Legal Aid
NEW SOUTH WALES

Alternative Verdicts

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The Prosecution must prove each element of an offence beyond reasonable doubt. Where a trier of fact is not satisfied that one or more elements is proved beyond reasonable doubt, that will usually end the matter in an acquittal. However, in some circumstances, usually in an aggravated form of an offence, where one or more elements of the principal charge is not proved, but the elements that are proved constitute a lesser offence, it is possible for the trier of fact to convict of that offence. These are alternative verdicts.

Alternative verdicts are governed in some instances by common law, in other instances by statute. Alternative counts are often added to an indictment by the Crown – see section 23(3) **Criminal Procedure Act 1986**.

Common law

The common law position is set out in *Cameron* (1983) 8 A Crim R 466, in which the NSW Court of Criminal Appeal adopted this formulation from an old English case: *"The test is to see whether it is a necessary step towards establishing the major offence to prove the commission of the lesser offence: in other words, is the lesser offence an essential ingredient of the major one?"* – at 468. At common law an alternative verdict may be available where the alternative or lesser charge is included in the principle charge, such as in aggravated versions of offences. The lesser charge must be a step in the proof of the principle charge, so that the elements of the lesser charge must be proved as a step in the proof of all the elements of the principle charge. If the lesser charge is proved, but the extended elements that comprise the principle charge are not, then an alternative verdict to the lesser charge may be available. In *James v The Queen* [2014] HCA 6, the High Court referred to the lesser charge as the "included" charge; that is, that it is included in the proof of the principle charge.

There is some suggestion that where the *Crimes Act 1900* provides scope for a statutory alternative for a 'particular class of offence', then, by implication, that excludes the availability of other alternatives, such as common law alternatives: *Cameron* and later cited in *R v Storey* (1985) 19 A Crim R 275.

Common law alternatives: what is and what isn't?

A simple common law example would be a prosecution of a charge of A*ssault occasioning actual bodily harm*. The trier of fact is not satisfied that the element of "actual bodily harm" is proved beyond reasonable doubt. But all the elements of an *Assault* are proved. The trier of fact is entitled to acquit the accused of the A*ssault occasioning actual bodily harm charge* and convict the accused of *Assault*.

A classic common law example is *Murder*. The trial judge must instruct the jury of the alternative verdict of *Manslaughter* where it is open on the evidence, and regardless of the attitude of the parties – *James v The Queen* [2014] HCA 6 at [19] – [23].

The question is then, in what circumstances is an alternative **not** available at common law?

In *Cameron*, the accused was charged with an offence under the now repealed s61C *Crimes Act 1900*, being 'Sexual assault category 2 – inflicting actual bodily harm etc with intent to have sexual intercourse.' At trial, the accused was found not guilty, but guilty on an alternative of 'assault occasioning actual bodily harm'.

On appeal, the Criminal Court of appeal quashed the conviction. The CCA found that, notwithstanding that there was sufficient evidence to support the alternative verdict, the verdict was not available as an alternative to the offence charged.

The Court determined that it was not because the indictment for the sexual assault charge provided:

> *"… for that he … did maliciously inflict actual bodily harm …. With intent to have sexual intercourse…"*

In contrast, the elements of an AOABH offence are:

1. an assault and
2. actual bodily harm to be occasioned.

The CCA noted that there was a substantial body of authority to differentiate between an 'infliction of harm' and an 'assault', which has a particular legal definition.

Statutory alternatives

There are notable offences where the statute that creates the offence also creates a statutory alternative.

Examples in the *Crimes Act 1900* are section 33(3), section 61Q, section 86(4), section 97(3) and section 193E.

Example of a statutory alternative: sections 33(1) and 35 Crimes Act 1900

Section 33(1) creates the offence of *Wound or cause grievous bodily harm with intent to cause grievous bodily harm*. The maximum penalty is 25 years imprisonment. It carries a standard non parole period (SNPP) of 7 years.

Section 33(3) creates an alternative verdict by providing for the circumstances where "the jury is not satisfied that the offence is proven but is satisfied that the person has committed an offence against section 35," in which case "the jury may acquit the person of the offence charged and find the person guilty of an offence against section 35".

Section 35 creates the offence of *Reckless cause grievous bodily harm or wounding*. There are various permutations. Section 35(1) has the elements of "cause grievous bodily harm, in company", and carries 14 years. Section 35(2) has the element of "cause grievous bodily harm" and carries 10 years. Section 35(3) has the elements of "wound, in company", and carries 10 years. Section 35(4) is a simple offence of "reckless wounding" – that is, not cause grievous bodily harm, and not in company – and carries 7 years.

The obvious difference between an offence under section 33 and an offence under section 35 is the element of "with intent". The difference to the accused is profound: the maximum penalties for any of the offences under section 35 are substantially less than the maximum penalty for an offence under section 33.

Crown prosecutors will often plead the statutory alternative count on the indictment, immediately after the principal count, and with the specific words "in the alternative" preceding the count. It is much easier if they do because the jury has the specific words "in the alternative" and the specific count laid out before them in the indictment, and they can see the different elements. If the Crown does not plead the indictment in this way, it becomes a little messier, because in many circumstances the jury should be made aware of the statutory alternative. In those circumstances, the trial judge has a duty to direct the jury of the availability of the alternative verdict. But this duty is limited by the test of "what justice to the accused requires" – *James v The Queen* [2014] HCA 6 at [34].

The judge will direct the jury about the alternative verdict, if it is not pleaded on the indictment, in circumstances where the Crown or the Defence requests it, or where the Crown opens or closes on it. Difficulties arise when no one requests it. It is a difficult position because there are cases where it is considered that it may be jeopardising an accused's right of an outright acquittal if the possibility of an alternative verdict is proffered to the jury. *James v The Queen* makes it clear that it is the judge's decision, and the fact that counsel has made a forensic choice not to request an alternative verdict direction is not determinative – [38]. What is determinative is the judge's duty to ensure a fair trial – [38].

In a recent trial in which one of the writers appeared, both the Crown and the Defence requested the trial judge to give the jury an alternative verdict direction, even though, in the circumstances of the trial, it was an all-or-nothing

defence. The single charge on the indictment was *Wound with intent to inflict grievous bodily harm*, contrary to section 33(1). No alternative count was pleaded.

The defence was, "It wasn't me, I did not stab the complainant, I wasn't even present at the place where the complainant was stabbed". The Crown opened on the alternative verdict and requested the direction because the evidence of intent was not strong – two stab wounds that were serious but not particularly so, and one relatively minor stab wound, all to the stomach of the complainant. No words were spoken by the accused to assert his intent. The Crown relied only on the conduct of the accused to establish intent. If the jury were not satisfied of the element of intent, and no alternative verdict of *Reckless wounding* was offered, the accused may have been outright acquitted. This was not an outcome that the Crown relished.

The Defence supported the Crown in asking for the alternative verdict direction because the evidence that the accused stabbed the complainant was extremely strong – almost immediate complaint, naming the accused, whom he knew, as the person who stabbed him. While the defence was all-or-nothing, it was to some advantage of the accused that the alternative verdict be considered by the jury because they were most unlikely to acquit him of a section 35(4) *Reckless wounding*, but may have acquitted him of the section 33(1) offence because they were not satisfied as to intent. As noted above, the maximum penalties for section 35(4) and section 33(1) are 7 years and 25 years respectively. The section 33(1) offence carries a SNPP of 7 years. However, of course, as the defence was, "it wasn't me", the jury was not addressed on the issue of intent by the defence. Such an address, on the alternative verdict, would have undermined the defence of "it wasn't me".

Alternative verdicts and charge bargaining

An available alternative verdict may be very helpful in charge bargaining with the Crown, particularly over offences that carry an element of specific intent – like section 33(1) referred to above. Where the evidence of intent is weak or equivocal, or may be subject to the *Intoxication* provisions under Part 11A of the Crimes Act 1900, the unlikelihood of a conviction for a charge that includes an element of intent may be argued in case conferences with the Crown to persuade them to abandon the more serious charge and proceed with the less serious one.

Pleading guilty at arraignment to a charge not on the indictment

Section 153(1) *Criminal Procedure Act 1986* provides that an accused may enter a plea of guilty at arraignment to a charge that does not appear on the indictment. The accused must plead Not Guilty to the charge on the indictment, but Guilty of the other offence. It is supposed that the "other offence" is one upon which the accused can be lawfully convicted.

An example of that course is where the accused admits that they caused grievous bodily harm to the victim but denies that their act was *intended* to cause grievous bodily harm. In other words, a plea of guilty to a section 35(2) offence to an indictment that carries only a section 33(1) charge.

Something like this happened in a trial one of the writers had a few years ago. The charge arose out of a confrontation between two groups of teenagers in a laneway. During the confrontation, the accused's friend and the victim got into a fist fight.

When the victim appeared to be getting the advantage of the accused's friend, the accused hit the victim over the head with a skateboard. The blow caused serious brain damage to the victim, that ultimately, and fortunately, resolved itself with medical treatment over time. The injury was, without any doubt, grievous bodily harm. The accused told the police in the ERISP that his intention at the time he struck the victim was to stop him punching his mate. He was charged with *Cause grievous bodily harm with intent to cause grievous bodily harm*, per section 33(1).

In pre-committal and then pre-trial negotiations we offered to plead guilty to the section 35(2) offence of *Recklessly cause grievous bodily harm*, on the basis that the evidence did not establish the relevant element of intent for a section 33(1) offence. The Crown would not accept the plea in full satisfaction. They also refused to put the alternative count on the indictment. At arraignment before the jury panel, the client pleaded not guilty to the one count on the indictment. In the defence opening address, the jury was told that the defence would do something unusual for a defence lawyer and ask them to convict the accused. However, they would be asked to convict him of the offence he committed, which was not the offence on the indictment. The Defence told the jury that the judge would give them directions about an alternative verdict at the end of the trial. That happened, and the accused was acquitted of the count on the indictment and convicted of the statutory alternative as the judge directed was open to them to do. The judge, we might add, was highly critical of the Crown's approach to this trial, in refusing to put the alternative count on the indictment, and so making the trial more complex and the directions more complex than they needed to be. Of course, as we had made the offer to plead to the 35(2) count since before committal, our client was given a 25% discount from on his sentence.

Directions on alternative verdict

A jury direction on the availability of an alternative verdict will set out the elements of the alternative charge and basis in the evidence for the alternative verdict. One thing that juries are specifically warned about is that they are "not to regard the availability of an alternative count as an invitation to compromise your verdict" – Bench Book 2 - 210. They are warned that they are not to use the alternative count as a way to resolve the differences between those who want to convict of the accused of the principle charge and those who do not.

The statutory alternative of "attempt": s162 Criminal Procedure Act 1986 (NSW)

Other jurisdictions, such as Victoria, have embraced the common law test into their criminal procedure legislation – see for example section 239 Criminal Procedure Act 2009 (Vic). In NSW there is no such statutory adoption of the common law position, other than for "attempt". Section 162 of the NSW act permits a jury that is not satisfied that the accused has committed the offence on the indictment to convict the accused of "(a) an attempt to commit the offence, or (b) an assault with intent to commit the offence."

Frankly, we have never seen or heard of a jury being directed of the availability of this alternative verdict, let alone convicting on it.