De La Haye v AG

Jurisdiction:	Jersey
Judge:	Rowland JA
Judgment Date:	18 May 2010
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Text

[2010] JCA 92

COURT OF APPEAL

Before:

J. P. C. Sumption, **Esq.**, O.B.E., **Q.C., President**; Sir Geoffrey Rowland, Bailiff of Guernsey, **and;** J. Martin, **Esq., Q.C.**

Sophia Elizabeth De La Haye
and
The Attorney General

Advocate D. J. Hopwood **for De La Haye.**

S. M. Baker, **Esq., Crown Advocate.**

Authorities

Road Traffic (Jersey) Law 1956.

Attorney General v Vaughan [Royal Court Unreported November 1974].

R v Venna [1976] QB 421.

Whelan's Aspects of Sentencing in the Superior Courts of Jersey, 2nd edn. (updated to November 2003).

Attorney General v Annison 1988/25A; [1987–8] JLR N-9.

Burnett v AG [2008] JLR 117.

Harrison v Attorney General [2008] JLR 117.

Tromans v AG 1997/95.

Foster v Attorney General [1992] JLR 6.

Renouf v Attorney General for Jersey [1936] AC 472.

Offences against the Person Act 1861.

R v Barnes (2005) 1 Cr. App. R. 30 CA.

Archbold 36 th Edition.

Coward v Baddeley (1859) SC28 LJ Ex 260.

English Larceny Act 1916.

Hawkin's Pleas of the Crown, vol 1.

Attorney General v Bonhomme [2001] JJ 146.

R v Stranney (2007) EWCA Crown 2847.

R v Bain [2005] 2 Cr. App. R. 319.

R v Bridle [2002] EWCA Crown 908.

Appeal against the conviction by the Royal Court on 11 th January 2010 on three charges of grave and criminal assault

Rowland JA
Introduction

This is the judgment of the Court.

1 On the night of 24th April 2009, the Appellant, aged 23 drove a motor car on public roads in St. Helier whilst heavily intoxicated. It was apparent that not only was the Appellant unfit to drive, but that prior to driving the car away she was visibly drunk and that she had struggled at times to maintain her balance. She was stumbling and falling over and had collided heavily with another pedestrian, had bounced into a shop window and had fallen to the ground. One of her friends had helped her to get up. She drove erratically and in a chaotic manner colliding initially with a wall and having driven away from the scene drove into a group of three women pedestrians causing severe injury to each of them. She drove away from that scene crossing a junction into a main road without stopping, crashed into a wall directly opposite the junction before then driving into a wall on the other side of the road. Leaving that scene she drove erratically along the main road often on the wrong side of the road, until crashing into an hotel. As a result of that impact the car was incapable of being driven further. There had been damage to the car's suspension and much more.

2 It was only by chance that no further injuries or deaths were caused to other pedestrians or passengers of other vehicles on the road at the time. A road side breath test was carried out. The lowest recorded sample indicated an alcohol level of 69 micrograms in 100 millilitres of breath. The legal limit is 35 micrograms. When interviewed the Appellant could not recollect her actions but did not deny them.

3 She was to face a nine count indictment. The Crown did not proceed with the first count, a minor offence of driving with inoperative stop lamps. The indictment included one count of driving with alcohol above the prescribed limit, one count of dangerous driving and three counts of failing to report an accident, each of those counts being statutory offences under articles of the Road Traffic (Jersey) Law 1956. The offence of dangerous driving related to the way in which the Appellant had driven along the whole course of the journey. The Appellant pleaded guilty to these offences.

4 Counts 6, 7 and 8 alleged grave and criminal assault, a common law offence. The Appellant pleaded not guilty to them. Following the ruling of the learned Commissioner Sir Christopher Pitchers the Appellant changed her plea to one of guilty to these offences.

5 In Jersey law assaults can be of two kinds, either common assault or grave and criminal assault. The latter category is reserved for the more serious types of assault. Classification is a matter of degree. There is no distinction between assault and battery.

6 The maximum sentence for grave and criminal assault, being a common law offence, is unlimited. The appropriate sentence is at the discretion of the Court gauged by reference to guidelines, the practice of the Court and the facts of the case. The maximum period of imprisonment for dangerous driving is two years' imprisonment.

DETERMINATION IN ROYAL COURT OF PRELIMINARY LEGAL ISSUE

7 Before the learned Commissioner in the Royal Court sitting alone, the Appellant had raised a legal issue concerning the three counts of grave and criminal assault.

8 By way of concession, for the purposes of legal argument before the learned Commissioner, the Crown did not argue that the Crown could prove a deliberate assault or hostility by the Appellant. The Crown accepted that the collision with the three pedestrians was caused by the Appellant's loss of control through intoxication. It was also common ground that she had no intention of striking, or even of driving towards the three victims. The Appellant conceded that recklessness was proved in this case, if recklessness could properly be the basis of the charge.

9 The legal issue which the learned Commissioner was called upon to decide was this:-

> *"For an assault charge to be made out in Jersey, is it sufficient that the defendant was reckless as to the application of force to the other person (the prosecution position); or must the defendant have directed an intentional hostile act toward the victim, 'mere' recklessness not amounting to mens rea in the case of assault (the defence position)?"*

10 It was contended on behalf of the Appellant that if her argument was upheld that 'mere' recklessness would not suffice as *mens rea* in the case of assault then it should be ruled that the Crown should not proceed against her on those three counts. If she should fail in that argument then it was further argued that the learned Commissioner should rule that it would be an abuse of process for the Crown to proceed.

11 The learned Commissioner ruled that:-

> (i) recklessness is sufficient *mens rea* where the charge is grave and criminal assault both generally and where the allegation relates to driving a motor vehicle;
>
> (ii) it was not an abuse of process for the Crown to proceed on the three counts.

12 The learned Commissioner stated that in his judgment Jersey law remained the same as English law. There was no need to adopt English law but had it been necessary to do so he would have reached the same conclusion by a different route.

Sentences

13 On 11th January 2010 the Appellant, who pleaded guilty, was sentenced to 2 years 9 months' imprisonment and 5 years' disqualification on each of the three counts of grave and criminal assault and to lesser terms of imprisonment and periods of disqualification from driving for each of the other counts. On the count of dangerous driving, contrary to Article 22

(1) of the Road Traffic (Jersey) Law 1956 the Appellant was sentenced to 21 months' imprisonment and 5 years' disqualification from driving.

Appeal

14 On 28th January 2010 the Appellant filed a notice of appeal contending that the ruling of the Commissioner on both points was incorrect and appealing against the three convictions for grave and criminal assault, but not against any other conviction or against any sentence imposed on her. The Appellant's case was that you cannot have grave and criminal assault in Jersey law without actual hostility or specific intent. There must, the Appellant contended, be a hostile act directed towards the victim. In the alternative it is an abuse of process to charge these offences in a road traffic context.

THE APPELLANT'S SUBMISSIONS

Mens Rea

15 Mr Hopwood's submissions on the Commissioner's findings, contained in a comprehensive and extensive skeleton argument developed orally, may briefly be summarised as follows:-

(i) the normal course is to charge reckless driving of a motor vehicle as dangerous driving under the Road Traffic legislation, whether or not personal injury is caused;

(ii) the elements of assault in Jersey law were defined in *Attorney General v Vaughan* [Royal Court Unreported November 1974] and included hostility but not recklessness. The customary law of Jersey in relation to assaults is not the same as English law;

(iii) this appeal, as was the case in the Royal Court, is concerned with the definition of an assault and that the term has a different meaning under the customary law of Jersey from that under English law. There must be a hostile act directed at the victim. As the conduct of the Appellant had been reckless whilst drunk her conduct was not hostile;

(iv) this area of Jersey criminal law had not always been the same as that of England. The origins were different;

(v) even if the learned Commissioner intended to say only that the law of the two jurisdictions had been the same since the case of *Vaughan*, that view is incorrect. Vaughan has been applied in the Jersey Courts and the Jersey Courts had failed to adopt any alternative or subsequent development of English law in the definition of assault;

(vi) the case of *R v Venna* [1976] QB 421 appears to have established recklessness

as part of the *mens rea* of battery in England. *Venna* represented a significant change in English law that was never imported into Jersey law.

16 Whelan's Aspects of Sentencing in the Superior Courts of Jersey, 2nd edn. (updated to November 2003) para 608 addresses the definition of grave and criminal assault. Advocate Whelan had referred to the summing up of Deputy Bailiff Ereaut (as he then was) in the Royal Court in the case of *Vaughan*. Advocate Whelan said this:-

> ***"As to definitions in this area, the locus classicus remains the summing-up of Deputy Bailiff Ereaut to the jury at the trial of Anthony David Vaughan in November 1974:***
>
> ***I am going to begin by telling you the meaning of 'a grave and criminal assault'.*** Now, in Jersey law, an assault is a touching or laying hold by one person on another in an angry, revengeful, rude, insolent or hostile manner, and it includes an attempt to do so, provided that the person who is threatened is led to anticipate an attack. In the United Kingdom, an attempt to do those things is called 'an assault', and the actual doing of those things is called 'a battery'; but here we make no such distinction, we use the same name both for an attempt and for the actual doing of the thing; they are both equally called "assaults". In Jersey law assaults can be of two kinds. They can either be a common assault, which is the less serious of the two kinds of assault or they can be a grave and criminal assault, which is, as its name implies, the more serious type of assault, and the only difference between them is one of degree ……" (Emphasis provided)

17 The learned Commissioner with reference to customary Jersey law and English law had concluded as follows:-

> ***"In my judgment Jersey law remains the same as English law.*** To echo Lord Justice James in Venna, I can see no reason in logic or law why a person who recklessly applies physical force to the person of another should be ***outside the criminal law of assault.*** It is not a question of aligning the law in the two jurisdictions. In my judgment, this has always been the law here. This is simply the first time that it has been necessary to articulate it expressly."

18 Mr Hopwood submitted that the learned Commissioner had fallen into error by accepting the Crown's contention that the law of Jersey was the same as that of England in this area of reckless conduct and that he had given insufficient weight to authority to the contrary. In developing his argument Mr Hopwood referred to a number of cases including:

> *Attorney General v Annison 1988/25A*; [1987–8] JLR N-9.
>
> *Burnett v AG* [2008] JLR 117.
>
> *Harrison v Attorney General* [2008] JLR 117.

19 Mr Hopwood advanced an argument relating to the meaning of hostility. He contended that there is little or no evidence of reckless assault in the law of Jersey. There had been no discussion of the meaning of recklessness in any assault case in Jersey. If recklessness has formed a critical part of the offence then this silence was surprising. In *Tromans v AG 1997/95* and in *Burnett v AG*, both cases on appeal to the Royal Court from the Magistrate's Court, the Court set out what it considered to be the law of assault and faithfully followed the Vaughan formulation.

20 Referring to the cases of *Foster v Attorney General* [1992] JLR 6 and *Renouf v Attorney General for Jersey* [1936] AC 472, Mr Hopwood submitted that if the Crown's argument was that the relevant English principles do not currently exist in Jersey those cases are authority for the proposition that this Court should by sensible adoption incorporate them into Jersey law then such arguments were ill founded.

Abuse of Process

21 Mr Hopwood, in support of his contention that the prosecutions for grave and criminal assault should be stayed as an abuse of process, submitted that such prosecutions would undermine the authority of the legislature and oppress the Appellant. To do so would in effect create a new quasi-offence of *"causing serious injury by dangerous driving"* thereby circumventing the intention of the legislature which had set the maximum sentence for dangerous driving at two years custody. It was further submitted that such prosecutions undermine public respect for the rule of the law by introducing uncertainty into the structure of the law. Mr Hopwood placed reliance on two academic notes written by Mr David Thomas, Q.C., in Criminal Law Review (issues in February 2005 and February 2008). Those notes were critical of the process of charging both dangerous driving and an offence against the person in a case where serious injury is caused. Dr Thomas considered that to charge in this way was misconceived and inappropriate.

THE CROWN'S SUBMISSIONS

22 Mr Baker for the Crown, in a comprehensive and extensive skeleton argument supplemented orally, in summary form, addressed Mr Hopwood's submissions. His written and oral submissions may briefly be summarised as follows:-

Mens Rea

23 An assault in Jersey law comprises the application of unlawful force to another person and that the offence is made out even if the force is applied recklessly rather than deliberately. Consideration of what is unlawful will involve a consideration of many issues. The fundamental question is whether the application of force was unlawful.

24 The key *mens rea* question on the facts of the present case resolves to this:-

> *"When someone's bad driving causes serious physical injury to another person, is it permissible to bring a charge which reflects the causing of that injury, even though it was not deliberate but, rather, was reckless?"*

25 In England the answer to the recklessness question is in the affirmative. There is a practice approved by the Courts, of charging a count to reflect the reckless causing of serious injury in addition to dangerous driving when the facts justify it. There are many examples of that practice, and it is a charge under section 20 of the Offences against the Person Act 1861 (inflicting grievous bodily harm).

26 *R v Barnes* (2005) 1 Cr. App. R. 30 CA at para 17 confirms that recklessness is sufficient *mens rea* for a s.20 offence, and means no more than that the defendant foresaw the risk that some bodily harm (however slight) might result from what he was going to do and yet, ignoring that risk, he went on to commit the offending act.

27 The summing up of Deputy Bailiff Ereaut in *Vaughan* was limited in its guidance. It could not be treated as an authority relevant to the central issue in this case. It was a summing up tailored to the facts of the case. It did not decide or attempt to decide anything about the law of assault in Jersey but focussed principally on the distinction between common assault and grave and criminal assault and that no distinction is drawn in framing a charge between assault and battery. It was never intended comprehensively to define or to circumscribe the law of assault in Jersey. It did not deal with recklessness *mens rea* because recklessness did not feature in the case.

28 Successive enquiries in the 19th century had found that the foundations of criminal law in Jersey had become largely undiscoverable save in so far as they depended on the practice of the Royal Court. Privy Council Commissioners in 1847 had confirmed that it was unexceptionable for that practice to base itself on English models.

29 The summing up of Deputy Bailiff Ereaut had conveniently repeated the relevant passage of *Archbold* Criminal Pleading, Evidence and Practice of the day (36 th edition) in deliberate battery cases in England:-

> ***"A battery …. includes beating and wounding. To beat … means not merely to strike forcibly with the hand, or a stick, or the like, but includes every touching or laying hold (however trifling) of another's person or clothes, in an angry, revengeful, rude, insolent, or hostile manner: 1 Hawk C62; s.; see*** *Coward v Baddeley*, 4. & N. 478; …"

It is to be noted that the judgment of the Court in *Coward v Baddeley* was delivered in 1859 [SC28 LJ Ex 260].

30 Deputy Bailiff Ereaut was intentionally equating Jersey "assault" to English battery. Any functioning definition of an offence of assault or battery necessarily includes the generic concept of the actual or apprehended application of unlawful force. There was no intention of Deputy Bailiff Ereaut to exclude the generic application of force from the offence of assault in Jersey. No source of Jersey law has been identified which provides any basis for a limited definition.

31 The Court of Appeal in *Venna* (James, Ormrod L.JJ. and Cusack J) in a reserved judgment had held, dismissing the appeal, that recklessness in the use of force was sufficient to satisfy the mental element necessary to form the intent to commit a criminal assault and accordingly the judge had correctly directed the jury that a physical injury inflicted deliberately or recklessly constituted the offence of assault occasioning actual bodily harm. James LJ had also pointed out that:-

> ***"In many cases the dividing line between intention and recklessness is barely distinguishable."***

32 *Venna* did not change the English common law; it was simply declaratory of it. The case described the existing state of the law in England and did not seek to change it. The Appellant *Venna* had appealed against conviction on the ground, *inter alia*, that the judge erred in law in directing the jury that the mental element of recklessness was enough, when coupled with the *actus reus* of physical contact, to constitute the offence of assault.

33 The Royal Court of Jersey has on a number of occasions taken the *mens rea* for assault to include recklessness and Crown Advocate Whelan in an article in October 2006 in the Jersey Law Review entitled Grave and Criminal Assault – The Landscape Past and Present had referred to recklessness in terms which made it clear that in his view recklessness *mens rea* was an ingredient of the Jersey offence of grave and criminal assault in an appropriate case.

34 Mr Baker submitted that the learned Commissioner was entitled to proceed as he did:-

> (i) on the basis that a rational common law system includes the criminalisation of the reckless application of force to another person unless the contrary is shown. He was entitled to regard English common law as an example in support of that proposition. He was shown no legal authority contradicting the existence of recklessness as *mens rea* in assault in Jersey. He was not entitled to suppose that this point of Jersey law proceeds on a basis of illogicality; and/or
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> (ii) on the basis that the nature of the summing-up in *Vaughan* (taken directly from the Archbold of the day so far as appropriate to the facts of the case before the jury) was evidence of common law principles shared with England in the matter of common assault, and that *Venna* was declaratory of shared common law principle.

Abuse of Process

35 Mr Baker, referring to the view of Dr Thomas, Q.C., submitted that academic articles do not have the force of law. The Courts in England and Wales have affirmed that it is not improper to bring charges of having caused personal injury in addition to dangerous driving charges where circumstances merit it.

36 Mr Baker further submitted that a sentence of two years or less being the maximum period of imprisonment which the Royal Court could have imposed for dangerous driving would not have addressed the factual gravamen of the case. The manner in which the Appellant had driven had caused very serious injury to three victims. The lives of the victims had been badly affected and so had the lives of their families. Proceeding against the appellant as charged was not an abuse of the court's process

THIS COURT'S CONCLUSIONS

Mens rea

37 The question at the heart of the first limb of the Appellant's grounds of appeal has been to establish whether, in a case when there has been an assault involving the application of unlawful force to another person, the offence is made out if the force was applied recklessly rather than deliberately.

38 In this case there was no dispute that the Appellant had, whilst drunk, been at the wheel of a car which had collided with three pedestrians causing to each of them very serious injuries.

39 There might be cases where a vehicle is driven in similar circumstances on the foreshore of a beach or on a private estate when arguments focussed on Road Traffic legislation would not be relevant but in this case the collision had taken place on a public highway.

The Reports of the Privy Council Commissioners

40 Our attention was drawn to the historic position. In the mid 19th century Privy Council Commissioners were appointed to inquire into the state of the criminal law in the Channel Islands. Separate inquiries were held in the Bailiwicks of Jersey and of Guernsey. The First Report of the Commissioners dealt with the position in Jersey (1847) and the Second Report with the position in Guernsey (1848).

41 The Commissioners in their First Report found that the laws of Jersey had become largely undiscoverable save in so far as they depended on the practice of the Royal Court. The Commissioners deemed it appropriate that a code of Jersey criminal law should be drawn

up defining offences and assigning punishments following English law.

42 The Commissioners stated *inter alia* that:-

> ***"The result of this examination into the present state of the Criminal Law of Jersey appears to us to be that, except in the case of those lighter offences, and the few more serious ones, which have been the subject of specific enactments, neither the definition of crimes nor their punishment rests upon any authority which can be deemed permanent for the future, or even certain for the present.*** The offences now punished are scarcely in a single instance classified according to the ancient law; nor have there been substituted for this, either direct legislative provisions, or new practical principles capable of being distinctly ascertained or possessing any assured stability".…….
>
> ***……."But, in the law of Jersey, the practice which innovates on the custom introduces in its stead nothing which is not equally liable to change. The evil is not mitigated, but aggravated, by a nominal reference to the works which are the supposed depositories of the ancient law. For, wherever the law, as there exhibited, differs from the law as practised, a reference to it amounts in effect only to the recognition of an additional disturbing force. The practice, which is now constantly prevalent, of referring to English legal works and precedents as authorities, seems indeed to have become almost the only practical mode of introducing fixed principles into the criminal law of the island."……***
>
> ***……"Another cause of the unfixed state of the law is to be found in the rarity of recorded precedents.*** The law now, as we have shewn, rests almost exclusively on the modern practice of the Royal Court; but the number of decisions is small; and these, as we have mentioned, are not reported so as to furnish adequate means of instruction in the principles recognised by the Court. But the grounds of the decision never appear otherwise than by a very brief and technical recital of the view which the Court takes; no detailed judgment, showing the reasoning which has led to this view, appears; nor are the arguments of counsel set forth. It is almost impossible that decisions so few in number, so slight reported, and not published at all, can afford a foundation for a fixed system of law."……
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> ***……"The English criminal law is abundant in reported decisions: but it is not reduced to the form of a code.*** It is, however, well defined by practice: and that practice is now constantly referred to in Jersey. It appears to us, therefore, that the States, if so inclined, might easily take a step which would at least place the criminal law of the island on as steady a foundation as that of England. … To avoid any doubt on the subject, the new code might recite that the language and provisions of the old Jersey criminal law had in many ***instances become obsolete, and that the more modern criminal law, so far as not introduced by express enactment, was not sufficiently defined for the purposes of***

justice, and that it therefore became advisable to lay down the law in language conformable, as far as possible, with the language used in the Courts of England."

"The criminal law of Jersey may easily be constructed on the language of the English criminal law, as now existing.

43 The Privy Council Commissioners in their Second Report reviewed the historical development of the criminal law in the Bailiwick of Guernsey and focussed on the several heads of crime and the punishments incident to them. Their conclusions were similar to those found in the First Report.

44 Perhaps of some relevance to the position in Jersey the Commissioners in the Guernsey Report said this:-

> ***"We recommend the adoption of a course, with regard to the criminal law of Guernsey, similar to that suggested in our First Report with regard to the criminal law of Jersey: that is to say, that a code be drawn up, embodying in as few words as possible the definitions of crime, and, so far as may be thought expedient, assigning punishments, in language which has already become familiar in the English law books.*** The effect of this will be to supply those who have to administer the Criminal Law in Guernsey with that which they cannot possibly obtain from their own Court, namely a copious body of practical precedents accessible through authorized publications."

45 The Commissioners were making a common recommendation for both Bailiwicks and the recommendation was to base the criminal law on English law. It is worthy of note that the 1st edition of Archbold Criminal Pleading, Evidence and Practice was published in 1822 and that the 10th edition had been published in 1846. *Archbold* was in its 14th edition (1859) at the time of the enactment of the Offences against the Person Act 1861 and neither Jersey nor Guernsey have seen fit to enact equivalent legislation to that Act in the Bailiwicks. Archbold was treated as an English law book of repute both before and after the two Reports.

46 Neither Bailiwick Island proceeded to follow the recommendation and adopt a code of criminal law and neither has England. The Reports of the Commissioners appear to have strengthened the trend to look to English law for offence definitions and guidance on punishment. In both Bailiwicks common assault and serious assaults remain common law offences. In the Bailiwick of Guernsey following the publication of the Second Report of the Commissioners the Courts look to the principles of English common law offences where there is no Guernsey statutory offence.

47 In Guernsey typical charges where a person has been killed or injured will range from murder, through manslaughter, causing grievous bodily harm with intent, unlawful

wounding and assault. In Guernsey *mens rea* recklessness is recognised in common law offences against the person.

48 It is unsurprising, notwithstanding the roots of Jersey law in Normandy that the Jersey Courts for over 160 years have adopted or closely followed English common law principles in criminal law.

49 This Court in *Foster v Attorney General* [1992] JLR 6 considered the common law of fraud in Jersey and extensively reviewed the way in which it had developed over the centuries noting how the use in Jersey of English categories and definitions had become increasingly widespread until cases falling within the scope of the English Larceny Act 1916 were prosecuted as they would have been in England. The Court emphasized that this practice did not supplant the common law of the Island or preclude an enlargement of the range of crimes punishable in Jersey as fraud, but took place within it.

50 In *Coward v Baddeley*, Bramwell J referred to *Hawkin's Pleas of the Crown*, vol 1, p 263 where it is said (emphasis provided):-

> ***"Any injury whatever, be it never so small, being actually done to the person of a man in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or*** *in any way tracking him in anger, or violently jostling him out of the way,* ***are batteries in the eyes of the law".***

51 Those adjectives or epithets found in the 36th edition of *Archbold* were to be adopted in substantially similar form by Deputy Bailiff Ereaut in his summing up to the jury at the trial of *Vaughan*.

52 It is perhaps no coincidence in light of what is contained in the First Report of the Commissioners that Deputy Bailiff Ereaut was largely adopting adjectives or epithets used by Bramwell J in relation to battery prior to the Offences against the Person Act 1861, in England and used in England in *Coward v Baddeley* not long after the Report of the Commissioners of the Privy Council.

53 Deputy Bailiff Ereaut's summing up to the jury focussed on what was necessary in that case. To have sought to employ an all encompassing definition of assault or grave and criminal assault would have been wholly inappropriate and unnecessarily confusing.

54 If it was the intention of Advocate Whelan in a work on sentencing principles to indicate that Deputy Bailiff Ereaut, in a summing up to a jury in a case not involving recklessness, had been setting out a precise and exhaustive formula to accommodate the necessary *mens rea* in all cases then we would part company with him. However, we are not of the view that he was. The answer lies in a 2006 article in the Jersey Law Review to which we were referred by Mr Baker. There can be no doubt that Crown Advocate Whelan was of the

view that recklessness *mens rea* was an ingredient of the Jersey offence of grave and criminal assault, to be relied upon in an appropriate case.

55 The adjectives or epithets to be used by a judge will depend on the particular circumstances of each case but what is important is that the judge brings home to the judges of fact the level of criminality that is required. Adjectives or epithets in modern usage are to be preferred. There is a danger in over elaboration.

56 Mr Baker submitted that Deputy Bailiff Tomes and Deputy Bailiff Birt, as he then was, two judges long versed in Jersey law, in the cases of *Attorney General v Annison 1988/25A* and *Attorney General v Bonhomme* [2001] JJ 146 had accepted the position that recklessness as *mens rea* for an assault was an accepted part of Jersey law, albeit obiter and expressed briefly. He accepted that in those cases references to recklessness might give this Court no more than measured and limited comfort.

57 In *Annison* Deputy Bailiff Tomes in an appeal against conviction in respect of a count of assault referred to the 36th edition of *Archbold*. It is evident that he recognised that *mens rea* recklessness can be relevant in a case of assault although it was not appropriate on the particular facts in *Annison*:-

> ***"In the instant case there was gross negligence but no hostility and therefore it could not be an assault.*** To seek to incorporate recklessness as an element of assault in this case is inappropriate. Recklessness is relevant only where the act done – intentionally or recklessly – causes another to apprehend immediate and unlawful violence. A person who recklessly applies physical force to the person of another commits an assault. But here there was no reckless application of physical force to the child."

58 In *Bonhomme* Deputy Bailiff Birt, as he then was, in sentencing following a guilty plea on a count of grave and criminal assault following an incident of unprovoked violence, fuelled by alcohol said this:-

> ***"The Crown accepts that you did not intend to push the victim through the window, but you were certainly reckless about it."***

59 As pointed out by Mr Hopwood Deputy Bailiff Birt was not focussing on the fundamental intent in the case. There was no doubt in that case that the Defendant intended violence but he was reckless only as to how he caused it.

60 Given the paucity of cases in a small jurisdiction it is not surprising that the matter of recklessness rather than intent in assault cases has not been argued so as to form the ratio decidendi of a Royal Court judgment.

61 Mr Hopwood submitted (para 2.13 of the skeleton argument and in oral argument) that the judgment in *Venna* in 1976 represented a significant change in English law that was never imported into Jersey law. James LJ, who delivered the judgment in the Court of Appeal stated as follows:-

> ***"On the evidence of the appellant himself one would have thought that the inescapable inference was that the appellant intended to make physical contact with whoever might try and restrain him.*** Be that as it may, in the light of the direction given, the verdict may have been arrived at on the basis of "recklessness"."
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> ***Mr. Woods cited*** *Ackroyd v Barett* (1894) 11 T.L.R. 115 ***in support of his argument that recklessness, which falls short of intention, is not enough to support a charge of battery and argued that, there being no authority to the contrary, it is now too late to extend the law by a decision of the courts and that any extension must be by the decision of Parliament.***
>
> ***Mr Woods sought support from the distinction between the offences which are assaults and offences which by statute include the element contained in the word "maliciously", e.g. unlawful and malicious wounding contrary to section 20 of the Offences Against the Person Act 1861 in which recklessness will suffice to support the charge.*** See *Cunningham* (1957) 41 Cr.App.R. 155; [1957] 2 Q.B. 396. ***In so far as the editors of text books commit themselves to an opinion on this branch of the law, they are favourable to the view that recklessness is or should logically be sufficient to support the charge of assault or battery.*** See Glanville Williams Criminal Law: The General Part (2nd ed.), para. 27, p.65; Kenny Criminal Law (19th ed.), (1966) para. 164, p.218; Russell on Crime (12th ed.), p.656 and Smith and Hogan (3rd ed.) p.286.
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> ***We think that the decision in*** *Ackroyd v Barett* ***(supra) is explicable on the basis that the facts of the case did not support a finding of recklessness.*** The case was not argued for both sides. The case of *Bradshaw* (1878) 14 Cox C.C. 83 ***can be read as supporting the view that unlawful physical force applied recklessly constitutes a criminal assault.*** In our view the element of mens rea in the offence of battery is satisfied by proof that the defendant intentionally or recklessly applied force to the person of another. If it were otherwise, the strange consequence would be that an offence of unlawful wounding contrary to section 20 of the Offences against the Person Act 1861, could be established by proof that the defendant wounded the victim either intentionally or recklessly but, if the victim's skin was not broken and the offence as therefore laid as an assault occasioning actual bodily harm contrary to section 47 of the Act, it would be necessary to prove that the physical force was intentionally applied.
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> ***We see no reason in logic or in law why a person who recklessly applies physical force to the person of another should be outside the criminal law of assault.*** In many cases the dividing line between intention and recklessness

is barely distinguishable. This is such a case."

62 Courts will be required to clarify the criminal law but in so doing such clarification is not usurping the role of the legislature.

63 At para 14 of his judgment the learned Commissioner said this:-

> ***"Advocate Hopwood also seeks to pray in aid the absence of any reference to reckless assaults in Jersey cases.*** The Crown might equally point to the absence of any reference to Jersey law having diverged from English law in this area. In truth, in a small jurisdiction, it should not be wondered at that a particular situation has not come before the Courts in a way which would produce authority."

The learned Commissioner had referred to Crown Advocate Whelan's article Grave and Criminal Assault – The Landscape Past and Present (2006) in which the author had reviewed the English law and Jersey law and the differences between them. The author referred to the Vaughan direction in Deputy Bailiff Ereaut's summing up. He observed that the judge's task was to condense principle into the most acceptable form for use, on a particular set of facts.

We concur with the view expressed by the learned Commissioner that the Court in *Venna* was not seeking to change the law but to express the existing position. We concur with his conclusion that there is no evidence that the law of Jersey relating to assault has taken a different course.

64 We too, echo the words of Lord Justice James in *Venna*. We can see no reason in logic or in law why a person who recklessly applies physical force to another should be outside the criminal law of assault. Recklessness is not to be equated with negligence. Recklessness is not negligence writ large. The conclusion that recklessness, which has a subjective element, forms part of the law of Jersey in assault cases has both logic and moral force.

65 Clearly, different considerations might arise if the relevant rule of English common law were unduly technical or anomalous, or if it arose from considerations rooted in English experience which did not have the same relevance in Jersey. In fact, the treatment of recklessness as morally and legally equivalent to intention is a general feature of the English law of tort and of aspects of the English law of trusts, as well as of the English criminal law. Provided that it is borne in mind that recklessness is a subjective state of mind and not an objective standard of conduct, this is a rational response to a problem which is by no means peculiar to the law of criminal assault. To discard recklessness as an element of the offence of grave and criminal assault or apprehended assault would be to introduce into this area of the Jersey criminal law distinctions which are practically difficult to draw, arbitrary in their effects, and anomalous in the broader scheme of the law.

66 We are of the view that in Jersey law the element of *mens rea* in the offences of assault

and grave and criminal assault is satisfied by proof that the defendant intentionally or recklessly applied force to the person of another.

Abuse of Process

67 The injuries sustained by the three pedestrians were both grave and multiple and were caused as a result of the Appellant's recklessness in her consumption of alcohol and then recklessness while driving her car on a public road.

68 It is unsurprising that the Attorney General concluded that the Appellant should face counts which would enable the Royal Court to impose a sentence in excess of two years.

69 Although there is no appeal against any of the sentences imposed by the Royal Court we would not have considered a sentence of two years or less to be appropriate for each of the counts of grave and criminal assault. The sentences of 2 years and 9 months were appropriate in this case.

70 The learned Commissioner noted that in England the Courts had not disapproved of the practice followed by the Attorney General in this case. In *R v Stranney* (2007) EWCA Crown 2847 on which Mr Baker placed reliance, the judgments in *R v Bain* [2005] 2 Cr. App. R. 319 and *R v Bridle* [2002] EWCA Crown 908 were considered. The English practice was affirmed in *R v Stranney*.

71 Having considered a note by Dr Thomas which criticised the practice in England, which the Attorney General in this case had deemed appropriate, the learned Commissioner stressed that it is important to consider the facts of the case and the maximum sentence which would be available to the Court.

72 It is to be recollected that sentencing is an art rather than a science and a sentence will mark the seriousness of the defendant's conduct.

73 Arguments advanced by Dr Thomas and echoed by the Appellant do not address the fact that a legislature can abolish any offence. The offence available to prosecutors in England and Wales and to the Attorney General in Jersey has not been abolished, nor modified so as to be available to a prosecutor only if an offence is committed otherwise than by use of a motor vehicle on a public road.

74 The learned Commissioner on the subject of the appropriateness of bringing a charge of grave and criminal assault and the sentencing discretion of the Court said this at para 819 of his judgment:-

"…. it is not an abuse of process to charge these offences, I should make

clear my strong view that it would only be in exceptional cases where this course will be the right one. Normally, even where dangerous driving has led to serious injury, the proper charge will be under the Road Traffic legislation. It should also be borne in mind that, although the consequences of the driving are of course relevant, it is the seriousness of the dangerous driving that primarily governs the gravity of this offence. However the present case and its facts are such an exceptional case and I do not criticise the Prosecution for charging it as they have."

75 We concur with the learned Commissioner's conclusion and his observations. The prosecution has a wide discretion in deciding what offences to charge, and the relevant maximum sentence will often be a relevant consideration in the exercise of that discretion. The decision which was made in the present case was well within the limits. But we should emphasise that we are not saying that the prosecution can do whatever it likes in this area. There will be some statutory offences which overlap with a common law offence to such a degree that the legislature may fairly be said to have determined as a matter of policy what the sentence is to be for conduct of the relevant kind, whether it is charged under statute or at common law. Even in such cases, the better course will usually be for the courts to be guided by the statute in sentencing for the common law offence, rather than to treat the charge as an abuse of process. But we are a long way from that area in the present case. The essence of the offence of dangerous driving is the manner in which the vehicle was driven. The fact that some one was injured is an aggravating factor and may provide some evidence of the dangerous character of the driving. But it is not an element of the offence. On the other hand, injury to the victim is an element of the offence of grave and criminal assault. Indeed it is of its essence. For that reason, it is not possible to impute to the legislature, when they created a general offence of dangerous driving punishable by up to two years' imprisonment, an intention to regulate the appropriate sentence for every injury, however grave and however culpable, that may be brought about by the dangerous use of a motor vehicle. If we were to accept that proposition, we would be forced to the unpalatable conclusion that it would be an abuse of process to charge grave and criminal assault, even in a case where the accused deliberately drove at the victim intending to injure him.

76 The Attorney General cannot be criticised in principle or in practice for proceeding with counts of grave and criminal assault in this case as well as a count of dangerous driving.

CONCLUSION

77 It follows that we would dismiss the appeal and uphold the rulings of the learned Commissioner on the two points of law.

78 We are conscious that we have not dealt with every nuance of Mr Hopwood's lengthy written submissions and oral arguments, but we believe that we have dealt with the principal matters on which he relied and with all the central issues arising for decision in

this appeal. We have in particular focussed on what we have concluded to be the legal position in Jersey on recklessness *mens rea* in assault and grave and criminal assault cases and not what it might be. We have not concerned ourselves with what might be the advantages or disadvantages of Jersey adopting English law principles in a law system with its roots in the customary law of Normandy but we consider that the First Report of the Commissioners is instructive as to the position in 1847 and that the criminal law lessons implicit in the Report should not be overlooked or forgotten. Courts will be required to clarify the criminal law but in so doing such clarification is not usurping the role of the legislature.

79 We would add a more general observation about the value of English case law as persuasive authority in Jersey. There are areas, such as the law of real property or inheritance laws where Jersey has developed a distinctive body of legal principle, derived from sources (generally Norman customary law) which are quite independent of the English common law. In these areas, it is generally neither necessary nor useful to refer to English cases. But in the criminal law and large areas of the civil law, the problems which the courts encounter are of relatively modern origin, and are much the same as those with which the English courts grapple daily. Since 1847, the court system in Jersey has become more elaborate and the volume of civil and criminal litigation has grown exponentially. But the Commissioners' observations about the advantages of resort to English law are as pertinent today as they were then. In a relatively small jurisdiction, there will be many issues which arise too rarely for the courts to have generated a coherent body of indigenous legal principle. In the interests of legal certainty, it is undesirable for the courts to reinvent the legal wheel each time that an issue of principle arises which is not covered by existing Jersey authority, when there is a substantial and coherent body of case law available from a jurisdiction with which Jersey has close historical links and with which, on most issues, it shares common social and moral values and a common legal culture and from which it derives most of its criminal statutes.