was regrettable that no one spoke up. It sure is. It is easy for me to be wise after the event. No doubt the Magistrate, defence counsel and police prosecutor were under significant pressure. Still, the police prosecutor's clear duty was to inform the Magistrate that he had no power to release you onto a mandatory treatment and monitoring order given the positive finding he had made as to self-induced intoxication. No one said anything and the order was imposed on each charge when on the basis of

his findings, there was no power to impose that order on either charge. I am not being critical of the Magistrate at all. I had great difficulty myself following the legislative framework and ascertaining the consequences of finding the existence of a special reason. Those consequences are not described in section 10A which is the provision setting out the special reasons. Those consequences can only be discovered by going to the definition section of the Act (section 3) and then to a number of further provisions including s 5 ss (2G), s 5 ss (2GA), s 5 ss (2GB) and s 5 ss (2GC). It is a bit cumbersome. The Magistrate had the unenviable task of being the first to apply these provisions and he really should have been given much greater assistance than he was given by both parties. Had he been given that assistance, I would not be hearing this Directors' Appeal. Maybe instead, you Mr Haberfield would have been appealing against the term of imprisonment which necessarily would have been imposed, given his findings.

- 16 Nor by the way am I in any way being critical of Parliament for seeking to protect emergency workers on duty. Not just paramedics but firefighters and policemen and many others who fall under that banner. People who are engaged in tough professions, people who have no option but to respond, people who are by virtue of their occupation the very last people who should be assaulted in the course of their duties and yet who so frequently are. What is Parliament meant to do? Sit by and just twiddle their thumbs whilst these attacks continue? Surely not. So they acted as they were entitled to, passing legislation and then amending that legislation to promote the safety of those working in such vital occupations.

### **Parliament acted to limit sentencing discretion**

- 17 These laws represent a very strong Legislative statement indeed as to the need to strengthen the protections offered to emergency services workers and they do that by removing so much of the discretion that ordinarily resides with a judicial officer. Parliament's intention is very clear. I have a much fettered or limited sentencing discretion in relation to the major charge here of RCI. If no special reason is established, it is at least 6 months prison for you. That is simple enough. The consequences of establishing a special reason are less simple. In every case where a special reason is established, a

Court must still send the offender to prison for a period unless satisfied that the offender had impaired mental functioning causally connected to the offence which substantially and materially reduced his or her culpability and which was not arising solely from self-induced intoxication. In such a case and only in such a case, a mandatory treatment and monitoring order is potentially available with no requirement to imprison at all. That is all a bit of a mouthful and I shall return to discuss these provisions later in these reasons.

## **The Facts**

18 Firstly, let me turn briefly to the sentencing facts.

19 The matter was opened to me by Ms Parkes in accordance with a four page amended summary of the facts dated 18 November 2019. That document was marked as Exhibit A on the plea. It is not in dispute in any way and so I sentence according to those agreed facts. I won't repeat them all now.

20 Very briefly stated, you were 21 years of age at the time of these events in January of this year. You had attended at a music festival in Western Victoria over the Australia Day long weekend. You had consumed a cocktail of drugs including hallucinogens, amphetamines, ecstasy and ketamine. Upon your return from the festival your family were very worried by your conduct and took you to hospital due to what appeared to them to be some form of delusional behaviour or psychosis. In fact you escaped from them. You spent some hours it would seem, hiding in a dog kennel. You were reported missing by your worried family. At 10:00PM that night you knocked on the door of some complete strangers at a house in Coburg. The door was not answered so you went inside but were then discovered by the alarmed occupants. You were in a drug affected and disturbed state. You were ushered from the house but one of the occupants then correctly took the view that you needed assistance. He rang '000' and requested an ambulance.

21 Well your victim Monica and her partner Sam Smith had the misfortune to be allocated that job. As I said last week, it is one of those 'sliding doors' moments in her life. It could have so easily been any other crew and maybe then she'd be sitting in Court supporting a different victim because one thing is very clear. Her being assaulted had nothing at all

to do with anything that she did. It was driven entirely by your delusional mindset. Whoever turned up would likely have faced the same attack. However the job came to them. They attended to assist you. They were in uniform and in a marked ambulance. The paramedics were briefed by the worried homeowner who had called them and they then attended to you. Monica ushered you into the ambulance. You were not making any sense. She commenced an assessment of you and placed a blood pressure cuff on your arm and you mumbled something about a mobile number. She rang that number. It was your father.

22 Without any warning you became aggressive and agitated, snatching off the blood pressure cuff. Monica stood up and you pushed her back down with force. She then tried to escape out of the ambulance in extreme fear of you. You responded by punching her to the face on the left hand side and then wrapped your arms around her and squeezed her. She was trapped and pinned down by you and screaming for help. A number of civilians heard the screams and could see the ambulance rocking from side to side as well as the silhouette of the attack occurring within. The attack was not quite so brief as Mr Hallows described and however long it took, I have no doubt that it would have seemed like an eternity for Monica trapped in that ambulance. Her offsider Sam Smith took steps to assist his partner. He observed Monica being pinned down in the rear corner of the ambulance between the floor and the door. You were pushing hard against her and she was screaming. Mr Smith tried to distract and remove you, grabbing you by the leg and you then focused your attack upon him saying *'You wanna fucking go too?'* You started throwing punches and charged towards him pushing him back in the ambulance. That intervention by Sam Smith at least gave Monica the opportunity to escape the ambulance which she did. The police were called. Some pretty brave civilians whom I commend publicly, James Dullard and Ivan Saric opened the ambulance door and removed you and so the assault on Sam Smith stopped. You were restrained on the ground and sedated by Sam Smith. The duress button had been operated and police attended.

23 You were arrested and taken to the Royal Melbourne Hospital.

- 24 The physical injuries suffered by each member are set out in the summary. Monica's at para 20, Sam Smith's at para 22. Plainly the physical injuries sustained by Monica were more serious. She continues to suffer significant psychological trauma as well as ongoing physical issues. I'll come back to the impact in one moment.
- 25 You were discharged the following day but your parents then took you to the Alfred Hospital and you were admitted for several days. On 13 February you were interviewed and gave a no comment interview.
- 26 I doubt if you would have had any memory of any of these events. You had a cocktail of drugs on board and were plainly acutely psychotic at the time. You were labouring under paranoid delusions.
- 27 That is enough then of my relatively brief summary of the facts. I sentence in accordance with the full agreed statement.

### **Victim Impact Statement**

- 28 I turn now to the impact of your crimes. There is a large amount of victim impact material here including reports from an osteopath, a psychologist and a medical practitioner's progress notes in relation to Monica. She has also made two impact statements, the second quite recently. That is the one which she courageously read aloud in open court on the first day of the appeal. As I said last week, she should never have found herself sitting in a court in November 2019 reading such a document for she should never have been assaulted. No paramedic should be. She should have been out on the road doing the job that she has enjoyed doing for 9 years, working as a serving paramedic and the reason that she was not is because of having the great misfortune of meeting with you. Her year has been a disaster because of you. It is that simple. There is less material as to the impact upon Mr Smith. He did not wish to prepare an impact statement which is his right but there is some material relating to the medical notes and an excerpt from his statement describing his anger at what had occurred. That is perfectly understandable. In each case there are some photographs.

- 29 I take into account the impact of these crimes. I suppose I could say no more in that respect and move on to deal with the matters that have been raised on your behalf. But why should I do that? This is not all about you. This represents the only opportunity that your principal victim will ever have to provide information to the court about the impact of your crime. These sentencing remarks will be full of matters dealing with your own position, your age, your family, your character, your regret, your prospects, your future. You, You, You. That is how a plea in mitigation usually proceeds because of course I am sentencing you. But what about her future? I am sentencing you for the serious crime that you have committed upon your principal victim. Upon her. She is the victim not you. I must never lose sight of that fact.
- 30 So I will say just a little bit more about the impact here. The only risk in doing so is that by mentioning only some of the impacts, people may think I am disregarding parts which I fail to mention. That is not the position. These remarks will be lengthy enough as is, without me quoting slabs from impact statements. So I am not going to descend to the full detail of the impact materials. I have by the way read all of the impact materials again since the plea.
- 31 Your victim has been very deeply affected by your conduct. What did she do to deserve this? Nothing. She has had many encounters with drug affected patients and regards herself as situationally aware. There was really no forewarning as to what erupted in the ambulance. It blew up out of nowhere. She suffered the physical injuries described in the summary and in her statement and I am not going to set them all out again. Those things have required much by way of treatment, some still ongoing. She after all suffered an annular tear at the L5-S1 disc level. She still has sizeable pain and it impedes her return to work. The psychological damage is perhaps even worse. She has recurring thoughts of this shocking night. Many symptoms of PTSD. She feels lost. So much has been taken away from her. She has panic attacks and flashbacks. She is not back at work. That is a very big gap in her life. She enjoyed that work. Will she ever again? She attempted a return to work but had flashbacks and had to desist. So since January, she has had ongoing appointments, medical, counselling, the osteopath, and of course the court case

has played out along the way. There have been a variety of changes in her life, none of them positive. Deteriorations in a number of areas: Sleep, appetite, socialising, income, exercise and activity, independence, self-esteem.

- 32 Your crime has impacted negatively on almost every domain of her life. She feels a bit powerless. What lies ahead for her? Work? This job? Who knows? She doesn't, and this is all because of you. Now I have to be very careful. I must not let the impact of the crime swamp my consideration of other matters. The impact of a crime is one of a large number of matters which I must consider and I am careful not to give it undue weight. It is however an important consideration. Hopefully in the time ahead she makes a full recovery physically and some of the mental scars either heal or at least fade. Hopefully she can return to work and enjoy that valuable work, as she used to. That is all up in the air. The fact is your crime has had a very deep and lasting impact upon her as that impact material makes so clear to me. It continues to this day. She will never forget this day in her life. I take the impact of your crimes into account as I am required to.

## **Plea**

- 33 Your counsel Mr Hallows leading Mr Halphen conducted an excellent and thorough plea on your behalf. They provided an equally excellent written outline of submissions. Mr Hallows took me to your background. He conceded how serious this offending was and how deep the impact had been. He placed before me a large range of mitigatory materials. There was an expert consultant psychiatrist's report from Dr Carroll and an update to that report, as well as reports from your treating psychiatrist Dr Jasek and from your headspace psychologist Ms Brookes. Also from your GP Dr Helman. There were a large number of clean urine screens as well as a report from an alcohol and drug course which you had completed. There was the original Corrections assessment report and one from Forensicare as well as the two judicial monitoring reports prepared by Corrections relating to the order imposed by the Magistrate. You had continued on with that order. It is not stayed by the Appeal. You have done everything asked of you on that order. There were also your academic transcripts and a large bundle of very impressive references from those who know you. Family members including your mother and father and aunt,

friends, an employer, even a boarding house master from Ballarat.

34 Your legal team relied upon a number of matters in mitigation including:

- Your early guilty plea;
- The presence of genuine remorse in this case;
- Your complete lack of any past or subsequent criminal offending;
- Your youth and the importance of rehabilitation in such a setting;
- The impact of your mental health illness upon your culpability and upon the exercise of my discretion generally;
- The extra-curial effect of the publicity here;
- They made submissions as to your prospects of rehabilitation and your increased custodial burden,

35 Whilst conceding this was serious offending, Mr Hallows argued that it would be open to find that special reasons existed under both section 10A(2)(c)(i) and 10A(2)(c)(ii) and that in such a setting, it would then be at least open for the Court not to send you to prison at all. It was not just a matter of your having drugs on board on this night, there was, he argued, an underlying mental illness here, which should amount to a special reason. He argued then that the 6 month minimum prison term would not apply and that you should not be imprisoned at all. Failing that, that you should be exposed to the shortest period in prison as was possible in all the circumstances.

36 He took me to some recent cases in this area dealing with the potential mitigatory effect of a drug induced psychosis where a person was not on notice of the likelihood of such a state developing.

## **Prosecution**

37 The prosecutor Ms Parkes appeared on the first day of the appeal and had prepared some written submissions as to sentence. She didn't remain in the matter last week as she was unwell so Mr Glynn appeared to prosecute. He relied on that detailed written outline and I will not go into that in detail. There was nothing controversial in that document as it went to many matters of established principle. I see no need to work my way through each and every submission in that document. The Crown conceded that it was well open to find a special reason courtesy of the obvious substantially increased burden of prison here but they argued that the other special reason was not made out to the required degree. They submitted that it was likely that this was an incident of self-induced intoxication, that being so, they argued that the impairment of mental functioning was caused solely by that self-induced intoxication and hence could not amount to the special reason under section 10A ss (2)(c)(i) required to avoid prison altogether. That the combined reading of section 10A ss (2)(c)(i) and section 5 ss (2GA) compelled me to imprison you for at least a period. Further, the prosecutor Mr Glynn made it clear that if I was satisfied that the impaired functioning was not caused solely by the drug use, that in such circumstances, it would be open to me to deal with you as the Magistrate had by way of a mandatory treatment and monitoring order on the charge of RCI. As to the other charge, they argued that a CCO was open. So there was a strange aspect to this appeal. It was brought in the public interest citing the errors of law and yet concessions were made that the 6 month minimum term would not apply courtesy of the increased burden and that secondly, if you established the other special reason, it would then be open for me to place you on the order the Magistrate had actually placed you on.

## **Background**

38 I will turn only briefly to your background. It is not seriously in dispute and I accept what I have been told about you by Mr Hallows

39 Your background is also set out in quite some detail in Dr Carroll's report marked as exhibit 2. You were born in Warrnambool in May 1997 so are now 22. You were 21 at the

time of the offending. You are one of three children. You have two older sisters. You grew up in Warrnambool but went on to finish your secondary schooling as a boarder up at St Patrick's College in Ballarat. You had some delayed speech and unusual habits when much younger and some odd presentation at times and the view presently is that you in fact are on the autism spectrum, though that had never been the subject of confirmation or any investigation as you grew up. You had never had any mental health issues or treatment in the lead up to these events though there were some strange features surfacing in October 2018 at around the time you started using synthetic cannabis. After obtaining your VCE in 2015, you went to Deakin University in Geelong and studied for a construction management degree. You were living in Geelong but at one point in early 2018, you moved up to Melbourne to live with your sister. You were living with her at the time of these crimes.

- 40 You have had solid permanent part time employment unloading containers. The character evidence assembled together with the lack of any history leaves me in no doubt at all that you are a young man of otherwise excellent character. It is hard to imagine a person less likely to engage in a nasty physical assault upon a female paramedic coming to your assistance. You are described as shy, quiet, gentle, modest, caring and community minded. These characteristics were certainly not on display on the night in question, that is for sure. You were behaving like a maniac.
- 41 You had used drugs in the past, some amphetamine but mainly cannabis, and then you moved on to synthetic cannabis in late 2018.
- 42 You went to this festival at least outwardly in decent enough shape even though there were some unusual thought processes emerging in the lead up. You came home a blithering wreck and in the same way as Monica's life changed, so too did yours. The key difference is that she is the victim. You are the offender. You chose to use a cocktail of drugs. Presumably you hoped they would disconnect you in some way from the real world, they would alter you or your engagement or perception or disinhibit you. Or even as is suggested take you to some higher order. I'm pretty confident you would never have envisaged acting in the way that you did or have had any understanding of the likelihood

of the onset of this psychosis. There is some suggestion of an untoward assault committed upon you at the festival though who knows if that is actual or a product of your delusions. Either way, you believe now and believed on the night that it had happened. I'm not suggesting for one moment that you are feigning anything.

43 As I mentioned earlier, after the incident, you were secured and taken to the Royal Melbourne Hospital. You were discharged the next day but it was plain to your family that you were in a very bad state. You were admitted to the Alfred hospital where you remained on a voluntary basis for several days. You were discharged on 8 February and referred on to 'headspace'. You have seen them or dealt with them on 34 occasions since with much by way of individual psychotherapy. You at one point returned to Warrnambool but then came back to Melbourne to live with your sister. You have seen your GP 19 times, your treating psychiatrist Dr Jasek 9 times. You are drug free but still nowhere near in optimum mental health. You have been plagued by the impact of the media reporting of this offending. You have deferred your studies and do not like to go out in public.

44 You have done everything you can to deal with your own issues including performing excellently on the treatment and monitoring order which was imposed in the Magistrates Court. I have been sitting as a Judge for close to 10 years and cannot recall seeing such a wealth of plea material as has been assembled on this plea.

### **Guilty plea**

45 I turn then to consider the matters raised in mitigation. You have pleaded guilty at the earliest stage in the proceedings. That is clearly important.

46 You have taken early responsibility for your offending. There is a utilitarian benefit in pleading guilty. Witnesses have at least been spared the experience of coming to court to give evidence in a contested hearing. The community has been saved the time, cost and the effort associated with the conduct of a contested criminal hearing. I must reward you for facilitating the course of justice in the way that you have.

47 The law requires me to take these matters into account. I would have imposed a far more

significant sentence upon you, had you been found guilty following a contested hearing. A guilty plea is also often indicative of remorse.

## **Remorse**

48 I simply do not doubt for one moment that you are sorry for committing these crimes. Not just sorry for yourself or your family, that would not be remorse, but sorry to have placed the victims in the position you placed them. Sorry for the impact you here described. Sorry for your acts. Sorry for your crimes. Why would you not be? Why would I entertain any doubt at all? I have the evidence of the sort of person you normally are, the absence of any criminal history at all and then this madness. You were not yourself, that much is surely very clear. The status of your victim spells out just how disconnected you were from the real world and from what was happening. It would be an extreme thing for someone with your history to assault any person at all. For you to assault a female paramedic who was coming to your aid, to amongst other things, punch her to the face, spells out the extent of your delusional state. You know now that is what was happening. You know now that you assaulted someone coming to your aid and have caused them great harm. I am sure you are deeply ashamed of your acts and the ramifications of them for her and her family and for the other victim. There is much in the references touching upon how you feel about what you did. Also the various reports. To quote from your mother: *“James is very remorseful for his actions and the circumstances that occurred after the event. He feels very ashamed for the pain he has caused physically and emotionally. As James’ mum, I assure you I will fill my obligation to my highest ability Your Honour to love support and guide James back to medical wellness. My apologies to the people concerned in this incident and I beg forgiveness for his actions”*. There are similar sentiments in many of the references. You are genuinely sorry for what you have done, I have no doubt on that score at all, and I take that into account.

## **Rehabilitation**

49 I move now then to set out my conclusions as to your prospects of rehabilitation and I can do so briefly. Given what I have said about you past character and the fact of your

committing these offences in the midst of a psychosis, also all the steps you have taken since with doctors, psychologists and psychiatrists and even Corrections, you surely have excellent prospects of rehabilitation. You obviously have very strong family support. Your family are simply aghast at what you have done but still support you as they should. It is critical that they do, as you have become increasingly isolated. You have pleaded guilty at an early stage and are genuinely remorseful. I suppose the greatest threat to your future prospects would be continued drug use or disconnection from appropriate treatment and paradoxically that later outcome is far more likely if I allow the Directors' appeal and imprison you. Prison will disconnect you from much of your treatment and heightens your risk of significant deterioration. I have the written references containing an impressive body of character evidence and speaking as they do of the sort of person you are, the contributions you have made in the past and your response to this offending. I find that you have excellent prospects of rehabilitation. In truth the community has never needed any protection from you in the past nor is it likely it will need it in the future. I am as confident as I can be that this offending was a once off with a very serious departure from your normal behaviour in the course of a psychosis. If only it didn't have such serious impact, but it did. If only it was not committed upon an on duty paramedic, but it was. Because it was and because it is a charge of RCI, I have the special sentencing provisions which apply to my task.

## **Youth**

50 I briefly mentioned earlier in these reasons the importance of youth in the sentencing exercise. You were only 21 at the time of this offending and with no criminal conduct before or since. So a youthful first offender. That is of real importance. I take into account those principles as set out in cases such as Mills [1998] 4 VR 235 and Azzopardi [2011] VSCA 372. Young people are more prone to making errors in the context of drugs and experimentation. They are not fully developed. They can make poor decisions without necessarily considering the consequences. They are more amenable to successful rehabilitation because they are young and less set in their ways. They are also far more vulnerable to the harm and the corruptive influences which exist in adult prison. The law

generally treats youth as involving some sizeable reduction in culpability and as generally leading to some moderation of the purposes of sentencing including the need to deter and to punish. It should not be forgotten, but often enough is, that the rehabilitation of a youthful first offender serves to actually protect the community. Sometimes, investing in rehabilitation can pay dividends to the community. A prison term imposed to satisfy a public clamour for punishment can often enough set back the rehabilitative prospects of a youthful offender and in that same way impact negatively upon the community as well. The Sentencing Advisory Council (SAC) released a lengthy paper the week before last dealing with the complexities of sentencing young adult offenders. See 'Rethinking Sentencing for Young Adult Offenders' (SAC, December 2019). It is an impressive and thought provoking paper touching upon the sentencing principles in this area and the reasons the law has developed in this way.

51 There is, for good reason, generally a much stronger focus on rehabilitation and less weight given to punishment. That is not me inventing it as I go along. In the same way as I have to apply the special sentencing provisions that exist in this case, I must also apply the common law sentencing principles that have been developed by much wiser judges than I over many decades. Those firmly established principles inform me that the benchmark for sending a youthful first offender to prison is a high one indeed as it surely should be. Having said all that, the weight to be given to youth varies from case to case. Nothing is set in stone. Enough youthful first offenders are sent to prison. I've sent enough there myself. Regrettably, sometimes there is just no choice. The more serious the crime the less weight can be given to youth and rehabilitation and more weight given to other purposes such as general deterrence and punishment. When dealing with the RCI charge, I have the strong considerations thrown up by the specific legislative provisions. A special reason for not imposing a 6 month term in the previous legislative provisions (prior to the amendments in October 2018) was directly connected to a finding in relation to youthful and impressionable offenders. The amended provisions which I must apply got rid of special reasons based on youth, immaturity or rehabilitative prospects. Again, a pretty clear and telling signal from the Parliament, if one was needed, as to the intent of these provisions. I don't lose sight of your youth, but it is only one matter which I must

consider. There are many other matters to consider and I must apply the amended legislation to the RCI sentencing exercise.

### **Extra-curial punishment**

52 I turn to the issue of extra-curial punishment. That is to say, punishment of some description already delivered up independent of the sentencing process. As I mentioned earlier, there has been some intense publicity. The proceedings have been conducted in open court and the media are free to report on the proceedings. Fair and accurate reporting is welcome. The public should be informed about what is happening in our courts. Regrettably, you seem to have become public enemy number one. You have been the subject of much public vitriol. Headlines and news footage and statements about you depicting you in a way that anyone who knows you or even anyone actually hearing the plea or reading any of these materials that I have read would know is just a nonsense. Your criminal acts were serious make no mistake, but you were floridly delusional. You were labouring under an acute and frightening persecutory delusion. You felt at imminent risk of great harm and sought to escape. Now of course looking at it through rational eyes, it makes no sense, but it was perfectly real and frightening to you at the time. You felt you were under threat. People were tracking you and persecuting you and wanting to harm you or so you thought. This is not something being dreamt up on the plea as an afterthought to try to excuse your acts. It was the way you were then feeling. It should not be forgotten that your parents were so worried that they tried to admit you to hospital. They were trying to help you. Nor should it be forgotten that you then fled from the safety of your own family and it would seem hid in a dog kennel. To examine and critique your conduct as though it was the calm and deliberate cowardly conduct of someone not so profoundly disturbed and affected makes no sense at all. Yet that is what has happened. Let me assure both you and the public, if that was the nature of the conduct I was dealing with, that is a cold calculated and cowardly physical attack by a man in control of his senses upon a female paramedic, I would not be imposing a 6 month term. It wouldn't come close. I'd sail far north of that figure. But of course that is not the state you were in. You were floridly delusional.

53 The publicity has taken a toll. You have lost some work owing to the publicity. Some people don't want you on a worksite. On a personal level it has undoubtedly been most unpleasant for you and your family to be thrust into the spotlight in this way. You have deferred your course. You have become very isolated and are uncomfortable even going out in public. You are ashamed to be seen. You have been subject to vile online abuse. There is evidence before me from Dr Helman, Dr Jasek and Ms Brookes as to the effect of all of this unwanted attention and I take this into account as I am required to. I should say though, it cannot for one moment be compared to the impact upon your victim. These are impacts upon you arising from your crime. She was your victim.

#### **The expert evidence: Dr Carroll and others**

54 I have mentioned already the reports of Dr Helman, Dr Carrol, Dr Jasek and Sally Brookes. There is also the report of the Forensicare Nurse and the assessment report for the order you were placed on. Also the two monitoring reports for the order you were placed on. I have read all of this material again. I have also read the evidence of Dr Carroll given over 2 days. Again, I see no great utility in descending into the full detail of the evidence. Though there has been some challenge to the opinion of Dr Carroll on one discrete point, the prosecution has not sought to place before me any evidence from their own expert. What it amounts to is this. You are a 22 year old man who had never received any mental health treatment or received any psychiatric or psychological diagnosis prior to this event. You had completed your VCE and gone on to University. You have held down a job.

55 Looking back at some aspects of your life and personality traits that were on display in those earlier years, the clear suggestion now is that you in fact were and are on the autism spectrum. I accept that may very well be so. There were then some signs of poor reaction to synthetic cannabis use in late 2018. Then we have the use of a large amount of drugs at the Rainbow Serpent festival. Initially your condition was treated as a drug induced psychosis. The present view is that you have an underlying illness being schizophrenia. You were acutely psychotic in that ambulance and labouring under paranoid and persecutory delusions. Simply, you were not yourself. Dr Carroll says that

though drugs undoubtedly were very directly implicated in reducing you to that state, it was not the sole cause of that impaired mental functioning. That is because there was that underlying illness. I will return to this in a moment but first let us visit the legislation as briefly as I might.

**The provisions: ss10AA, 10A, 5(2G), 5(2GA), 5(2GB) 5(2GC) Sentencing Act 1991**

56 As I mentioned earlier, in the absence of a special reason, I must send you to prison for at least 6 months on the RCI charge. That is simple enough. That is the effect of section 10AA ss (4). No such requirement exists for the assault charge. The legislation does not limit my sentencing discretion on the assault charge at all.

**Special reasons**

57 Section 10A ss (2) of the Sentencing Act provides that a Court may find a special reason in only a handful of specified circumstances. Your counsel raises two of those provisions as applicable here, section 10A ss(2)(c)(i) and (ii) and so I will focus on those two provisions and only briefly mention a third purely to illustrate the clear intent of the Parliament. The first, 10A ss (2)(c)(i), relates to impairment of functioning at the time of the crime, the second, 10A ss (2)(c)(ii) relates to impairment of functioning at the time of sentence and beyond.

**10A ss (2)(c)(i)**

58 Section 10A ss (2)(c)(i) states that;

*“the Court may make a finding that a special reason exists if the offender proves on the balance of probabilities that subject to section 2A, at the time of the commission of the offence he had impaired mental functioning that is causally linked to the commission of the offence and substantially reduces the offenders culpability.”* (My emphasis)

59 The proviso introduced by section 2A is that this special reason will not be available if the impaired mental functioning was caused solely by self-induced intoxication. I will refer to this special reason in shorthand as the causally connected mental impairment.

## **10A ss (2)(c)(ii)**

60 The other special reason relied upon is found in section 10A ss (2)(c)(ii)

61 That provision reads that;

*“a Court may make a finding that a special reason exists if the offender proves on the balance of probabilities that he has impaired mental functioning that would result in the offender being subject to substantially and materially greater than the ordinary burden or risks of imprisonment. (My emphasis)*

### **Impairment of mental functioning**

62 Each provision requires proof of impairment of mental functioning. That is defined in section 10A ss (1) and includes a ‘mental illness’ within the meaning of the *Mental Health Act 2014*, or an autism spectrum disorder. There are other conditions set out but they do not arise in this case so I will not list them.

63 Mental illness is defined in section 4 of the *Mental Health Act* to include a medical condition that is characterised by a significant disturbance of thought, mood perception or memory.

### **Increased custodial burden - s10A ss (2)(c)(ii) impairment now**

64 I will deal firstly with the less controversial special reason relating to your impaired functioning now. There can surely be no doubt that you have an increased custodial burden and risk produced by the raft of issues described in the expert reports and the evidence. I am satisfied of that on the balance of probabilities. That however is not the test. It is much higher. The bar was raised with the amendments which came into force in October of last year which included the words ‘substantially and materially greater than the ordinary burden or risks’. Previously it read ‘significantly more than the ordinary burden or risks’. The bar was very deliberately raised by Parliament. Do you satisfy me that you reach that high level? I am satisfied that you currently suffer from conditions which are correctly classed as impairments of mental functioning. These are conditions

you now suffer. A major depressive disorder has to some extent receded but will most likely return under stress. So there is that disorder to consider. Also the autism and schizophrenia exist now. Not that it is critical for this determination, but I am satisfied these conditions are not solely caused now by self-induced intoxication.

65 If imprisoned, you would be disconnected from the treatment regimes in place and from the day to day supports offered by your family. Treatment would still take place but not in the same fashion with the trusted professionals who have been treating you. Nor at the same frequency or in the same disciplines. The treatment with 'headspace' has been very important and it would not persist. You have an odd affect at the moment and are obviously quite vulnerable in custody. You won't relate well to other prisoners or pick up cues perhaps owing to your autism or maybe even the active psychosis which prevails. You have a disturbingly high suicide risk and a high risk of developing an acute psychosis in prison. Suicide risk would be managed in an onerous fashion in custody which itself would heighten stress which feeds into deterioration of your mental health. There would be a sizeable risk of developing once again a major depressive disorder. Dr Carroll spells out the many reasons why you have such a substantially increased burden. So too the other experts. Dr Jasek for instance says that you are a vulnerable person who is likely to deteriorate further if incarceration occurs. He goes on to describe the likelihood of a deepening psychiatric illness from which you may never recover. Ultimately it is for me to answer the question posed by the legislation. Is there a special reason established here based on the increased custodial burden? Or to pose the question using the wording of the Legislation; Do you have impaired mental functioning that would result in your being subject to substantially and materially greater than the ordinary burden or risks of imprisonment? The prosecutor himself conceded that this question can be answered in the positive.

66 The evidence goes in only one direction here.

67 That special reason set out in section 10A ss (2)(c)(ii) is amply made out here. I have no doubt about that at all and I suspect nor would any person objectively and dispassionately reading and assessing the materials placed before me. The prosecution don't for one

moment challenge that this special reason is established in this case. They seemingly did in the Magistrates court though I note that the OPP did not have carriage of the matter at that stage and a police prosecutor was at the Bar table. Hopefully the concession made by the DPP in this Court may signal to the general public the strength of the materials placed before this court. They are after all the party appealing and yet recognise the very much increased custodial burden here. As that special reason is established to my satisfaction, the 6 month minimum term is no longer required. If that was the only special reason established, I would still however be required to send you to prison, just not necessarily for a period of 6 months.

68 Further in any sentence that I do impose I must also take into account the increased custodial burden owing to these various matters. Prison will be extremely difficult and damaging for you, with far in excess of the ordinary burdens and risks which apply to prisoners generally. Also with great risks of deterioration. I have no doubt about that at all. So the 5th and 6th principles from the case of Verdins [2007] VSCA 102 would also come into play dealing with your elevated custodial burden and risks.

#### **10A ss (2)(c)(i) - Causally connected mental impairment (Impairment at offence)**

69 What then of proof that at the time of the offence you had impaired mental functioning that was causally linked to the commission of the offence and which substantially reduces your culpability? If that is established and if I am satisfied that it was not caused solely by self-induced intoxication, that would be another special reason and one then paving the way at least for consideration of a mandatory treatment and monitoring order subject to satisfying the section 5 ss (2GA) provisions.

70 What it amounts to is this. Without such a finding, no such order is open and the positive finding on the other ground could not save you from a prison term of some duration, though there would be no requirement to impose a minimum period of 6 months. That is the effect of section 5 ss (2G) and section 5 ss (2GA) of the *Sentencing Act*. Though section 5 ss (2GA) sets out what a court can do if a special reason is established, and remember there are 5 such special reasons in section 10A, the provision then makes

clear that the only route to a non-custodial option is if it is established that there is the causally linked impairment which was not caused solely by self-induced intoxication.

71 As I have said already, impaired mental functioning is defined. Though it includes autism spectrum disorder, and though I accept that condition seemingly exists now and did at the time and is relevant to your heightened custodial burden, I am not satisfied that it is in any way causally linked to the offence. That condition won't attract the provision. So you need to establish a mental illness. Plainly you were acting under an acute psychosis and that would be a mental illness within the meaning of the *Mental Health Act*. The evidence on that topic is clear. It is also clear that it was by virtue of that disturbed state that you acted in the way that you did. You struck out owing to the strength and nature of the delusional beliefs. As Dr Carroll said at page 69, your judgement was severely impaired because you were under the delusional belief that your life was in acute danger. Plainly there is the causal connection required. Equally plainly, someone in such a state has nothing like the level of culpability of someone acting in an undisturbed state. There is a substantial reduction in culpability. To that point there is no dispute.

72 What about the issue of self-induced intoxication? The Magistrate concluded that the impaired mental functioning was caused solely by self-induced intoxication. I am not at all surprised by that finding given the state of the evidence before him. He could only act on what was placed before him in August. I have had the advantage of the more up to date report from Dr Carroll. Also the evidence from Dr Carroll. Dr Carroll was not called in the lower Court and there is often a very big difference between a written report and the level of detail in actual sworn evidence. Dr Carroll has himself had the advantage of the passage of time and information provided to him as to the persistence of symptoms which suggests to him that there is and was an underlying, enduring mental illness, not just a drug induced psychosis. He has also seen you again the other day.

73 No special reason can be found under this provision if the impaired functioning is caused solely by self-induced intoxication. That is clearly then the key matter in dispute in relation to this special reason. The prosecutor made that clear. Not whether you had impaired mental functioning. You did. Not whether it was causally connected to your criminal act.

It was. Not whether it substantially reduced your culpability. It did. The issue in dispute is whether the impaired mental functioning was caused solely by the drugs.

- 74 Now when you were originally seen at the Alfred Hospital they seemingly diagnosed a drug induced psychosis. That would hardly be surprising. Of course they had only that limited engagement with you and your family and they no doubt had the history of recent drug use and no reason to look beyond that immediate trigger. Dr Carroll described the difficulties in labelling an illness based on a first episode (see T50). The label or diagnostic tag will be determined by the duration of and persistence of the symptoms. What might be first assumed to be a drug induced psychosis may no longer be so classified depending on the duration of symptoms.
- 75 You saw Dr Carroll in July and he took a history from you and others. There were some details from you spelling out some strange functioning or mindsets held late the year before. So as far as he was concerned, clear psychotic symptoms predating January 2019 (see T60). He has now had access to the other expert's reports including the reports speaking of your mental deterioration and the return of psychotic symptoms. That was significant as you had not been using illegal drugs as evidenced by a large number of clear drug screens. The antipsychotic medication was at one point stopped and the delusional conduct returned. Plainly that was not produced by illegal drugs, given the clear drug screens. He has also examined you a few weeks back. The hypothesis is that you had an underlying schizophrenia which was undoubtedly triggered by the use of the sizeable quantities of drugs at the festival. Your acutely disturbed state was, to quote Dr Carroll: *"primarily a consequence of intoxication but that intoxication had caused an exacerbation of an underlying mental illness so it would not be accurate to say that the substances were the sole cause of his mental state disturbance"* (see T60). You in fact had an enduring mental illness and the substances exacerbated that underlying illness (see T59). He likened it to fuel thrown onto a fire. He said: *"The fire was already grumbling and the illicit substances acted as potent fuel and have severely exacerbated his mental state which was already disturbed"* (see T70). He said that this severely disturbed state would not have occurred absent the illicit drugs (see T73). You would not have had the

acute psychosis but for the onset of the underlying illness, schizophrenia, caused by the drug use. However it is argued that there was that underlying mental illness, one which was not caused solely by the use of the drugs. It existed and its onset was driven or fuelled by the drug use. The schizophrenia was present, having some impacts upon you given the October 2018 behaviour and the continued unusual mindset after that date but was drawn out of the shadows in late January 2019 by the drugs you took, at which point you became floridly delusional. It was not then a 'simple' drug induced psychosis to which section 2A would apply and deprive you of the potential benefits of this special reason. That is the defence argument.

76 The prosecution argued that drugs were very directly implicated here and that this was in all probability an impairment of functioning brought about solely by self-induced intoxication. They argued that this was equally consistent with a drug induced psychosis or even a drug induced psychosis in October 2018, another in January 2019 followed on by the later development of schizophrenia. That as a result you do not fall within that provision.

77 I am not the expert. I must act on the evidence placed before me and only one expert was called. He was directly challenged in cross examination. I from time to time have been pretty unimpressed by some of the experts who give evidence in this Court. I have said as much. Not so in this case. In this case it is not just Dr Carroll, though he was the only expert called. There is support for his opinion from the other experts. I am prepared to accept that you have now and had at the time schizophrenia. I do not believe that is in dispute at all. The fact that you are still in such fragile mental health, the fact of delusions returning so many months after you have stopped used illegal drugs and when you have stopped your anti-psychotic medication speaks clearly of a far more complex setting than merely a drug induced psychosis. No doubt the drugs are implicated in the severity of the onset, Dr Carroll said as much. He said that someone with schizophrenia is exquisitely sensitive to stimulants, that the manifestations can be more extreme owing to the illness. Various hypotheticals were put to him in cross examination. Yes, it would be possible for someone to have a drug induced psychosis in October and a drug induced psychosis in

January and then develop schizophrenia some time later. He said unequivocally that he did not believe that was what happened here. Yes, it was possible for someone to take a quantity of drugs and develop a drug induced psychosis at the festival. Again he made it clear he did not believe that is what happened. His clear opinion was that the impaired mental functioning was not caused solely by the drugs. There had been a developing illness with some prodromal signs in late 2018. This was not in his view a drug induced psychosis at all.

78 He was stating his professional opinion. He is an expert and so he, unlike other witnesses, is entitled to give opinion evidence. It is true that I am not bound to accept any evidence whether expert or otherwise, but nor is it open for me to just capriciously reject an expert opinion. I asked the prosecutor why I should not act on the expert evidence in what was this key area in dispute, given that Dr Carroll was an expert and the only expert called. There was little Mr Glynn could say other than to remind me I was not bound to accept an expert opinion. Well I know that but on the materials before me I see no reason not to accept that evidence. I was impressed by the witness. He is an eminent expert in his field and made appropriate concessions in his evidence and yet was firm as to his ultimate opinion here. I have no reason to doubt the man or the opinion.

79 I accept Dr Carroll's opinion. On the materials before me, I don't believe it can be said that your impaired mental functioning in that ambulance on that night was solely due to the drugs. It is of course impossible to quantify the contribution of the illness and the contribution of the drugs but that is not critical. The evidence is that there were multiple causes. I am satisfied to the requisite degree that it was not caused solely by the drugs you took. Would it have occurred without them? The answer is most likely it would not have. But that is not the question posed by the legislation. Was the impaired mental functioning caused solely by the drugs? The evidence is that it was not. There was an underlying condition, schizophrenia, a condition of which you were then completely unaware. It combined with the drug use to bring about your disturbed state of mind. I am satisfied on the balance of probabilities that you have established a special reason under this provision as well. That is not the end of my task, not by a long shot. The finding of

this special reason does not necessarily rule out a prison sentence.

### **Reduction in culpability: recent decisions in Court of Appeal**

80 Now of course I have found a substantial reduction in culpability for the reasons I have just announced. Even had I been satisfied that it was impaired mental functioning owing solely to self-induced intoxication, and I am not, that would still have had some significant mitigatory value. That is because a person acting in a psychotic state owing to drug induced psychosis and one who was not on notice as to the likely effect of taking drugs is said to have a significantly reduced moral culpability. That seems to be the effect of two recent decisions of the Court of Appeal, which apply some principles from earlier Court of Appeal decisions. See the recent cases of Avan [2019] VSCA 257 (11 November 2019) as well as Marks [2019] VSCA 253 (8 November 2019). I am bound to follow those cases though I mentioned on the plea that I have some reservations as to this line of authority.

81 The fact is anyone taking drugs is seeking to be disinhibited and disconnected from the real world to a degree. They know there will be some impairment of functioning. If a person is just disinhibited by drugs and does something they normally would not do, then that is not mitigatory, in the same way as it is not mitigatory to drink 20 beers and do something whilst under the influence of alcohol. Why then, if you take drugs, should there be mitigation to be had if and when you happen to develop a psychosis? Why should that person be treated as less culpable? The answer lies in the fact of that person not being in any way on notice that his drug use might induce in him a psychotic state likely to precipitate criminal offending. Hence the Court of Appeal says that there is that reduction in culpability and that such a person is not a suitable vehicle for general deterrence. There is in such a setting a reduced need to emphasise specific and general deterrence. My reservations as to the law treating this as a mitigatory matter arise from the frequency with which we, as Judges in this Court, are seeing cases of people offending when in the grip of a psychosis who then seek to rely upon that in a mitigatory fashion. It must be very common in the Magistrates' Court as well. 'Ice' and synthetic and other cannabis are the drugs of choice for so many and are so often implicated in

developing a drug induced psychosis.

- 82 However, my obligation is to follow that line of authority whether I like it or not. In your case your delusional state was not solely due to drugs but they had a sizeable role to play. That is true, but you were plainly not on notice of your underlying illness or the risks of psychosis. That is clear from the evidence from Dr Carroll and the updated report. Plainly you were delusional, and hence there is that substantial reduction in culpability and reduction in the weight given to specific and general deterrence. So the Verdins 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> limbs arise here.
- 83 Of course there are other factors which go in the other direction to increase the weight to be given to general deterrence here, predominantly the status of the victims as on duty emergency workers.

### **CSP and general principles**

- 84 I am also required to consider current sentencing practices. That is of no assistance to me to me here in relation to the RCI charge as there is simply no point my considering sentences passed for the crime of RCI where these amended sentencing provisions did not apply. A significant majority of people sentenced in the Magistrates Court for RCI do not go to prison. That is what the statistics tell me. Over a third get fines or good behaviour bonds, about a third get CCO's and about a third are locked up. So over two thirds are not locked up. See SAC online data. Those sentences passed in those sorts of cases have no application in this case where I have the fettered discretion. I also have all the other matters that a Court must have regard to. Sentencing purposes such as general and specific deterrence, community protection, denunciation, punishment and rehabilitation. Also the need to take into account the maximum penalties and the impact of the offending. Given my conclusions as to your excellent prospects of rehabilitation and low risk of offending there would be very sizeable reduction in the weight given to specific deterrence and community protection. Given the aspects of reduced culpability and the impact of the complex mental health issues, there are the Verdins reductions I have spoken of.

## Principles altered here

- 85 Some of the purposes and principles of sentencing are turned on their head in relation to the charge of RCI. How am I at the very brink of sending to prison someone who ordinarily would not be despatched there? The answer lies in the prevalence of assaults upon emergency workers whilst on duty and the need to stop such attacks. The common law has for many years recognised their status as demanding greater weight to be placed on the principle of general deterrence, punishment and denunciation. When I speak of the notion of general deterrence, that is the need to deter other likeminded offenders.
- 86 Paramedics in particular but police and hospital emergency department staff as well, are randomly brought into contact with members of the public many of them mentally disturbed or affected by substances. Many of those people who commit assaults are affected by drugs or alcohol or have underlying mental health illnesses. The paramedics don't have a choice about turning up. The call goes out for help, they are summonsed, despatched and then exposed to risk. It is not some acceptable part of the job. We don't just dismiss it and say 'well it comes with the territory'. It doesn't. The law must strive to protect them.
- 87 The normal weight given to the usual sentencing purposes would very often see the offender spared a term of imprisonment. Why?
- 88 In the context of an emergency worker who is a paramedic, who in their right mind would attack a paramedic who is either providing care to that very offender or to a friend of the offender? Why would anyone want to intervene violently against such a person? Surely the lion's share of such people are not behaving in the way they normally would. They are affected by alcohol or drugs or heightened emotional response to some event or mental health demons or all of the above. For of course, any one in their right mind would normally breathe a sigh of relief, as I have myself, when an ambulance with paramedics arrives on the scene. I suspect that the vast majority of such people who assault paramedics can and do, in the cold hard light of day, recognise the shameful nature of their act upon someone who was, after all, there to help. So once at Court, a common

feature on most plea's would be the existence of deep remorse and shame, and the claim that the conduct was out of character with disinhibition brought about by alcohol or the drugs or the mental health issue driving the offending. So almost always, there will be an excuse or explanation proffered at Court, as there is here. A claim as to the conduct being out of character, as there is here.

89 Courts have in the past exercised an unlimited sentencing discretion in such cases as these prior to the earlier provisions being introduced. The assaults continued. How then is the message to be sent if the Courts are not sending it? How can people be deterred? Parliament says tougher sentences are the answer. Prison. Lock up people who assault emergency workers and others will get the message soon enough and desist. To engineer that outcome, we have these amendments to the Sentencing Act deliberately and directly limiting my sentencing discretion.

90 I suppose one might query whether that class of person who is acting in the way I have described or the way you were, is actually able to be deterred. They are, one would think, highly unlikely, in such a state of intoxication or delusion to calmly reflect on the term of imprisonment that may be waiting in the wings. To suppose that a man who has been so delusional as to flee from his family and hide in a dog kennel, is going to reflect on the legal consequences of his actions, is perhaps not that realistic. However, as I say, I am not here to sign off on the legislation. Parliament has no doubt considered those matters. Legislation was passed which was designed to remove from the equation very many of the usual excuses and matters raised on the plea. The remorse, the explanation for why someone was acting out of character, the fact that they may otherwise be a fine upstanding person is all well and good, but what assistance is any of that to the injured paramedic to learn several months after the assault the true context of it. The real context is that they are doing a difficult job at the best of times and that there is no excuse to turn on them. Parliament is saying that we need these assaults to stop. People must understand that an emergency worker on duty is sacrosanct. You do not touch them.

## **Substantial and compelling circumstances that are exceptional and rare**

- 91 Now as I explained earlier, they are not truly mandatory sentencing provisions as there are the special reasons provisions, but the whole tenor of this legislation suggests that it will be a rare case to find the existence of special reasons such as to altogether remove the obligation to imprison. I have not mentioned it to this point but one other special reason existing in the legislation makes this very clear. It is not raised in this case but I set it out purely to illustrate the clear intention of Parliament. Section 10A ss (2)(e) reads “a court may make a finding that a special reason exists if there are substantial and compelling circumstances that are exceptional and rare and that justify doing so”. Not just substantial and compelling as existed in the older version of the Act. That is already a very high bar as some cases interpreting that older provision made clear. See Hudgson [2016] VSCA 254. The amendment adds in the words exceptional and rare. The bar is raised about as high as it can be without becoming fictional or illusory.
- 92 In interpreting that particular special reasons provision, Parliament then tells judicial officers directly in section 10A ss (2B) to put aside many of the usual things that are so important on a plea. They stand for nought. So general deterrence and denunciation reign supreme, with less weight given to rehabilitation and to the personal circumstances of the offender. Further the court is told not to take into account previous good character other than the absence of prior convictions. Not to take into account a plea of guilty or prospects of rehabilitation. These are, in the scheme of the usual plea, the very things which would often be so decisive and spare an offender prison. They are to be ignored for the purposes of considering if there are substantial and compelling circumstances under section 10A ss (2)(e).
- 93 That signals Parliament’s clear intention but if there was any doubt, that is removed in 10A ss (3)(ab) which reads that Parliament’s stated intention is that ordinarily for an offence of RCI committed upon an emergency worker, a term of imprisonment is to be imposed.

## **Consequences of establishing a special reason**

94 We also have the consequences of establishing special reasons. Again, a clear window into the intention of Parliament. A person is not 'home free' if they can establish a special reason. It does not guarantee them anything. It does not then just open up the normal sentencing discretion or the normal sentencing options. That used to be the position under the old provisions but that was all very deliberately changed with these amendments. Parliament must have had a sense of leaving too much discretion in the hands of Magistrates or Judges. Now owing to those amendments, absent proof of impaired mental functioning causally linked to the offence and substantially and materially reducing culpability, there is only one option. Prison. Not necessarily a minimum of 6 months but prison all the same.

95 If the causally connected impaired mental functioning special reason is established as well as the provisions of section 5 ss (2GA), there are then only two choices. Either prison or a mandatory treatment and monitoring order. One or the other. No other dispositions are available.

## **A new sentencing landscape for judicial officers**

96 So this sentencing landscape is a foreign territory to Judges and Magistrates who are so used to applying the normal principles of sentencing and considering the normal sentencing options and hierarchy. It compels a large shift in thinking. This altered position required significant amendments to the *Sentencing Act* provisions including those dealing with the concepts of parsimony. That is the extent to which a Court must only pass a sentence necessary to achieve the purposes of sentencing. There is a general prohibition upon a Court imposing a more severe sentence than is required to achieve those purposes. It makes good sense. That is why prison has always been a disposition of last resort. In the past it has only ever been imposed when there is no alternative. These various provisions now have a qualification and the qualification is when the court is dealing with someone for a category 1 offence. I am here, as RCI committed upon an on-duty emergency worker is a category 1 offence. Proportionality and parsimony have for

so long been foundational sentencing principles. So a Court in the past has only been able to impose just, appropriate and proportionate punishment and only sentences of a severity as are required to achieve the purposes of sentencing. That has been altered here in relation to the RCI. In the absence of a special reason, it is at least 6 months prison, whatever I think of that sentence. In the absence of the one special reason I have discussed, it is some prison, maybe not 6 months, but some, again whether I think that is just or appropriate or necessary to achieve the purposes of sentencing. What I must do is avoid approaching my task as though these amendments do not exist. They exist and were brought into existence, and deliberately so by our Parliament for judges to apply them, not to ignore them. I cannot say, as Dr Jasek says in his first report, that *“imprisonment due to mandatory sentencing would be out of proportion of (sic) his actions”*. That sentiment is irrelevant. If I was to approach my task in that fashion, I would be ignoring these provisions which is exactly what I must not do. It requires a shift in thinking.

97 As I reflect on these amendments, it seems to me that it will be very rare indeed for someone to avoid altogether a term of imprisonment when sentenced for this crime. Someone acting whilst intoxicated or juiced up on drugs without some causally connected mental impairment will have nowhere to hide. Prison will be a certainty. Even someone who will have the most horrendous time in prison will be sent there unless able to establish that the mental impairment was causally connected to the offence and substantially and materially reduced their culpability and that it was not caused solely by self-induced intoxication. Even if discharging the burden of establishing that special reason, such a person may still be sent to prison, as there are only the two options I have described.

98 Under these provisions, undoubtedly more people will be sent to prison for these offences, even people who would not be imprisoned in the absence of these laws. That is plainly the intention of Parliament.

99 The message sent by Parliament could not be clearer. Do not assault emergency services workers. If you do, don't say you have not been warned. Prison will ordinarily be

the outcome, whoever you are, whatever your character, whatever the reasons for you so acting, whatever damage may be caused to you in prison.

100 Part of the law I must apply are the special reasons provisions. I am bound to consider those as well. Again, some of the publicity might have suggested that some tricky lawyer had sniffed around and found some hidden loophole or come up with some novel interpretation of the legislation. It was not a hidden loophole or novel interpretation. The special reasons exceptions were very sensibly inserted into the Act by Parliament to prevent an injustice in the rare cases where they may be enlivened. They exist for a reason. The Magistrate was obliged to consider those provisions. He could not just ignore them, no more that I can.

## **Conclusions**

101 So then to my conclusions. I have already found the existence of the two special reasons relied upon. That does not win the day. All that does is remove from the equation the required 6 month minimum period of imprisonment. The assault against Sam Smith is not minor given that he was a paramedic on duty but undoubtedly the RCI is a far more serious offence. It has had serious impact upon the principle victim, Monica. It has changed her life. There is just no question about that.

102 I must sentence you for RCI, not recklessly cause serious injury or intentionally cause injury, and for acts occurring in your delusional state.

103 Undoubtedly, even without these new provisions, I would be required to take into account the need for general deterrence, given her status as a serving paramedic going to your aid and being assaulted in such a setting. It just should never happen but is all too common. That is in part why we have this new legislation. Undoubtedly the particular provisions I have referred to are designed to very much focus the judicial officer's mind on prison and the need to deter others by sending that message. Prison is usually a disposition of last resort. With these provisions, prison is the default setting, only able to be avoided if certain things are established by the offender. That is a massive change and one which I must apply to my task.

- 104 'Emergency worker' is broadly defined and includes a police officer, ambulance officer or paramedic, doctor, or nurse, or someone supporting a doctor or nurse in a hospital. It extends to SES volunteers and to firefighters in the CFA or MFB. In most instances of a person recklessly causing injury to an on-duty emergency worker or prison officer or youth justice officer, that person will be sent to prison. It is that simple.
- 105 Undoubtedly though, there will be very rare cases where an offender may escape being sent to prison. The legislation provides for that outcome but only if the very high bar is reached. Those provisions are very sensible. They recognise that there will be some very rare cases where common sense and humanity would dictate against sending a mentally unwell person into a prison setting.
- 106 Now I have been around long enough to have an appreciation of how my sentence in this matter may be received. I have but two choices. The first is to send a young man of exemplary past behaviour to prison, one whom I judge to have excellent prospects of rehabilitation if dealt with in a humane fashion here, and yet one who has very serious risks of substantial deterioration as well as a worryingly high risk of suicide if imprisoned. Or I spare him from prison but admit him to an intense order which was created and designed specifically to be used only in the case of an offender who establishes the matters which can enliven that option, as you have. What a choice.
- 107 I hope I have conveyed in these reasons my understanding of the amendments, the intention of Parliament in making them and my intention to follow the letter of the law. I hope I have also conveyed that I never once lose sight of the dire impact of your crime committed upon Monica. That impact does not get submerged and lost in the wealth of plea material placed before me.
- 108 This is actually a very difficult sentencing task. One of the great strengths of our criminal justice system is that we have an independent judiciary. When passing sentence, we as judges are trusted to act as judges should, and so to put out of our mind outside influences and irrelevant considerations and there are so many in a case such as this. A high profile case where so many views have been aired. Everyone seems to have a view

and a strong desire to express it. I must put from my mind the media reports and all of the publicity. I must not put from my mind legitimate public expectations. I must not put from my mind the impact of the crimes. I must not put from my mind all the legitimate sentencing considerations which as a Judge I am required to take into account including denunciation, general deterrence and punishment. I must not put from my mind the amended legislation which so plainly is designed to limit my discretion and to lead to harsher sentencing outcomes. I must not put from my mind the special reasons provisions.

109 I am required to be true to my oath, to apply the law to the best of my knowledge and ability, without fear favour or affection, and to pass an appropriate sentence applying the existing law to that task. We sometimes are required to do things that we know may be unpopular and we do them because they are the right thing.

110 I believe that you have established the two special reasons under the Act. There is then no requirement to send you to prison for a minimum of at least 6 months. As I mentioned earlier, to this point, there is no serious contest. The prosecution concede the existence of an increased burden here, sufficient to invoke a special reason under section 10A ss (2)(c)(ii). On its own, that removes the need for a 6 month minimum term. So the DPP looking at your plea materials says that is well and truly on the cards. The second of the special reasons (which is not conceded but which I find established) permits me to at least consider a mandatory treatment and monitoring order. That finding does not however compel me to place you on such an order. I have to consider whether such an order is appropriate in this case.

111 The prosecution say that in such a setting, it would then be open to me to place you on a mandatory treatment and monitoring order as the Magistrate did. As with all these things, it is for me to reach my own view for I am passing sentence, but I do take into account that submission.

112 Even though you have demonstrated the causally connected impaired mental functioning with substantially and in my view materially reduced culpability, it plainly was in a setting

where there was a sizeable enough contribution from your voluntary drug use. That conduct significantly contributed to the onset and dimensions of the psychosis. You were not then to know that you had schizophrenia. Still, you took these drugs. That is a choice that you made and you can be distinguished from a person labouring under a mental illness at the time who descended through no fault of their own into a psychotic or delusional state in the course of their mental illness. Or even such a person descending into that state as a response to not taking prescribed medication as opposed to taking illegal drugs. You on the other hand took these illegal drugs and had in your mind altering to some extent your connection to reality. You had disinhibition in mind. It did that and so much more. That is why you sit where you sit. As I have said though, you had not the slightest idea it would trigger the delusions and psychosis and precipitate any violent criminal offending.

113 Should your use of the drugs and the role they undoubtedly played disable you from the disposition which will keep you out of prison? The prosecution say no.

114 These reasons would hopefully convey that this has been the subject of much anxious consideration. I would be lying if I said I have not wavered. If I focus on all the matters I would ordinarily focus on in the sentencing exercise, including your age, lack of criminal history, your excellent prospects and undoubted vulnerability and heightened risks in prison, then the non-custodial order immediately springs to mind. However, I then consider the nature of the physical attack. I then turn my mind back to the status of the victim, to her role as a paramedic serving this community and serving you. I read her impact statements and consider that material and I reflect on the very serious impacts of your crime. I consider the particular provisions deliberately inserted into the Sentencing Act, tightening up these laws and spelling out Parliament's clear intention. I consider the need to give weight to general deterrence and the need to send a powerful message to others in the community and that non-custodial option that seemed so clear and within reach a moment before just evaporates before my eyes and prison beckons for you.

115 So there has been this tussle going on as is actually not that uncommon in many instances of sentencing a youthful first offender for a serious crime with sizeable impact.

There are always tensions at play in such a case and that is so even in cases where these legislative provisions have no application at all.

116 Then I turn back to the Legislation as I must. I consider also the prosecution concession that a mandatory treatment and monitoring order is open here if I am satisfied that the causally connected mental impairment was not caused solely by self-induced intoxication, as I am.

117 Maybe there will be some criticism of this legislation. There should not be. It is very tightly drafted Legislation. The truth is, owing to this legislation, Magistrates and Judges will be sending a lot of people to prison, who, absent these provisions, would not be sent anywhere near a prison. It is irrelevant whether I think that is a good idea or a bad idea. That is because my views on that score are unimportant. Parliament are the body who legislate. They are elected to make laws and they are well entitled to bring about that outcome if they think it a good idea. They have spoken. I will apply the law.

118 Though not in this language, the legislation plainly says that the vast majority of people who commit this crime against an on-duty emergency worker will go to prison. The vast majority, but not all.

119 The legislation requires a judge to consider the special reasons which were inserted into the Act in recognition of the fact that there can and will be very rare exceptions to the general rule.

120 I am understandably concerned as to Monica feeling a sense of being abandoned or not protected by the Court if a prison term is not imposed. She and others may question the point of having these provisions in place if Courts do not follow through on them by imprisoning. The Union who have understandably been very vocal during this case stand by and wait to watch what happens in this case, as though it is some definitive test of the legislation. It isn't.

121 This will not ease Monica's feelings at all but all I can say is this is one case, the first, and my obligation is to treat each case on its own unique facts, whether it is the 1<sup>st</sup> or the 51<sup>st</sup>

case where this legislation has application. It is not my job to consciously and deliberately make an example of the very first person who happens to be subject to these provisions and to somehow mark out the commencement of the amended provisions with a fanfare of flourish. It is my job as a judge to impose an appropriate sentence and it just so happens that the first instance of this legislation being applied relates to the sentence which must be imposed on a deeply disturbed and vulnerable youthful first offender whom everyone, including the DPP who brings the appeal, acknowledges is likely to be greatly damaged in an adult prison.

122 A prison sentence may well be disastrous for you Mr Haberfield. For you, for your family and actually for the community more broadly. It may very well undo all the work that has been done and which lies ahead of you, and you may then represent a significant burden on the community into the future, rather than being the fully contributing member you hopefully will become.

### **Sentence**

123 Having applied the legislation, I find that special reasons do exist here under both section 10A ss (2)(c)(i) and (ii) and that it is then open to me and appropriate not to imprison you in this case. I will come to the formal orders in one moment.

124 Now I want one thing clearly understood, and it is the message that should be heard but which I fear may be lost in the noise that could shortly follow, owing to the fact that I am not sending you to prison.

125 I am not saying it is okay to assault an emergency worker. It is never okay to do so. It is never okay to assault a paramedic. Your attack was completely unacceptable and has had dire consequences upon a totally innocent victim and one who I acknowledge may well feel very let down by this Court outcome. It is not a matter of not respecting her or recognising the impact upon her. I do. It is not a matter of endorsing your behaviour. I don't. It was totally unacceptable. My sentencing remarks are very lengthy. I have explained in far greater detail than I ordinarily would, why I am doing what I am doing in the hope that it will be apparent, even perhaps to people who may not agree with my

ultimate sentence, that I have at least taken great care in reaching my ultimate finding and that I have applied these new laws in exactly the way contemplated.

126 People certainly should not take from this one unique sentencing outcome some general statement that such assaults will be tolerated by the Courts. They won't be. People may rush about calling for amendments to the legislation. I can't stop those calls though perhaps pay some heed to my sentencing remarks.

127 The existing legislation is very tight indeed as it should be and conveys as I do the message that almost invariably, such a crime will be rewarded with a sizeable term of imprisonment.

128 That is not happening here owing to the two special reasons I have found established and the large quantity of mitigatory materials which have been placed before the court on your behalf.

129 This sentencing outcome in this case occurs on, what as a matter of chance, happens to be the first application of these provisions. That should not lead people to think the laws are not working or will not work or will not be applied by Judges. We will apply them. They will work in exactly the manner intended.

130 Indeed they are working, which is precisely why I am not sending you a mentally unwell, disturbed and suicidal youthful first offender with reduced culpability to an adult prison.

131 I have explained why I am doing what I am doing. The mitigatory materials in this case are unrivalled in my almost 10 years as a judge and 26 years before that as a lawyer. It is very hard to imagine that quantity and quality of material existing in another case and frankly, even in your case, you have had a very close shave.

132 Even with all of that excellent plea material including your early guilty plea, remorse, reduced culpability, strong family support, increased custodial burden, youth, lack of any criminal history and very many months of treatment and counselling, you have avoided prison by the skin of your teeth.

133 **Others should have no such expectation.**

### **Formal orders**

I intend to release you onto a mandatory treatment and monitoring order on charge 1. I am going to do what the Magistrate did but increase the term. On the charge of RCI to Monica, you are convicted. Pursuant to section 44A, I admit you to an 18 month Mandatory Treatment and Monitoring Order commencing today

### **Mandatory treatment and monitoring order (MTMO)**

134 These orders have a range of mandatory conditions which I will explain

135 Core conditions:

- You must not during this order commit an offence for which you could be imprisoned.
- You must report to and receive visits from your Community Corrections officer.
- You must report to Corrections within 2 working days. The address is on the document.
- You must let your corrections officer know within 2 clear working days of any change of address or job.
- You must not leave Victoria without getting permission from Corrections to do so.
- You must obey all their lawful instructions to you

*[HH further explained the core conditions]*

136 There are also tailored conditions and these are mandatory:

- You must undergo assessment and treatment (including testing) for drug abuse or dependency as directed.
- You must undergo any mental health assessment and treatment as directed.
- You must undergo any other treatment and rehabilitation as directed.

- I am also required to monitor this order so judicial monitoring is ordered. The first monitoring under my order will take place on 13 March 2020 at 9.30 am in this Court.

137 That MTMO starts from now. So as you can see I am in this way increasing the sentence. You have already been on such an order for almost 4 months and I am not giving you any credit for that. I am not backdating the order.

138 On the other charge of assault, I convict and release you on an 18 month CCO also commencing from today. The same core conditions apply so I will not repeat them. The special conditions attached to the CCO are identical to those imposed on the MTMO. So you must undertake drug assessment and treatment including testing, mental health assessment and treatment as directed, any other treatment and rehabilitation as directed and you will be monitored. Unpaid work is not a sensible condition in this setting given the high need for treatment.

*[HH further explained the orders and obtained consent to each]*

### **Appeal Costs Certificate**

Finally there is an application for an Appeal Costs certificate under section 15 of the Appeal Costs Act 1998. That provision enables you to apply for the recovery of your costs incurred in these proceedings because the DPP has brought this matter on appeal. Ordinarily, I would grant the certificate. This appeal would have not taken place had the two parties advised the Magistrate of the limits which existed to placing you on the order he placed you on. I discussed this aspect earlier in my reasons and won't repeat all that I said. I simply don't believe it is appropriate to indemnify you in those circumstances and so I decline to order an Appeal Costs certificate.