CITATION:	*Police v Allan James Robinson* [2008] NTMC 004
PARTIES:	ERICA SIMS v ALLAN JAMES ROBINSON
TITLE OF COURT:	COURT OF SUMMARY JURISDICTION
JURISDICTION:	Criminal
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CRIMINAL LAW – DEFENCE OF ACCIDENT – NEED FOR ACCIDENT TO BE OPEN ON THE EVIDENCE – THE EVIDENTIAL PRESUMPTION CREATED BY s7 OF THE CRIMINAL CODE (NT) – THE RELEVANCE OF INTOXICATION TO THE DEFENCE OF ACCIDENT – CONSENT AS A DEFENCE – THE DEFENCE OF DEFENSIVE CONDUCT

Criminal Code (NT), ss 7, 23, 29, 31, 32
Criminal Code (QLD), s 23

Kaporonovski (1973) 133 CLR 209 Followed
Duffy (1980) 3 A CRIM R 1 Followed
Falconer (1990) 65 ALJR 20 Followed
Breedon [1993] 3 NTLR 119 Followed
McMaster [1994] 4 NTLR 92 Followed
Ryan (1967) 121 CLR 205 Applied
Hubert (1993) 67 A Crim R 181 Applied
Skerritt (2001) 119 A CRIM R 510 Applied
Charlie [1998] 7 NTLR 152 Followed
Pregelj v Manison (1987) 51 NTR 1 Applied
Sullivan (1981) 6 A CRIM R 259 Followed
O'Connor (1980) 146 CLR 64 Applied
Carroll v Lergesner (1991) 1 Qd R 206 Applied

R v Viro (1978) 141 CLR 88 Applied
R v Stokes and Difford (1990) 51 A Crim R 25 Applied
Olasiuk (1973) 6 SASR 225 Applied

REPRESENTATION:

Counsel:

Prosecutor:	Mr T Smith
Defendant:	Mr T Berkley

Judgment category classification:	A
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IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20602063

[2008] NTMC 004

BETWEEN:

ERICA ANN SIMS
Plaintiff

AND:

ALLAN JAMES ROBINSON
Defendant

REASONS FOR DECISION

(Delivered 23 January 2008)

Dr John Lowndes SM:

THE CHARGE AND THE ISSUES

1. The defendant pleaded not guilty to the following charge:

> On 21 January 2006 at Darwin in the Northern Territory of Australia unlawfully assaulted Lachlan Griffen

and that the said unlawful assault involved the following circumstance of aggravation, namely:

> That the said Lachlan Griffen suffered bodily harm contrary to s 188(2) of the Criminal Code.

2. The matter was heard on 27 and 28 November 2007. The hearing gave rise to a number of issues relating to the elements of the offence and defences of accident, consent, self defence and intoxication.

3. The matter was adjourned to enable the Court to receive written submissions with respect to those issues. Having read and considered those submissions, I deal with the issues as follows.

THE PROHIBITED "ACT" AND THE MENTAL ELEMENTS OF THE OFFENCE

4. Sections 23 and 31 are the two key general criminal responsibility provisions of the Criminal Code.

5. Section 23 provides:

> A person is not guilty of an offence if any act, omission or event constituting that offence done, made or caused by him was authorised, justified or excused.

6. Section 31 provides:

> (1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.
>
> (2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.

7. The starting point is the identification of the prohibited or punishable "act" for the purposes of those two provisions, and hence for the purposes of determining the criminal responsibility of the defendant in the present case.

8. Consistent with the interpretation of "act" in a long line of authority, the prohibited "act" in the present case is the act of striking the complainant's face with a glass, without his consent. That conclusion is supported in particular by *Kaporonovski* (1973) 133 CLR 209 and *Duffy* (1980) 3 A Crim R 1. It is further supported by *Falconer* (1990) 65 ALJR 20 and *Breedon* [1993] 3 NTLR 119.

9. Therefore, the prosecution must prove that the act done by the defendant - the striking of the victim with the glass – was either intended or foreseen by him as a possible consequence of his conduct (s 31(1), and if foreseen an ordinarily person similarly circumstanced and having such foresight, would not have proceeded with that conduct (s 31(2)).[1]

10. As the absence of consent also forms part of the prohibited "act" the prosecution must, as pointed out by Gray AJ in *McMaster* [1994] 4 NTLR 92 at 99, prove either intention or foresight in relation to that physical element:

> In relating s 31(1) to the present case it must be remembered that the assault which constitutes one of the elements of the offence charged is defined in s 187(a) of the Code as "the direct or indirect application of force to a person without his consent…
>
> In my opinion, s 31(1) produced the result that the prosecution must prove that it was the intention of the accused to assault the victim without his or her consent. This involves the proposition that the accused knew that the victim was not consenting or knew that he or she may not be consenting and proceeded regardless.[2]

11. In *McMaster* (supra at 99) Gray AJ made the observation that s 31(1) was "doubtless intended to give expression to the common law principle that a person is not criminally liable for unintended conduct". His Honour went on to say:

> In *Ryan v The Queen* (1967) 121 CLR 205 at 216, Barwick CJ said:
>
> > In my opinion, the authorities establish, and it is consonant with principle, that an accused is not guilty of a crime if the deed which would constitute it was not done in the exercise of his will to act.
>
> See also R v O'Connor (1980) 146 CLR 64.
>
> Section 23 of the Queensland Criminal Code 1982 (the equivalent of s 31) provides that "a person is not criminally responsible for an act or omission which occurs independently of the exercise of the will". I take this to be another form of expression of the same principle.

[1] An "act" which is done with the requisite foresight and not excused by s 31(2) is, in effect, a reckless "act": see *R v Venna* [1976] QB 421.
[2] The other members of the Court of Criminal Appeal agreed with this statement of the law.

12. His Honour's observations point to the similarity between the first limb of s 23 of the Queensland Criminal Code and s 31(1) of the Territory Code,[3] and also to the similarity between both provisions and the common law concept of "the exercise of the will".

13. The phrase "occurs independently of the exercise of the will", as appears in s 23 of the Criminal Code (Qld), is a compendious term that "comprehends the doctrines of voluntariness, intention and recklessness".[4]

14. In *Breedon* [1993] 3 NTLR 119 at 130 the Court of Criminal Appeal was of the view that the question of the voluntariness or otherwise of an offender's act is addressed by s 31(1) of the Code.[5] The other mental states – intention and recklessness – are explicitly dealt with in s 31(1) and (2).[6]

15. It was argued by counsel for the defendant that the decision in *Duffy* (supra), which dealt with a factual situation very similar to the present case and which involved the application of the first limb of s 23 of the Queensland Criminal Code, had application to the present case.

16. The facts in Duffy were that the appellant had swung his right hand in which he was holding a partly filled glass of beer into the left side of the victim's face, causing four cuts with the glass which had shattered. At trial the appellant relied upon self defence, but it was also argued that the appellant might have struck an injurious blow without intending to and that the blow might have been an accident; in other words, he might have acted suddenly under the circumstances without having time to consider whether he was

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[3] Similarly, in *Pregelj v Manison* (1987) 51 NTR 1 at 13 Nader J remarked upon the striking similarity between s 23 of the Criminal Code (Qld) and s 31 of the Criminal Code (NT).
[4] Howard *Australian Criminal Law* 2nd ed p 398.
[5] Presumably, the requirement of voluntariness is either subsumed under the element of "intention" or is implicit in the notion of an "act", that is to say, an "act" must be voluntary in order to qualify as an "act". The Supreme Court of the Northern Territory has on occasions suggested that the word "act" must be understood as meaning "voluntary act": see Gray "Criminal Responsibility Under Section 31 of the Criminal Code (NT) (2002) 26 Crim LJ 175 at 186. See *Sandby v The Queen* (unreported NT Court of Criminal Appeal 19 October 1993, p 7 cited by Gray.
[6] The foresight provisions of s 31(1) and (2) have been described as embracing subjective recklessness together with the objective aspect of the doctrine of recklessness – objectively unreasonable or unjustifiable risk taking: *The Laws of Australia* Vol 9 [9.1.2510].

holding a glass. It was argued that when he had put his hand up he did not know that he was holding the glass. The trial judge directed the jury that it was no defence that the appellant did not realise that he had a glass in his hand when he hit the victim. The appellant was found guilty, whereupon he appealed against conviction on a number of grounds.

17. One of the grounds was as follows:

> The learned judge had erred in directing the jury that it was no defence that the accused did not realise that he had a glass in his hand when he hit the person named in the indictment.
>
> Particulars
>
> If the evidence entitled the jury to find that the accused was or may have been unaware that a glass was in his hand when he struck the blow in question, an issue then arises as to whether the striking of the glass in the face of the person…was an "unwilled act" within the meaning of s 23 of the Criminal Code.[7]

18. Dealing with that ground of appeal Wallace J said:

> For the appellant to be criminally responsible for the act of striking Ramsay in the face it was necessary for the jury to find that the appellant knew that he held a beer glass in his hand at the time he struck Ramsay. There was ample evidence upon which such a finding could be found but equally evidence sufficient to sustain a doubt also existed. The jury was not informed that the appellant would not be criminally responsible for an act or omission which occurred independently of the exercise of the will and, indeed, the absence of such a direction is compounded by what his Honour had to say with respect to whether the accused did not realise he had a glass in his hand when he struck at Ramsay, for in those circumstances the jury was advised that such a mental condition, ie of knowledge – not of intent, would afford no defence. In my opinion, such a direction was wrong (see Barwick CJ in *Ryan* (1967) 121 CLR 205 at 207). There has been a miscarriage of justice for it is not possible to say that the appellant has not lost a chance fairly open to him of being acquitted…[8]

[7] [1980] 3 A Crim R 1 at 4.
[8] [1980] 3 A Crim R 1 at 4.

19. In dealing with the ground of appeal Jones J said:

> In his evidence and in his record of interview, the appellant had maintained consistently that he did not know whether he had had a glass in his hand or not, and his counsel had specifically raised that issue. That made it imperative for the trial judge to put that issue squarely to the jury, and to do that he had to explain to them fully and adequately the effect of s 23…
>
> In *Kaporonovski's* case, Kaporonovski had grabbed the victim's hand which was holding a glass and had jabbed the glass, thus held, into the victim's eye. This was held to be the relevant "act"; the consequence of the "act" was the "event" of grievous bodily harm. Not surprisingly, that was held to be not an "event which occurred by accident". There was no issue, in that case, of whether Kapronovski knew that he was jabbing a glass into his victim's face; that was the whole purpose of the "act". In the present case there was an entirely different position. There was an issue as to whether Duffy knew that he was striking the victim with a glass; Duffy maintained and consistently maintained that he did not know. Obviously the act of striking a man's face with a fist not holding a glass is a fundamentally different "act" from that of striking such a blow with a fist holding a glass. The latter "act", if the striker did not know that he was holding a glass, is an act that "occurs independently of the exercise of the will". It was therefore of fundamental importance that the trial judge should deal fully and adequately with the provisions of s 23 (the first limb, for the second limb, accident, obviously did not apply); and that, referring to the evidence in detail, he should put squarely to the jury that they must determine whether the appellant did or did not know that he was holding the glass when he struck the blow, and that if they were not satisfied beyond a reasonable doubt that he did not know, they could apply the section.[9]

20. *Duffy* is authority for the proposition that awareness of the circumstances existing at the time of an act – and forming part of the act – is relevant to whether the act occurred independently of the exercise of the will under the first limb of s 23 of the Queensland Criminal Code.

21. *Duffy* does not stand alone in introducing a dimension of awareness of circumstances into the notion of voluntariness or will. Although the High Court in *Falconer* (1990) 65 ALJR 20 equated the requirement for an act to be willed (under s 23 of the Criminal Code(Qld)) with the common law requirement of voluntariness, Mason CJ, Brennan and McHugh JJ further

[9] [1980] 3 A Crim R 1 at 11.

considered the relationship between voluntariness (or will) and awareness, and ultimately extended the notion of voluntariness beyond its traditional boundaries by introducing a dimension of knowledge:

> Mrs Falconer is responsible for discharging the gun if that act were "willed", that is, if she discharged the gun "of [her] own free will and by decision"…or by the making of a choice to do"… The notion of "will" imports a consciousness in the actor of the nature of the act and a choice to do an act of that nature…
>
> The requirement of a willed act substantially, if not precisely, corresponds with the common law requirement that an offender's act be done with volition, or voluntarily… The requirement of a willed act imports no intention or desire to effect a result by the doing of an act, but merely a choice, consciously made, to do an act of the kind done. In this case, a choice to discharge the gun.[10]

22. It is acknowledged that neither *Duffy* nor *Falconer* are binding on the Courts of the Northern Territory. However, in the absence of binding authority in the Northern Territory - and given the substantial similarity between s 23 of the Queensland Criminal Code and s 31(1) of the Territory Code, as well as the tendency in recent times for Courts to adopt a consistent approach to interpreting general provisions for criminal responsibility in the Code jurisdictions - the analysis of the notion of will undertaken in those two cases is so persuasive that this court adopts that analysis for the purposes of determining the criminal responsibility of the defendant in the present case.

23. The case for applying *Duffy* and *Falconer* to s 31(1) of the Code is made even stronger by the fact that that section prescribes intention and recklessness as the requisite mental states for criminal responsibility.[11] Consciousness on the part of an actor as to the nature of an "act" and a

[10] (1990) 65 ALJR 20 at 23.

[11] It is arguable that apart from addressing the requirement for voluntariness, the element of "intention" in s 31(1) also extends to the state of mind which is referred to, at common law, as general or basic intent – a mental state which is applicable to "acts". The prescription, in s 31(1), of "foresight" (subjective recklessness) as an alternative culpable state of mind to "intention" strongly indicates that the word "intend" was meant to do more than merely embrace the requirement of voluntariness. Furthermore, the fact that the Supreme Court has on occasions suggested, in the context of s154 cases, that the word "act" must be understood as meaning "voluntary act" substantially supports the view that the concept of "intention" in s 31(1) embraces more than the notion of voluntariness, particularly as s 31 does not apply to offences contrary to s 154 of the Code.

choice to do an "act" of that nature appears to be equally, if not more, relevant to the question of intention. Intention can involve a dimension of knowledge, as pointed out by Brennan J in *He Kaw Teh*:

> Intent, in one form, connotes a decision to bring about a situation so far as it is possible to do so - to bring about an act of a particular kind or a particular result. Such a decision implies a desire or wish to do such an act or to bring about such a result. Thus when A strikes B (the "act") having decided to or desiring or wishing to strike him, it can be said that he intends to strike B. Intent, in another form, connotes knowledge. This appears more clearly if we divide an action, somewhat artificially, into a mere movement and the circumstances that are an integral part of the action and which give it its character. When A strikes B, his action can be divided into A's movement of his fist and B's presence in the path of A's movement. Although A's movement may be voluntary, he is not said to strike B intentionally unless he knows that B (or someone else) is in the path of his moving fist. If mens rea were imported into an offence defined as striking another - a definition that does not include a result - two states of mind would normally be involved: voluntariness of movement and an intention to strike another - and intention is, for all practical purposes, established by knowledge that another person is, or is likely to be, in the path of the movement. If the definition is extended to include a result - causing bodily harm - the statute may prescribe a further mental element: ordinarily a specific or special intent to cause bodily harm…
>
> Voluntariness and general intent are distinct mental states. General intent and specific intent are also distinct mental states. General or basic intent relates to the doing of the act involved in the offence; special or specific intent relates to the results caused by the act done. In statutory offences, general or basic intent is an intent to an act of the character prescribed by the statute creating the offence; special or specific intent is an intent to cause the results to which the intent is expressed to relate. Both general and specific intent may be established by knowledge: the former by knowledge of the circumstances which give the act character, the latter by knowledge of the probability of the occurrence of the result to which the intent is expressed to relate. But existing circumstances can be known more certainly than the probability of the occurrence of a future result, and therefore specific intent is usually established by proof of a desire or wish to cause the prescribed result, whereas general intent is usually established by proof of knowledge of the circumstances prescribed by the statute as defining the act involved in the commission of the offence. Of course, proof of an actual desire or wish to do an act of the proscribed character is proof of a general intent but for practical purposes knowledge of the circumstances which give the act its character when an act is voluntarily done is the ordinary form of intent to do it. [12]

[12] Crawford *Proof in Criminal Cases* p 6.

24. Applying this analysis to the facts in *Duffy*, within the framework of s 31(1) of the Code, the accused would not have intended the relevant "act" unless he knew that at the time he struck the victim he was holding a glass in his hand. Similarly, applying the analysis to the facts in *Falconer*, again in the context of s 31(1), the accused would not have intended to discharge the firearm unless she knew that the gun was loaded.

25. On the facts of the present case the defendant would only have intended to strike the victim with the glass if he knew that he was holding a glass at the time he struck the victim. Similarly in order to have the requisite foresight under s 31(1), the defendant would have to have been aware that he was holding a glass in his hand or aware as to the possibility that there was a glass in his hand.

THE NATURE OF THE DEFENCE OF ACCIDENT

26. The defendant seeks to rely upon the defence of accident.

27. The defence of accident is a general or primary defence of considerable breath, which seeks to refute the prosecution case by way of a denial of volition, intention, recklessness or negligence.[13]

28. A helpful analysis of the defence is to be found in Howard *Australian Criminal Law* (2nd ed) pp 317-318:

> Another way in which voluntariness is sometimes denied is by D's saying that he caused the external elements of the offence charged by accident. Although the word "accident" is a convenient way of summarising the absence of the requisite mental element for any offence in question, it is not in itself a separate defence. To say that a result was caused by accident means only that it was caused without intention, recklessness or negligence on D's part with respect to that result. There are express references in the codes to accident.

29. There is no logical reason why the defence of "accident" should be confined to "results" and not be extended to "acts". Indeed, that is the case both at

[13] Crawford n 12 p 6.

common law and under the Criminal Codes of Queensland and the Northern Territory.

30. At common law "an act done by accident is excused for want of mens rea".[14] Furthermore – and more to the point – s 23 of the Criminal Code (Qld) covers an accidental act.[15] As noted above, the expression "independently of the exercise of the will", which appears in the section, is a succinct but comprehensive term that comprehends the doctrines of voluntariness, intention and recklessness.[16] The effect of s 23 is that a person is not criminally responsible for an act which is done involuntarily or without intention or recklessness. In a similar vein, s 31(1) of the Criminal Code (NT) embraces accidental acts by, inter alia, excusing a person from criminal responsibility for an act unless it was either intended or foreseen.

31. The connection between s 31 and the defence of accident with respect to "acts" was tacitly recognised by the Court of Criminal Appeal in both *Charlie* ([1998] 7 NTLR 152 at 155 & 169) and *Breedon* (supra at 128 and 130).[17]

32. By excusing a person from criminal responsibility for unintended or unforeseen acts, s 31(1) of the Criminal Code (NT) makes available a defence of accident.

THE NEED FOR ACCIDENT TO BE OPEN ON THE EVIDENCE

33. In order for the defence of accident to be a live issue, the defence must be open on the evidence.[18] The defence may be open on the evidence called in

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[14] Edwards, Harding and Campbell *The Criminal Codes Commentary and Materials* 4th ed p 207.
[15] Edwards, Harding and Campbell, n 15, p 208. The first limb of s 23 provides: "…a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will."
In *Pregelj v Manison* (1987) 51 NTR 1 at 12 Nader J observed that the sole test under the first limb of s 23 of the Queensland Criminal Code was whether the prohibited act was or not done , accidentally or independently of the exercise of the will. In other words, an accidental act is one that occurs independently of the exercise of the will.
[16] See above p 4
[17] In *Breedon* (supra at 128) the Court regarded the central issue as being whether the stabbing – the relevant "act" for the purposes of s 31(1) of the Criminal Code (NT) – was deliberate ie voluntary and non –accidental.
[18] *Hubert v The Queen* (1993) 67 A Crim R 181; *R v Skerritt* (2001) 119 A Crim R 510.

the prosecution case or on evidence adduced by the defence, or a combination of the two. If accident does not arise on the evidence it need not be considered.

34. The defence carries an evidential burden in relation to the defence of accident.

35. As s 31(1) is an excusatory provision - and the defence bears an evidential burden with respect to matters of excuse – the defence must raise the defence of accident. In the present case, that means that the defence must either adduce or point to evidence in the prosecution case that is capable of creating a reasonable doubt that the relevant "act" was intended (including voluntary) or foreseen as a possible consequence of the defendant's conduct. However, once raised, the prosecution must negative accident, as it has the burden of negativing the existence of authority, justification or excuse.[19] In other words, the prosecution must prove beyond reasonable doubt that the defendant either intended the relevant "act" or foresaw it as a possible consequence of his conduct.

36. In the present case the defence seeks to rely upon voluntary intoxication as a basis for raising the defence of accident.

37. It is clear from the provisions of s 7(1) of the *Criminal Code* (NT) that intoxication may, in some cases, be regarded for the purposes of determining whether a person is guilty or not guilty of an offence:

> In all cases where intoxication may be regarded for the purposes of determining whether a person is guilty or not guilty of an offence –
>
> (a) it shall be presumed evidentially that, until the contrary is proved, the intoxication was voluntary; and

[19] Shanahan Irwin and Smith *Carter's Criminal Law of Queensland* 5th ed p 219 citing the authority of *Mullen v R* [1938] St R Qd 97.

(b) unless the intoxication was involuntary, it shall be presumed evidentially that the accused person foresaw the natural and probable consequences of his conduct.[20]

38. As observed by Nader J, there is an interaction between intoxication and s 31 of the Code:

> …intoxication can operate as a defence (again improperly so called) only indirectly in as much as it may raise doubt as to the accused's intention or foresight and, if it does so it operates by virtue of section 31.[21]

39. Section 7(1) was judicially considered by the Court of Criminal Appeal in *Charlie v R* [1998] 7 NTLR 152.

40. Martin CJ made the following observations as to the nature of the presumption created by s 7(1)(b) and its relationship to s 31(1):

> The legislature has carefully expressed the nature of the presumptions in the two parts of s 7(1) quite differently. The classification of presumptions is dealt with at some length in *Cross on Evidence* (Aust ed, 1991), commencing at para 7245. Here, the basic fact is that the intoxication was not involuntary, from which the conclusion is drawn that the accused foresaw the natural and probable consequences of his conduct. The effect of the provision is that the presumption may be made, and thus provide some evidence of that fact. That does not disturb the burden of proof resting upon the Crown to show beyond reasonable doubt that the accused foresaw the possible consequences of his conduct as required by s 31. What must be looked at is the whole of the evidence including the presumed fact. However, the burden or onus of proof remains with the Crown (see also Ligertwood, *Australian Evidence* (2nd ed), para 6.16 and 6.17).[22]

41. Angel J also considered the effect of s 7(1)(b) on the persuasive burden of proof:

> Section 7(1)(b) establishes an evidentiary presumption only. There is no shift of the burden of proof. It is for the Crown throughout to prove its case beyond reasonable doubt. Section 7(1)(b) permits a jury to draw an inference in the absence of any evidence to the contrary. In the present case there was evidence of intoxication and a question for the jury was

[20] As the present charge does not involve an offence covered by s 31(3) of the Code, s 31(1) applies and voluntary intoxication may therefore be considered for the purposes of determining criminal responsibility.
[21] Justice Nader "The Criminal Code in the Northern Territory", paper delivered at the Australian Bar Association Conference, Bali, 1980, p 26.
[22] [1988] 7 NTLR 152 at 157

> whether, given that evidence, the appellant at the time of the stabbing foresaw the death of the deceased as a possible consequence of his conduct. It was incumbent upon the Crown throughout to prove that element. It was not open for the jury simply to presume that the appellant foresaw the possibility of death because of s 7 without considering the evidence of intoxication. The jury was to have regard to all the evidence and consider whether the Crown had proved the necessary element beyond reasonable doubt. It was not correct for the learned trial judge to say: "The Crown don't actually have to prove that element. They are entitled to rely upon the evidential presumption in the Act." It was not for the jury to consider whether the evidence of the appellant's intoxication established, on the balance of probabilities, a negative. [23]

42. Kearney J agreed with Angel J as to the effect of s 7(1)(b) of the Code.

43. The effect of the presumption is that notwithstanding a person's state of intoxication, he or she is presumed evidentially to have foreseen the natural and probable consequences of his or her conduct through their drink – clouded or alcohol – influenced mind.

44. The word "conduct", as used in s 7(1)(b), is central to the operation of the evidential presumption.

45. In *Charlie* (supra) the evidential presumption was applied in relation to an offence contrary to s 162 (1)(a) of the Code (murder). That offence consists of both an "act" and an "event". The misdirection concerning the effect of the evidential presumption related to the "event" constituting the offence. The presumption was considered in the context of the prosecution having to prove beyond reasonable doubt that the accused foresaw death (the event) as a possible consequence of his conduct. In that context, the relevant "conduct" was the act of stabbing the victim.

46. However, it is clear from the language of s 31(1) and what Nader J concluded in *Pregelj v Manison* (1987) 51 NTR 1 at 15, that the word "conduct", as appears in that section, is not to be read as being confined to an "act" or "omission". Section 31(1) clearly establishes criminal responsibility for what may be called "reckless acts" – "acts" done with the

[23] (1998) 7 NTLR 152 at 171.

requisite foresight. Therefore the use of the word "conduct" in that context cannot mean an "act" or an "omission". It must, by necessity, mean something less than all the ingredients of an "act" or an "omission". In my view, the word "conduct" in s 7(1)(b) needs to be subjected to the same analysis.

47. In the context of s 31(1), the requirement that a person foresee an "act" requires proof that he or she foresaw the "act" as a possible consequence of their bodily movements or actions. This analysis is supported by the Code's definition of "act".[24] The evidential presumption in s 7(1)(b) is to be construed in a similar way. Not only is a voluntarily intoxicated person presumed to have foreseen the natural and probable consequences of an "act" or "omission" done by him or her, but also the natural and probable consequences of their bodily movements or actions.

48. For the purposes of both s 31(1) and s 7(1)(b), one cannot divorce from bodily actions or movements contemporaneous circumstances ie the circumstances in which the physical actions are performed.

49. On the facts in the present case, the defendant would have foreseen the act of striking the victim with a glass if he foresaw that "act" as a possible consequence of the bodily actions or movements performed by him in bringing his fist into contact with the victim's face, while holding a glass in his hand. In order for the defendant to have foreseen the relevant "act" he would have had to been aware of the existence, or possible existence, of the glass in his hand at the material time.

50. By force of s 7(1)(b) the defendant is evidentially presumed to have foreseen the natural and probable consequences of his conduct. The striking of the victim's face with the glass can be properly considered to be the

[24] Section 1 defines an "act" as follows: "act in relation to an accused person, means the deed alleged to have been done by him; it is not limited to bodily movement and it includes the deed of another caused, induced or adopted by him or done pursuant to a common intention".

natural and probable consequence of the bodily actions or movements performed by the defendant which involved bringing his fist (in which a glass was being held) into contact with the victim's face. The presumption implicitly recognises that the bodily actions or movements performed by the defendant were willed or voluntary. Foresight of the natural and probable consequences of one's conduct presupposes a capacity to control one's actions, and accordingly voluntariness. It is also implicit in the presumption that the defendant was aware that he was holding, or might be holding, a glass in his hand at the time he struck the victim.

51. The effect of the evidential presumption in the present case is that in the absence of evidence to the contrary, the Court is permitted to draw an inference not only that the accused foresaw the natural and probable consequences of his conduct but also that his or her conduct was willed or voluntary.

52. It is arguable that the evidential burden in relation to accident (in the sense of involuntariness) arises in another way under the Criminal Code.

53. In *Falconer* (supra at 24) the High Court (constituted by Mason CJ, Brennan and McHugh JJ) stated:

> In the absence of some contrary evidence, it is presumed – sub silentio, as Barwick CJ said [in *Ryan* (1967) 121 CLR 205 at 213 in a passage that their Honours had just quoted] – that an act done by a person who is apparently conscious is willed or done voluntarily. That presumption accords with, and gives expression to, common experience. Because we assume that a person who is apparently conscious has the capacity to control his actions, we draw an inference that the act is done by choice. Keeping steadily in mind that the concepts of will and voluntariness relate merely to what is done, not to the consequences of what is done, it would be an exceptional case in which a person, apparently conscious, committed an act proscribed as an element in a criminal offence without choosing to do so …
>
> The foundation for the inference that an act done by an apparently conscious actor is willed or voluntary can be removed by evidence that the actor was not of sound mind or was insane when the act was done, but there are some cases where an act can be shown to be unwilled when it

> was done by an actor of sound mind. To take some obvious example: if the act be a reflex action following a painful stimulus or if it be a spastic movement, an inference that the act was willed or voluntary would not be drawn though the actor is of sound mind when the act is done…
>
> When an act is done by an apparently conscious actor, an inference that the act is willed must be drawn – not as a matter of law but as a matter of fact – unless it can be shown that the actor, being of sound mind, has been deprived of the capacity to control his actions by some extraordinary event or unless the actor, being of unsound mind, has thereby lost the capacity to control his actions. The accused bears no ultimate onus of proving that his act was not willed, but he bears the evidential onus of rebutting the inference that his act was willed, and there is no occasion for the jury to consider the possibility of an unwilled act unless that evidential onus is discharged. The inference that an act is willed is thus supported by the presumption that all persons have the capacity to control their actions unless they be of unsound mind, and an accused bears an ultimate onus of proving that he was of unsound mind if he chooses to raise that issue.

54. These observations appear to be equally applicable to the Criminal Code (NT). Like the Northern Territory Criminal Code, the Queensland Code does not contain an express provision establishing a presumption of voluntariness.

55. Returning to the tripartite relationship between intoxication, accident and s 7(1)(b) of the Code the question that arises in this case is what type and amount of evidence is required to raise the issue of intoxication relevant to the defence of accident?

56. In *R v Sullivan* (1981) 6 A Crim R 259 at 263 Reynolds JA addressed the sufficiency of evidence in relation to the so called defence of "intoxication":

> It is not the law that whenever an accused person makes reference to having consumed an unspecified quantity of alcohol at some time antecedent to the act charged, with no evidence as to the extent to which it may have been eliminated from the bloodstream and no evidence that it was capable of affecting or did affect his volition or powers of reasoning, a special direction is nevertheless called for. To give such a direction in

> those cases is to confuse and mislead a jury and invite a verdict which is contrary to the evidence.[25]

57. It should be borne in mind that in that case the appellant had merely asserted that he had been drinking and had a hazy memory of events. Witnesses in the case were not cross-examined as to the sobriety of the appellant. There was no evidence of amnesia or blackout or real intoxication. No medical or other expert evidence was adduced. No assertion was made by the appellant directly or indirectly that his volition or cognitive faculties were impaired by the ingestion of alcohol.

58. As to the quality of evidence required to properly raise the issue of intoxication, Barwick CJ had this to say in *R v O'Connor* (1980) 146 CLR 64 at 88:

> If the evidence, if accepted, is not such as to be capable of raising a reasonable doubt as to either of the basic elements, voluntariness or actual intent, there being no other material to suggest a lack of voluntariness or actual intent, that evidence can be withdrawn from the jury's consideration. It will have had no more than a tendency to establish that though the accused acted voluntarily and with the requisite intent, he was influenced in what he did in a state of insobriety. They should be told that if the evidence does not raise in their minds a reasonable doubt as to voluntariness or actual intent they may put that evidence out of their minds in considering the accused's guilt or innocence.
>
> But if the evidence is capable of raising a doubt either as to voluntariness or the existence of an actual intent, the jury should be told that if the evidence raises in their minds a reasonable doubt as to voluntariness or actual intent, it is for the Crown to remove that doubt from their minds and to satisfy them beyond reasonable doubt that the accused voluntarily did the act with which he is charged and that he did so with the actual intent appropriate to the crime charged. They should be instructed as to the meaning and scope of voluntariness and as to the precise intent which the crime charged requires. It would be proper in these cases to tell a jury that the fact that a man does not later remember what he did does not necessarily indicate that his will did not go with what he did or that he did not have the necessary intent.

[25] This statement of the law was applied in *R v Wilson* (1986) 42 SASR 203 at 212: See *Ross on Crime* 3rd ed at [9.2830].

59. Although these observations were made in the context of a non –code jurisdiction, they have, in my opinion, equal application to the Criminal Code (NT).

60. It needs to be borne in mind that where relevant evidence is received in relation to the fact and degree of intoxication, it can function to raise a reasonable doubt as to the existence of a requisite mental element, whether consisting of intention, recklessness or knowledge.[26]

61. Furthermore:

> It has been said that when the defence seeks to attack the prosecution case at the level of mens rea by reference to intoxication, juries are to be told that they are to determine whether D lacked mens rea at the time of the act charged, rather than whether D lacked the capacity to form mens rea, on the basis that the mere fact that D has the capacity to form mens rea at this time does not necessarily mean that D formed it. Amnesia respecting the time at which the act charged was committed does not of course involve in itself that D was intoxicated to the relevant degree, although it may be of evidential significance.[27]

62. For the purposes of discharging the evidential burden, the defence must adduce or be able to point to evidence that properly raises the issue of intoxication . The evidence must relate to the degree of intoxication and not merely to the fact of intoxication: "the mere fact that D was intoxicated does not logically involve that D was intoxicated to such a degree as to have acted involuntarily or without mens rea".[28]

63. As pointed out by Gillies:[29]

> The strength of the evidence needed to discharge the evidential burden will differ from one situation to the next, depending upon the nature of the crime and the circumstances in which it was allegedly committed:
>
> > The sobriety of an accused person can more easily be found relevant to the existence of the requisite intent in attempting to

[26] Gillies *Criminal Law* 4th edition, p 284
[27] Gillies n 26, p 281
[28] Gillies n 26, p 284
[29] Gillies n 26, p 284.

> discharge a firearm particularly where there is a factual issue as to the direction in which the firearm was pointed when the trigger was pulled than where the sobriety of the accused is argued to have a possible relation to intent in respect of some other crimes such as rape and buggery.[30]

64. For the purposes of discharging the evidential burden, medical evidence may be received to explain the likely effect of ingesting a combination of alcohol and medication. [31]

65. If there is any doubt as to whether intoxication has been sufficiently raised on the evidence, the trial judge is obliged to leave the issue to the jury: see *R v Viro* (1978) 141 CLR 88 at 118, applied in *R v Stokes and Difford* (1990) 51 A Crim R 25.

THE EVIDENCE OF ACCIDENT IN THE PRESENT CASE

66. Does accident properly arise on the evidence in this case?

67. The defendant, Mr Robinson has only a vague memory of the evening. He has a memory of the evening up until about 11.00pm or 11.30pm. His next memory is that of waking up in the rear of a police vehicle outside the watch house. He recalls vomiting and apologising to the police officers. He remembers having blood all over him. He remembers nothing of the incident during which the victim was allegedly assaulted.

68. In terms of raising the defence of accident, the defendant is hamstrung due to his total lack of recollection of the incident. The defendant is unable to give direct evidence that his striking of the victim was accidental, for example the result of a reflex action of the type sought to be argued in *Duffy* (supra). Therefore, accident is not raised in that sense on the defendant's evidence.

[30] *Murray* (1980) 2 A Crim R 418 at 424.
[31] *Honner* (1977) Tas R 1 at 6.

69. Instead, the defendant is compelled to rely upon indirect evidence going to his state of intoxication with a view to raising the defence of accident. It is more convenient to deal with that evidence later.

70. Mr Nebauer gave the following account of the incident:

> … we were sort of standing in a circle, I think it's at sort of the corner of the bar near the dance floor and we're sort of just talking and stuff like that. I think Lachlan half turned to speak to someone and jobbed a guy's arm, sort of, he was holding a drink and he took offence to that and I think pushed Lachlan who pushed him back and then they sort of tussled and this guy sort of essentially punched a schooner glass essentially like to the, a bit of a punching motion into the face and obviously he got hurt by that…
>
> I think it was just one of those spur of the moment things.

71. During cross–examination the witness gave the following evidence:

> Q: You said you saw the man who was initially bumped half punch Lachlan with a schooner glass?
>
> A: ….I guess it's sort of – he couldn't close his fist properly because it was around the glass but that's what he did… As I recall he essentially drew it back in something similar to a punch, about shoulder level. And then I believe like with his hand clasped around the glass, drove forward and into sort of Lachlan's face and hit him fairly squarely on the cheekbone I believe it was. So it would have been – it's kind of like a punch but obviously grasped around a glass you can't fully close your hand.
>
> Q: Now you've got the glass held, and if I use this plastic cup as a demonstration if the ceiling is north and the floor is south and you got the glass east – west?
>
> A:… I believe he had it side on.
>
> Q: And straight out?
>
> A: I believe so…it was punched at an almost directly along the shoulder line.
>
> Q: He certainly pushed the glass against him?
>
> A: Yeah, I believe it was like that.

> Q: And you are describing it about shoulder height, push forward motion?
>
> A: Yeah, the whole range of movement was about shoulder height.

72. The following exchange took place between Mr Nebauer and counsel:

> Q: Where did he [Lachlan] have the man who was holding the glass when the glass was pushed into his face?
>
> A: …I believe they sort of grabbed each other roughly around sort of the collar bone area of the shirt. I couldn't say on which side but I believe it was that sort of bunched up kind of grab of the shirt near the collar.

73. Mr Nebauer said that from memory it was a "quick sequence of events". The witness conceded that the whole incident may have lasted only 10 or 15 seconds.

74. This part of the evidence given by Mr Nebauer does not raise the defence of accident. Mr Nebauer gave an account of what he observed. It can be inferred from the outward circumstances of the defendant's conduct that he was acting voluntarily and with the requisite mental state at the time he struck the victim. The fact that the actions of the defendant were spontaneous and occurred with some rapidity, is not a sufficient indicator that those actions – and in particular the act of striking the victim with the glass – were accidental. As stated in *Olasiuk* (1973) 6 SASR 225 at 263, a person's intention can be inferred from what he or she does and in drawing that inference the tribunal of fact is "entitled to take into account [its] experience of life…" Far from raising the defence of accident, Mr Nebauer's evidence gives rise to the inference that the relevant "act" was deliberate and non –accidental.

75. The victim, Mr Griffen, has no recollection of the subject incident:

> …when I went to the Shenanigan Hotel I was there with friends and my next recollection was outside holding a towel to my face with blood gushing out of it, out of my face that is….
>
> My last memory is standing by a signpost next to the bar with the two gentlemen I was out with.

76. For reasons that are self–evident, the defence of accident does not arise on Mr Griffen's evidence.

77. Mr Boskovski gave the following account of the incident:

> What I remember was a group of guys, a rowdy group of guys walked in. This is just near the entrance. That's where our table was, near the same place as well. And they were rowdy and they were sort of bumping a bit. Obviously they were quite drunk. .. and started bumping some people around and sort of happened to bump Allan once and I told him I'm not going to worry about it…nothing to worry about, it's just people having fun…
>
> Nothing happened after that and I just went to get a drink and by the time I got back…it was people on the floor wrestling and the bouncers broke it up and through [sic] everybody out.

78. This witness did not see the defendant strike the victim with the glass and therefore cannot speak of the immediate circumstances surrounding the relevant "act". The defence of accident is not raised on the evidence of this witness.

79. The final material witness for the prosecution was Mr Casey.

80. Mr Casey gave evidence that he was drinking with Mr Griffen at Shenanigans. He said they moved onto the dance floor after sharing a couple of drinks. He stated that Mr Griffen was bumped two or three times from behind and Mr Griffen had told him to keep an eye on the person (who was apparently responsible for the bumping).

81. The witness then gave evidence that the victim was again bumped by the person behind. He said that the victim tapped that person on the shoulder and shrugged his shoulders. The witness stated that the person took offence at the victim's conduct and grabbed the front of his shirt.

82. Mr Casey said that the victim then used his right hand against the chest of the man who had grabbed him, trying to force him away. When the victim was unable to do that he dropped the glass that he was holding, and using

both his hands on the other person's chest he tried to push him away. Mr Casey went on to say that the person who had grabbed the victim began to fall and struck a ledge against a building support on which drinks are usually placed. After falling, the person who had grabbed the victim reached behind him with his right hand and produced a schooner glass and "in a round house type of motion across Lachlan's face proceeded to smash the glass".

83. Mr Casey said that as the victim and the defendant were falling back he moved forward and grabbed both of them by the shirts, and then around the arms and the top of their chest. He went on to say that once the victim had the glass smashed on his face he released the victim and grabbed the defendant, whereupon he pulled him to the ground.

84. During cross-examination, the witness denied that the incident started when the victim bumped the defendant and the defendant pushed at him. Mr Casey denied that the victim then pushed the defendant back and moved into him, grappling him with both arms. He denied that the defendant also took hold of the victim.

85. Mr Casey said that when the victim dropped his glass and grabbed the defendant with both hands and was forcing him back, the victim was "engaged in a fight" with the defendant.

86. The witness did not remember the defendant holding a glass the whole time. Mr Casey then said that he assumed that the glass that was produced by the defendant came from the ledge, adding "I think it did". The witness went on to say that the defendant did not have a glass in his hand when he was grappling with the victim. Mr Casey then added that he did not believe it to be the case that the defendant had a schooner glass in his hand when the victim grabbed him and when he was forced back into a table. The witness did not believe that his memory was affected by the alcohol he had consumed on the night in question.

87. Mr Casey was referred to his statement of 7 February 2006 wherein he stated that the defendant had used an axe chop style motion with the glass. The witness said that he had described the motion in his oral evidence as a "round house" because he believed that to be a better description of the motion. Mr Casey was sure that the victim did not get his face cut on something else.

88. It will be recalled that on 28 November 2007, I indicated, without giving reasons, that I could not be satisfied beyond reasonable doubt that the defendant picked up the glass during the course of the incident, as testified to by Mr Casey. I now give my reasons for coming to that conclusion.

89. Neither the victim nor the defendant are able to throw light on whether the defendant equipped himself with the glass during the course of the incident.

90. Mr Nebauer's account of the incident makes no mention of the defendant picking up a glass during the course of the altercation. In fact, his evidence has the defendant holding a drink at the start of the incident. Mr Nebauer's account is to be contrasted with the account given by Mr Casey, who says the defendant acquired the glass after the altercation had started and was well under way.

91. In terms of evaluating the evidence of each witness, it is noted that Mr Casey maintained his position that the defendant had picked up the glass from a ledge during the altercation. Mr Casey resisted the suggestion during cross examination that his memory of the incident and the sequence of events were impaired due to the amount of alcohol that he had consumed on the evening. However, there was a degree of uncertainty in his account as revealed by his evidence that he had assumed that the defendant had taken the glass from a ledge. His evidence was less than affirmative in that respect.

92. As for Mr Nebauer, he was at no time questioned about the defendant having picked up the glass after the altercation had begun. His account that the defendant was holding a glass at the start of the incident was left undisturbed.

93. Based on the evidence given by the two witnesses as to the amount of alcohol they had consumed on the evening in question, the impression I have formed is that Mr Casey had consumed considerably more alcohol than Mr Nebauer, and Mr Nebauer was relatively sober compared to Mr Casey, who admitted that he was "under the influence" at the time of the incident.

94. It is difficult to say whose account reflects the truth of the matter. There is no independent evidence pointing to one account being more accurate and reliable than the other. It could be argued that Mr Nebauer's account should be accepted given his sobriety and the likelihood that his recall of the incident was sharper than that of Mr Casey. However, the fact that Mr Casey was "under the influence" does not necessarily mean that his memory of the incident and the sequence of events was impaired. The impairment of his memory would depend upon the degree to which he was intoxicated. The extent to which Mr Casey's memory was impaired cannot be determined on the evidence before the Court.

95. Given the state of the evidence, it is not possible to determine where the truth of the matter lies. I am therefore left with a reasonable doubt about the circumstances immediately surrounding the relevant "act". I am unable to be satisfied beyond reasonable doubt that the defendant picked up a glass during the altercation prior to him striking the victim with that glass.

96. As I unable to be satisfied beyond reasonable doubt that the defendant picked up the glass during the altercation, the case, in so far as it relates to the defence of accident, falls to be determined on the basis that the defendant was holding the glass in his hand at the start of the incident and

up until the time of the doing of the "act" said to constitute the unlawful assault.

97. Although that may be of some comfort to the defendant,[32] there is nothing in the balance of Mr Casey's account of the incident that explicitly or inferentially raises the defence of accident.

98. In my opinion the evidence does not suggest that due to the rapid sequence of events surrounding the incident, the defendant struck out with the glass in his hand by way of an automatic reflex action, without having time to consider whether he was holding a glass. In my opinion that hypothesis is purely speculative and not raised on the evidence.

99. If, however, I have erred in reaching that conclusion and there is, in fact, sufficient evidence to support that hypothesis, then the prosecution has negatived it beyond reasonable doubt by force of (1) the evidential presumption created by s 7(1)(b) of the Code (2) the rational inferences drawn from the circumstantial evidence (3) the presumption of voluntariness and (4) the concession made by the defendant as to the voluntary nature of his bodily actions or movements. In addition, the evidence given by both Mr Nebauer and Mr Casey indicates that the actions of the defendant differed from what would normally be considered to be a "lashing out". The strike amounted to a punch which was both measured and deliberative in nature. The defendant's movements appear to have been regular or uniform, and far too rhythmical to qualify as a "lashing out".

100. I am also of the opinion that the evidence does not suggest that the victim suffered the injury to his face as a result of coming into contact with the glass that he had dropped onto the floor or due to any other cause consistent with the defendant's innocence. In my opinion that hypothesis is purely fanciful and can be rejected outright.

[32] If Mr Casey's account were to be accepted, then that would strongly indicate that the defendant's conduct was deliberate and non –accidental.

101. I now turn to consider the evidence concerning the defendant's state of intoxication and its bearing on the defence of accident.

102. The defendant said that he went out at about 7.30pm on the evening in question. He had a few drinks at Bruce Davidson's house and then went to Rob Boskovski's house, which is opposite Shenanigans. He said that he would have drunk three or four full strength beers there before going to Shenanigans. The defendant said that they arrived at Shenanigans at about 9.30pm or 10.00pm. He said that they were drinking jugs of beer at Shenanigans – Tooheys New, he thought. He said: " …we'd buy a jug, have schooners and drink it and then get another jug". The defendant said that he probably remembered things until about 11.00pm or 11.30pm. He added: "I just remember vaguely remembering it was early in the night and that's pretty much it". The next thing he recalled was waking up in the rear of the police vehicle outside the watch house and "vomiting everywhere". He said that he was covered in blood, but did not know where that had come from.

103. The defendant said that at the time he had also taken pain killers for an injury to his jaw. He could not remember the name of the pain killers. He believed he was taking three a day.

104. During cross-examination, the defendant appeared to say that he had one beer before going to Rob Boskovski's house.

105. When it was put to the defendant that on the evening in question he seemed "a bit stressed and depressed" and in need of "cheering up", he said "it's more about my jaw, I was very sore".

106. The defendant said that he remembered at least six jugs had been purchased. As to the amount that he had consumed, he said "Rob wasn't drinking as much as I was and Bruce – I don't know what happened to him…"

107. The defendant said that he only drinks when he goes out and does not drink during the week. He said that he had never experienced blackouts before.

108. The defendant remembering having taken the pain killers on the day in question. He thought that he would have taken three that day. When he was given the medication he was told not to consume alcohol.

109. Mr Boskovski said that he was out drinking with friends at Shenanigans on the evening in question. The defendant was one of those friends.

110. The witness said that he had consumed too much alcohol to drive that evening. He was drinking with the defendant from the start of the evening. They were drinking jugs of beer. The witness was unsure as to how many jugs had been drunk. Initially he said three or four, which then went to two. He said that they might have gone to the "Tap" bar beforehand.

111. As to the amount of alcohol that the defendant had consumed, the witness gave this evidence:

> I think we both started at the same time. I'm only guessing that. I think some people are slower drinkers than others, so I wasn't counting how many drinks he was drinking but we did share those amount of jugs together, I do remember that.

112. When it was put to him that the defendant was "rather intoxicated" on the evening, he replied "Okay… I don't think so…He was just normal". However, he did say the defendant "seemed a bit stressed and depressed". He said "he gets like that a lot of times and he'll say Rob, let's go out for a drink, I'm a bit down at the moment… I need a bit of cheering up…"

113. Mr Boskovski appears to have agreed that he had been out for about two and a half hours when the incident began to unfold.

114. The following exchange occurred between the witness and counsel at page 22 of the transcript:

> … I could see Allan already had enough. We both had enough…
>
> Q: …You see he's already had enough to drink
>
> A: Yeah

Q: ….I put to you he was actually quite intoxicated on the evening?

A: M'mm.

Q: Would you agree with that?

A: Yes.

115. Mr Nebauer gave evidence that the defendant was probably "fairly drunk …up about a seven or an eight [out of ten]". He added that "he looked fairly unsteady as he was walking" and was "reasonably intoxicated".

116. Mr Kimani gave evidence that when he arrived at Shenanigans the defendant was "very drunk already". He said the defendant was "already gone for the night". He added that he "couldn't get any sense out of Allan".

117. During cross-examination, the witness said that the defendant was "basically talking to people – he was…drunk, talking to people". He added that he was "quite intoxicated". Later he said that he was "very drunk".

118. When asked how Mr Robinson appeared to him at the scene Constable Menzies said:

> At the time – well when I was viewing him for approximately 10 metres away where I was attending to the victim, he didn't seem to be slouching or leaning up against anything at the back of the cage. He was in conversation with my partner. I didn't actually say anything to this gentleman… From my observations that's what I saw.

119. The Constable did not make an assessment as to the sobriety of the defendant: he merely saw the defendant standing at the back of the cage talking to Constable Tindal.

120. The evidence as to the amount of alcohol consumed by the defendant over a period of time was of a general nature. It is not possible to quantify the amount of alcohol consumed by the defendant. The only two witnesses that were able to throw light on the quantity of alcohol drunk by the defendant were Mr Boskovski and the defendant. There were inconsistencies in their

evidence, particularly in relation to the number of jugs of beer purchased at Shenanigans. Furthermore, the defendant's claim that they had bought at least six jugs of beer between arriving at Shenanigans and the incident strikes me as being exaggerated.

121. Given the non–specific nature of the evidence, it is difficult to make any assessment as to the extent to which alcohol may have been eliminated from the defendant's bloodstream. It is also difficult to assess the extent to which the amount of alcohol present in the defendant's bloodstream was capable of affecting and did, in fact, affect his volition or powers of reasoning.

122. It is noteworthy that the defendant did not give evidence as to his own lack of sobriety. Commonly, a person is able to give some assessment of his own level of intoxication up to a particular point of time – even up to the point of a blackout. No such evidence was forthcoming from the defendant. Nor did the defendant assert directly or indirectly that his volition or cognitive faculties were impaired by the ingestion of alcohol.

123. There are further difficulties with the evidence concerning the defendant's state of intoxication. He says that on the day in question he had been taking pain killers, but he is unable to identify the medication. In any event, contrary to medical advice he mixed alcohol with the medication. Although medical evidence may be received to explain the likely effect of ingesting a combination of alcohol and medication,[33] no such evidence was called in the present case.

124. The evidentiary difficulties go even further. The defendant principally relies upon the fact that he does not remember what he did. However, as pointed out in *O'Connor* (supra), that does not in itself indicate that the defendant was intoxicated to the relevant degree and that "his will did not go with what he did or that he did not have the necessary intent". The defendant's

[33] *Honner* (1977) Tas R 1 at 6.

alleged amnesia does not in itself entail that he did not know that he was holding a glass in his hand when he struck the victim in the face.

125. Although an assertion of amnesia may have "evidential significance"[34] – that is it may stand alongside other evidence such as "the state of the accused in relation to sobriety" – there is a deficiency of evidence of that type in the present case as indicated above.

126. Finally, witnesses gave varying assessments of the defendant's lack of sobriety. And one witness, Mr Boskovski, vacillated in his opinion as to the defendant's state of intoxication.

127. Initially, Mr Boskovski rejected the suggestion that the defendant was "rather intoxicated" and expressed the opinion he was "just normal"; though he observed the defendant to be "a bit stressed and depressed". However, inexplicably, Mr Boskovski shifted in his opinion of the defendant's state of intoxication, saying that he had "had enough" and was "quite intoxicated". Why the shift? One has to be very circumspect about Mr Boskovski's revised opinion. His evidence leaves open the real possibility that the defendant did not present as being heavily intoxicated to at least Mr Boskovski. In any event, his subsequent evidence that the defendant was "quite intoxicated" does not tell us very much about the degree of the defendant's intoxication.

128. Mr Nebauer's assessment of the defendant's lack of sobriety was inconsistent with Mr Boskovski's initial opinion of the defendant. Furthermore, his evidence was not altogether helpful in gauging the defendant's degree of intoxication. What does "fairly drunk" or "reasonably intoxicated" mean? If anything, these assessments imply something less than severe intoxication. What does a rating of "7 or 8 out of ten" mean? It all depends upon what level of intoxication is signified by a score of ten and

[34] Gillies n 26, p 281.

what levels of intoxication are signified by scores between one and ten. The fact that the defendant appeared to have a fairly unsteady gait does not in itself indicate that his volition or reasoning powers were affected by the ingestion of alcohol.

129. Mr Kimani also fluctuated in his opinion respecting the defendant's degree of intoxication. His assessment went from "very drunk" to "quite intoxicated", and then back to "very drunk". Although Mr Kimani could not "get any sense out" of the defendant, he observed him to be conversing with other people. The fact that the defendant was engaged in dialogue tends to suggest some self –awareness on the part of the defendant.

130. Although Constable Menzies did not make an assessment as to the defendant's state of intoxication, the defendant appeared to be able to stand on his own feet while he was conversing with Constable Tindal.

131. The fact that the defendant had vomited does not in itself indicate that his "will did not go with what he did or that he did not have the necessary intent". Vomiting is a physical reaction to stimuli and, in the absence of medical evidence, does not appear to have any necessary bearing on one's volition or cognitive faculties. In all probability, the defendant vomited as a result of the ingestion of alcohol and the pain killers – a physiological reaction.

132. In my opinion, the evidence of the various witnesses did not paint a uniform picture of a severely intoxicated person whose cognitive faculties might have been impaired to the extent that he was acting involuntarily or without the necessary intent at the time of the incident.

133. For all of the foregoing reasons, I do not believe that the defence of accident based on voluntary intoxication has been fairly raised on the evidence.

134. However, in the event I have erred in my assessment of the evidence and should have concluded that the evidence regarding the defendant's degree of

intoxication was capable of raising a doubt that the defendant acted involuntarily or without the requisite mental state, then the prosecution has for the reasons that follow satisfied the Court beyond reasonable doubt that when the defendant struck the victim with the beer glass he was acting voluntarily and with the requisite intent. In other words, the defendant knew that he was holding a glass in his hand when he struck the victim's face and he intended to strike the victim with the glass. If I have erred in finding that the defendant intended the relevant "act", it is clear that he had the requisite foresight (as required by s 31(1) of the Code) in relation to that "act", and an ordinary person similarly circumstanced, and having such foresight, would not have proceeded with the conduct engaged in by the defendant: see s 31(2).

135. As pointed out in *Charlie* (supra), the prosecution is assisted by the evidential presumption created by s 7(1)(b) of the Criminal Code (NT) in discharging its legal and evidential burden.

136. As stated earlier, it is presumed evidentially that the defendant foresaw the natural and probable consequences of his conduct, namely the "act" of striking the victim in the face with a glass. It is implicit in that presumption that the conduct of the defendant was voluntary, and that he was aware of the existence of the glass in his hand.

137. It is worth noting what Nader J said when s 7(1) (b) was amended:

> It is true that the presumption that the accused intended the natural and probable consequences was in terms removed, but it is almost a mere play on words to say that an accused foresaw a consequence but to hold back from saying that he intended it. Indeed, a number of academic writers have questioned whether to say that a result is intended means any more then to say that it is foreseen as a consequence of action with sufficient degree of likelihood.[35]

[35] Justice Nader n 21 pp 31-32.

138. The evidential presumption not only provides evidence of recklessness in terms of s 31(1), but is sufficiently pitched to provide evidence of intention as required by s 31(1).

139. It should be noted that in the present case the defendant did not seek to argue that his bodily movements or actions were involuntary,[36] but that the "act" was unintended in that he did not know or realise that he had a glass in his hand when he struck the victim. What the defendant asserts is that whilst his state of intoxication was not so complete as to preclude the voluntariness of his actions, it was sufficient "to prevent the formation of an intent to do the physical act involved in the crime charged".[37]

140. The defendant finds himself in a difficult situation. By not asserting that his bodily actions were involuntary, he concedes that he had a mental capacity to control his actions, as well as a degree of cognitive functioning. At the same time, he is presumed to have foreseen the natural and probable consequences of his conduct, which implies a reasonable level of cognitive functioning. The defendant's claim that he was intoxicated to such an extent that he was not aware of the existence of the glass is juxtaposed with those two positions.

141. In addition to the evidential presumption, the prosecution is able to rely upon such inferences as to the defendant's state of mind as are open on the evidence. Voluntariness and mental states, such as intention, are invariably proved circumstantially – that is they can be inferred "from the outward circumstances of D's conduct".[38] Of course, such an inference can only form the basis of a finding of guilt when "those circumstances are such that no

[36] In any event the evidence clearly establishes that the bodily actions or movements of the defendant were voluntary. As to this aspect see below, p 35
[37] See *O'Connor* (1980) 4 A Crim R 348 per Barwick CJ at 353.
[38] Gillies n 26, p 58

reasonable doubt is left as to D's possession of the intention sought to be proved."[39]

142. Although the two witnesses who saw the actual incident gave different accounts of the incident – that is as to the sequence of events – they both saw the defendant strike the victim with the glass, from which it can be inferred, in the ordinary course of events and in the absence of evidence to the contrary, that the actions of the defendant were voluntary and done with the requisite intent, including an awareness that he had or might have had a glass in his hand at the time he struck the victim.

143. Assuming that the defence of accident based on voluntary intoxication were open on the evidence (which is contrary to the conclusion that I have reached), the prosecution has excluded that defence by virtue of (1) the evidential presumption created by s 7(1)(b) of the Code (2) the rational inferences drawn from the circumstantial evidence (3) the evidence given by Mr Nebauer and Mr Casey (4) the presumption of voluntariness and (5) the defendant's concession as to the voluntary nature of his bodily actions or movements.

144. It is necessary to add that although the defence did not seek to attack the prosecution case by claiming that the bodily actions of the defendant were involuntary, the evidence relating to intoxication, in any event, was not such as to create a reasonable doubt as to the voluntariness of the defendant's conduct. As observed by Barwick CJ in *O'Connor* (supra at 353), a state of intoxication only rarely "divorce(s) the will from the movements of the body so that they are truly involuntary". The present case is not one of those rare exceptions.

[39] Gilllies, n 26, p 58.

THE ISSUE OF CONSENT

145. It is an essential element of the offence with which the defendant has been charged that the application of force be without the consent of the victim. The prosecution has to prove beyond reasonable doubt that the victim did not consent to the force applied by the defendant.

146. In the present case, the victim had no memory of the alleged assault and was, therefore, not in a position to say that he had not consented to being struck in the face with a glass. However, it is not necessary for the victim of an assault to give direct evidence that the application of force was without his or her consent. The absence of consent can be inferred from the nature of the assault and the circumstances surrounding the application of force.

147. Mr Berkley, counsel for the defendant, submitted that the Court could not be satisfied beyond reasonable doubt that the victim had not consented to the application of force. He submitted that the issue of consensual fight had been raised on the evidence. He further submitted that the prosecution had failed to prove that the defendant was not "engaging in a consensual fight" at the time he struck the victim, or that the defendant was not "mistaken as to the extent of the agreement to fight".[40]

148. Mr Berkley made the following submission on the evidence:

> Regardless of how the initial contact came about, the last act before the complainant and the accused came to grappling with each other was a push from the complainant which he followed on with. Nebauer sees the complainant push the accused and follow on toward the accused. Casey also sees the complainant push the accused prior to the scuffling. In both accounts the accused is retreating, either by virtue of superior force applied by the complainant or by losing balance, or a combination of both.
>
> The actions of the complainant in moving forward and into the accused fairly, rather than fancifully, raise the issue of a consensual fight, albeit on terms hard to determine. One might just as readily assume that the complainant knew that the accused had a glass in his hand and still consented to fight. There is evidence from Casey that the complainant

[40] See p 5 of Counsel's written submissions dated 15 December 2007.

> deliberately dropped his glass on the floor, causing it to smash, as he was moving into the accused. It is impossible to tell whether that was a sign of aggression by the complainant, or that the complainant wanted both of his hands to be free in the fight. The issue was whether it is reasonable for the defendant to have apprehended that violence was about to happen.[41]

149. The prosecutor, Mr Smith, made the following submissions with respect to the issue of consent:

> The prosecution submit that whilst neither the complainant nor the defendant can offer any evidence as to consent in this matter, on the evidence before the Court, an inference can arise that a consensual fight did occur and must be negatived by the prosecution…[42]
>
> The prosecution submit that evidence of a consensual fight could arise on the evidence pursuant to the evidence – in-chief and under cross-examination of witnesses. Predominantly arising from two witnesses, namely Nebauer, who says that the complainant went towards the defendant, a scuffle ensued and a glass strike occurred and further Casey who albeit states a differing order of initial events, says the complainant went up to the defendant, then during the scuffle the complainant dropped his drink to the floor and adopted a two handed grasp of the defendant, that they started to fall over and then glass strike occurred. And whilst it was not his impression he conceded persons viewing the initial incident may have considered the complainant was "offering to fight" the defendant. And further that at a point just prior to glass striking the complainant, both he and the complainant had hold of the defendant who was bent backwards over a ledge or table.
>
> Nebauer concedes the two were scuffling and pushing at each other. Casey states a scuffle occurred where both had strong single handed purchase upon each others shirt collar areas, drinks in hand of complainant, drops same and double hand grasp of defendant and Casey attempts to intervene between the two. Clearly the defendant now has the complainant, together with Casey having hold of him. It is open that the defendant may have simply struck out without knowledge of holding a glass in his hand due to his intoxication, attempting to get the person(s) away from him.
>
> Therefore the factual matrix as occurred in this matter must be that at the commencement of the incident the complainant and the defendant each held a glass in their hand, words were spoken, they were chest to chest, pushing commenced and then a scuffle ensued where the two held each other one handed and moved each other around which continued until the complainant dropped his drink. Grabbed the defendant with two hands taking the defendant backwards and over a ledge/table. The defendant

[41] See p 5 of Counsel's written submissions dated 15 December 2007.
[42] See p 3 of the prosecutor's written submissions dated 10 December 2007.

pushing or striking out with free hand holding a glass hitting face of complainant.[43]

150. It is important to distinguish the notion of a consensual fight from the defence of self–defence as, in my respectful opinion, the submissions made by the prosecutor and counsel for the defence tend to confuse or conflate the two defences. It is easy to confuse or conflate the two concepts as they are often run by way of defence in tandem in criminal trials. The so called defence of consensual fight seeks to negate an essential element of the offence of assault – namely the absence of consent - whereas the defence of self defence - now referred as "defensive conduct under s 29 of the Criminal Code(NT) – is a defence which concedes the elements of the offence, but which seeks to justify the commission of the offence.

151. In *Carroll v Lergesner* (1991) 1 QD R 206 at 212 Shepherdson J stated that where the defence seeks to challenge the absence of consent in relation to an allegation of assault, there must be evidence capable of amounting to consent.

152. Evidence of an invitation to fight is sufficient to raise the issue of consent in relation to a charge of assault. As is apparent from the judgement of Cooper J in *Carroll v Lergesner* (supra at 219), consent, in the form of an invitation to fight, may be raised by direct evidence – the consent may be express - or may be inferred from the surrounding circumstances – the consent may be implied. As I understand it, the defence, supported by the prosecution, relies upon circumstantial evidence pointing to an invitation to fight by way of raising the defence of consensual fight.

153. However, the evidence relating to the conduct of the victim towards the defendant is not sufficient to raise the issue of consensual fight. A careful examination of the evidence given by the two key eyewitnesses – Mr

[43] See pp 4-5 of the prosecutor's written submissions dated 10 December 2007.

Nebauer and Mr Casey – does not disclose an invitation to fight issuing from the victim.

154. According to Mr Nebauer, it was the defendant who first applied physical force to the victim. The victim then responded by pushing back. The fact that the victim might have "jobbed" the defendant's arm could not be sensibly construed as an invitation to fight. Nor could the victim's response to the defendant's application of force.

155. According to Mr Casey, after the victim was bumped by the defendant, the victim tapped the defendant on the shoulder and shrugged his shoulders. Consequently, the defendant took offence at the victim's conduct and grabbed the front of the victim's shirt. In my opinion, the tapping on the shoulder of the defendant by the victim and the shrugging of the victim's shoulders does not amount to an invitation to fight. It is going too far to read into that an invitation to fight. The defendant, by his conduct, may have been merely drawing the defendant's attention to the nuisance he was creating and at the highest imploring him to desist. In my opinion, Mr Casey's evidence does not properly raise the defence of consensual fight. However, I accept that those circumstances might give rise to a mistaken belief on the part of the defendant that the victim was inviting him to engage in a fight; and that aspect is dealt with later. Similarly, the conduct of the victim in dropping his glass is not sufficient to raise consensual fight; though it might give rise to a mistake of fact.

156. Mr Casey's evidence that the victim might have appeared to be offering to fight the defendant is not enough to raise the issue of consensual fight because in my view there was nothing in the conduct of the victim that properly raised the issue. At best, Mr Casey's evidence goes to a mistaken belief on the part of the defendant that the defendant was consenting to the application of force.

157. What is conspicuously absent in the present case is evidence from the two protagonists going to the issue of consensual fight. Neither witness has any memory of the incident, nor the circumstances leading up to the incident. That has to be a rarity in cases where the defence of consensual fight is relied upon. That poses a real evidentiary problem for the defence.

158. To be frank, I cannot accept the submissions made by Mr Smith and Mr Berkley. I consider that they have read far too much into the evidence, and in particular, by focusing solely on subsequent events Mr Berkley has underestimated the need to look at the earliest relevant interaction between the parties to ascertain whether the victim was in fact consenting to the application of force, that is to say, inviting the defendant to fight. In my opinion the "defence" of consensual fight does not arise on the evidence.

159. It remains to consider whether the defendant mistakenly believed that the victim was inviting him to fight. Mistaken belief falls to be determined by the provisions of s 31(1). That aspect can be dealt with swiftly. In order to raise a defence of mistake of fact, the defendant must either adduce evidence as to his mistaken belief or point to evidence in the prosecution case that enlivens such a mistaken belief. There was no evidence from the defendant as to his belief at that the material time. For example, the defendant did not say that he mistook the victim's shrugging of his shoulders or the dropping of his glass to be an invitation to fight. Nor did the prosecution case disclose the existence of a mistaken belief on the part of the defendant. There is no evidence as to the defendant's belief at the relevant time. In my opinion, a mistaken belief on the part of the defendant that the victim was consenting to the application of force does not arise on the evidence.

160. However, even if the evidence could be considered to raise a defence of mistake of fact in relation to "consensual fight" then, in my opinion, the prosecution has excluded the defence. The prosecution has proved that the defendant did not genuinely believe that the victim was consenting to the

application of force. Although a mistaken belief need not be based on reasonable grounds, the reasonableness of such a belief is relevant to whether the belief was in fact held. In the present case, it was unreasonable for the defendant to believe that the victim was inviting a fight by shrugging his shoulders.

161. The conclusion that I have reached is that the defendant intended to assault the victim without his consent. The defendant knew that the victim was not consenting or at least knew that he may not be consenting and proceeded regardless.

162. In the event that I have erred in the conclusions I have reached in relation to the "defence" of consensual fight, I am satisfied beyond reasonable doubt that the victim did not consent to the degree of force that was applied.

163. As stated by Cooper J in *Carroll v Lergesner* (supra at 219):

> In each case it is a question of fact for the jury to determine whether consent existed and if it did exist, the precise limits of the consent. No useful comment can be made as to where the limits, if any, of a consent lie. This is to be determined by the jury as a fact having regard to all the circumstances existing at the time the consent is expressly given or is to be inferred from the circumstances…whatever the limits, if any, of the consent be, they are set by the person giving consent and they are not imposed as a matter of law. In most cases, if not all cases, the practical consequence will be that the circumstances dictate that the person giving consent inferentially placed some limits on it. The consent is to the application of force and not to the consequence that follows from it. Thus, the jury must determine the limits of the consent before the first blow is struck in a fight…I would regard reference by the jury to the evidence of the bodily harm caused as a matter requiring the trial judge to warn a jury that it should treat such evidence with caution. It is only where, from the extent and nature of injuries sustained, it can be inferred that the method or manner of their infliction was outside the terms of any consent, that such evidence is relevant.

164. In my opinion, even if the evidence were sufficient to raise the "defence" of consensual fight – and the defence was not negated by the prosecution – the evidence before the Court establishes beyond reasonable doubt that the

victim did not consent to the degree of violence that was applied when the defendant struck his face with the glass.

165. As pointed out by Thomas J in *Carroll v Lergesner* (supra at 119):

> it is erroneous…to refer broadly to the question of 'consent to fight' or of consent to the receiving of a particular degree of injury. The issue, if it arises at all, is one of consent to a particular assault or a particular series of assaults. If the relevant consent is one to receive blows (or some other kind of assault) this necessarily raises the question of the type, nature and extent of the blows that the complainant had consented to receive.

166. In my opinion, the degree of force applied by the defendant – that is striking the victim in the face with a glass - palpably exceeded the degree of force to which the victim had consented, again on the hypothetical basis that the "defence" of consensual fight was open on the evidence and had not been excluded by the prosecution.

167. If in fact the victim had invited the defendant to take part in a fight, it is clear on the evidence that the victim did not agree to the application of force by means of a weapon, such as a glass. Significantly, at the start of the altercation, the defendant did not manifest any intention of using the glass as a potential weapon during any ensuing fight. At no time during the incident did he seek to make use of his glass as a weapon. Indeed, during the course of the altercation, the victim dispossessed himself of the glass by throwing it on to the floor. The victim's conduct at that point in time reinforced and further defined the parameters of the degree of force to which he was consenting, again assuming that he had consented to being assaulted by the defendant. Finally, there was no indication at the outset that the defendant might during any ensuing altercation resort to using the glass as a weapon. If in fact the parties had agreed to fight it was never contemplated that one or both parties would resort to the use of a glass as a weapon.

168. Finally, but not least, I consider that it is appropriate in this case to have regard to the nature and extent of the injuries received by the victim, [44] from which it can be reasonably inferred that the method or manner of their infliction was outside the terms of any consent given by the victim to the application of force.

169. In my opinion, the evidence does not raise a mistaken belief on the part of the defendant as to the degree of force to which the victim had consented. But if I have erred in that regard, the prosecution has negatived such a mistaken belief beyond reasonable doubt.

170. For the sake of completeness, I should deal with the vexed problem of the victim's capacity to consent to the application of force.

171. In cases where consent is relied upon as a defence, "the victim must know that the act (involving the application of force) is being or proposed to be done in respect of his body by the defendant who is present before him".[45] The requirement of knowledge on the part of the victim follows from the very meaning of consent: "one cannot consent in vacuo".[46]

172. I have considered whether the victim, due to his state of intoxication, was incapable of giving consent to the application of force by voluntarily participating in a consensual fight. Although the evidence shows that the victim was under the influence of alcohol, I do not believe that the prosecution has proved beyond reasonable doubt that the victim was incapable of giving consent to the application of force by reason of his state of intoxication. However, nothing turns on this aspect of the matter as I have disposed of the issue of consent on other grounds.

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[44] See Exhibit P1.
[45] Glanville Williams *Textbook of Criminal Law* 2nd ed, p 550.
[46] Glanville Williams, n 45, p 550.

DEFENSIVE CONDUCT: SECTION 29 OF THE CRIMINAL CODE (NT)

173. In addition to the defences of accident and consensual fight, the defendant sought to avail himself of the defence of defensive conduct, as provided for by s 29 of the Criminal Code (NT).

174. Relevantly, s 29 of the Code provides as follows:

> (1) Defensive conduct is justified and a person who does, makes or causes an act, omission or event by engaging in defensive conduct is not criminally responsible for the act, omission or event.
>
> (2) A person engages in defensive conduct only if –
>
> (a) the person believes that the conduct is necessary -
>
> (i) to defend himself or herself or another person;
>
> (ii) to prevent or terminate the unlawful deprivation of his or her or another person's personal liberty;
>
> (iii) to protect property in the person's possession or control from unlawful appropriation, destruction, damage or interference;
>
> (iv) to prevent trespass to land or premises occupied by or in the control of the person;
>
> (v) to remove a trespasser from land or premises occupied by or in the control of the person;
>
> (vi) to assist a person in possession or control of property to protect that property or to assist a person occupying or in control of land or premises to prevent trespass to or remove a trespasser from that land or premises; and
>
> (b) the conduct is a reasonable response in the circumstances as the person reasonably perceives them.
>
> (7) Sections 31 and 32 do not apply in relation to defensive conduct.

175. Being in the nature of a justification, the defendant bears the evidential burden of raising the defence of defensive conduct. The defendant must either adduce or be able to point to evidence in the prosecution case

justifying leaving the defence with the tribunal of fact.[47] Once that evidential burden is discharged – the evidence discloses the reasonable possibility that an act was done in self defence - the prosecution bears the legal burden of disproving defensive conduct.

176. Mr Smith submitted that the evidence was not sufficient to put the defence of defensive conduct in issue:

> The court simply has no evidence to infer or determine that point. It is the prosecution submission that there is nothing before the court to determine what the defendant's beliefs were at the time of the incident nor can the court infer what was in the defendant's mind at the time. Hence there is no capacity to subjectively determine what the defendant thought was a reasonable response to the situation, as the defendant would have perceived the situation to be at the time. Therefore the defence is incapable of arising on the evidence before the court.[48]

177. Mr Berkley responded as follows:

> There was…evidence from Casey that he, too, was physically intervening at this stage, and had put his hands on both the complainant and the accused, Casey said that the accused was bent backward against a small table attached to a post. In those circumstances self defence is clearly raised. Surely the *Zecevic* formulation that the accused could do whatever he thought necessary to defend himself (and mirrored in the Code) would also come into consideration.
>
> The Crown's submission that there is no evidence to infer or determine whether the defendant was engaged in defensive conduct misses the point. When the evidence is that the accused was set upon by one or two men and was being forced backward it must be reasonable to apprehend that a person in the position of the accused might perceive the gravity of the attack and then do something to cease the attack upon him. Following on from *Taylor and Tikos (No 1)* the evidence clearly sets out a fact situation where defensive conduct must fall to be considered by the fact–finder.
>
> It is not up to the accused to prove anything (*Woolmington*). Once the evidence that raised defensive conduct is before the court, the Crown must positively disprove it.
>
> The Crown's submission is also that there is no evidence to "… subjectively determine what the defendant thought was a reasonable response to the situation, as the defendant would have perceived the

[47] Gillies, n 26 p 323.
[48] See p 3 of Mr Smith's written submissions dated 10 December 2007.

> situation to be at the time". I take issue with my learned friend again here, as the test of what is a reasonable response is objective, but certainly does, as my learned friend says, relate to the circumstances as the accused reasonably perceived them, which is both objective and subjective. In my submission it might conceivably be thought by a reasonable jury that it was a serious possibility that the accused might have been defending himself, as expressed in *Tikos (No 1)* (supra).[49]

178. As adverted to by Mr Smith, the defence of defensive conduct puts the mind and mental processes of an accused in issue; and in this case, there is no direct evidence from the defendant as to what was going through his mind at the time, as he has no recollection of the incident.

179. However, while it is normal in cases where self defence is raised for the accused to adduce evidence as to his belief at the material time, there seems to be no logical reason why an accused, in the position of the present defendant, cannot seek to rely upon circumstantial evidence from which his belief at the relevant time may be inferred.[50] Requisite mental states for criminal responsibility are commonly proved circumstantially by drawing appropriate inferences from the surrounding circumstances.

180. Although the Court could not be satisfied beyond reasonable doubt, in the context of the defence of accident, that the defendant picked up the glass during the course of the incident, that remains a possibility on the evidence and the defendant is entitled to have that evidence considered in so far as it may raise, or otherwise be relevant to, a defence of defensive conduct. In my view, the possibility that the defendant equipped himself with the glass during the course of the altercation is a piece of circumstantial evidence, tending to show a belief on the part of the defendant as to the necessity to defend himself. That evidence is also relevant to the consideration of the circumstances as the defendant reasonably perceived them.

181. In relation to defensive conduct, two main hypotheses fall to be considered

[49] See pp 5-6 of Mr Berkley's written submissions dated 17 December 2007.
[50] See for example *Fahey* (1978) 19 SASR 577.

on the evidence. The first is the hypothesis advanced by the witness Nebauer. The second is the hypothesis put forward by the witness Casey, which incorporates the defendant's acquisition of the glass after the altercation began.

182. In my opinion the prosecution has negatived defensive conduct on both hypotheses.

183. Dealing with the first hypothesis, although it is arguable that the defence in terms of s 29(2)(a)(i) of the Code has been raised, it is clear that the defendant's conduct (ie striking the victim with the glass) was not a reasonable response in the circumstances as he reasonably perceived them.

184. According to that hypothesis, after some mutual pushing, a tussle ensued. Both men grabbed each other around "the collar bone area of the shirt". That was followed by the defendant punching the victim with the glass. Clearly, the defendant's conduct was not a reasonable response in the circumstances reasonably perceived by him.

185. Although it is again arguable on the second hypothesis that the defence has been raised in terms of s 29(2)(a)(i), the defendant's conduct was clearly not a reasonable response in the circumstances as he reasonably perceived them.

186. According to the second hypothesis, the incident began with the victim tapping the defendant on the shoulder and shrugging his shoulders. The defendant then grabbed the victim by his shirt. The victim responded by applying his right hand to the defendant's chest. After dropping his glass, the victim, using both hands, tried to push the defendant away. The defendant fell and struck a ledge. After falling the defendant reached behind him and produced a beer glass which he used to strike the victim. Mr Casey says that as the victim and the defendant were falling back, he moved forward and grabbed both men by the shirt and then around the arms and the

chest. He released the victim after the defendant had struck him with the glass. He then grabbed the defendant.

187. It is difficult to visualise what was really happening according to the account given by Casey. It is difficult to determine at what stage the defendant took hold of the glass on Mr Casey's account. Did he take hold of the glass before he was grabbed hold of by Mr Casey? Or did the defendant equip himself with the glass after he was grabbed by Casey. However, regardless of the situation, it is a misreading of the evidence to say that the defendant was "set upon by one or two men and was being forced backward", as submitted by Mr Berkeley.

188. Furthermore, regardless of the situation, it is difficult to see how the victim posed such a threat to the defendant as to warrant the defendant's reaction ie striking the victim with the glass. Mr Casey has the victim doing nothing at that stage, except for having fallen back along with the victim. Nor does Mr Casey have the victim doing anything when he grabs hold of him and the defendant. There is, of course, a suggestion that the victim might have been doing something to warrant Mr Casey grabbing hold of him. However, that was not explored either during examination in chief or cross-examination. The most likely explanation for Mr Casey's intervention is that he acted with a view to preventing a continuation of the incident.

189. Moreover, there is nothing in Mr Casey's account of the earlier stages of the incident indicating that the victim posed such a threat to the defendant as to warrant him equipping himself with a glass and striking the victim in the face with that glass.

190. Mr Casey was not an assailant, but an intervenor who was seeking to bring the incident to an end. In grabbing hold of the two men as he did, he acted reasonably. Indeed, it does not appear that the defendant considered it necessary to defend himself against the actions of Mr Casey. The defendant made no attempt to strike Mr Casey – indeed he did not try to resist Mr

Casey's attempt to constrain him. Instead, the defendant decided to strike the apparently passive victim.

191. In my opinion, the prosecution has negatived beyond reasonable doubt the defence of defensive conduct.

192. In my opinion, it is arguable that the defence of defensive conduct should be rejected on another more fundamental basis. It is open on the evidence given by Mr Nebauer and Mr Casey for the court to be satisfied beyond reasonable doubt that the defendant was the initial aggressor in terms of initiating hostilities.[51] According to Mr Nebauer, the defendant pushed the victim. Although Mr Casey has the victim tapping the defendant on the shoulder at the start of the incident, he says that it was the defendant who initiated the hostilities by grabbing the front of the victim's shirt. In my opinion, it is open on the evidence to view the defendant as having provoked a lawful attack upon him and to view the purported defensive conduct as aggressive behaviour "in pursuit of [an] original design".[52]

193. However, my preference is to reject the defence of defensive conduct on the basis that the defendant's response was not a reasonable response in the circumstances as he reasonably perceived them.

194. Before leaving the issue of defensive conduct, it is necessary to consider whether the defendant has a defence under s 29 of the Code based on an honest and reasonable mistaken belief as to the reasonableness of the response.

195. As Gray points out, [53] although an accused cannot argue that he or she made an honest and reasonable mistake as to the necessity of the response, pursuant to s 32,[54] an accused may have a defence under s 29 if he or she

[51] See O'Connor and Fairall *Criminal Defences* p 189
[52] See *Zecevic v DPP (Vic)* (1987) 162 CLR 645
[53] Gray n 5 p 133.
[54] Gray n 5, p 133

honestly and reasonably believed the response was reasonable.[55] The difficulty that faces the defendant in this case is that there needs to be some evidence of that state of mind in order to raise a defence of that type. The defendant gave no evidence as to his belief at the material time. Furthermore, such a mistaken belief is not capable of being inferred from the circumstantial evidence in this case. Accordingly, I am satisfied beyond reasonable doubt that the prosecution has negatived this aspect of the defence of defensive conduct.

SECTION 29 AND INTOXICATION

196. Section 20 of the Code makes it clear that both the response and the accused's perception of the threat must be reasonable.[56] Consequently, an accused who responds "as a result of a mistake arising from intoxication would not be regarded as having 'reasonably' perceived the circumstances".[57]

197. Accordingly, the defendant in the present case cannot rely upon his state of intoxication as laying the foundation for a defence of defensive conduct.

THE DEFENCE OF PROVOCATION

198. Although the defendant did not seek to rely upon the defence of provocation, it is nonetheless the duty of the Court to consider any evidence that might lay the foundation for a provocation defence. In my view, the evidence was not sufficient to raise the defence of provocation. But even if the evidence did enliven the defence, it is clear that the defence has been excluded beyond reasonable doubt on the basis that an ordinary person similarly circumstanced would not have acted in the same or a similar way.

[55] Gray n 5, p 133.
[56] Gray n 5 p 133
[57] Gray n 5, p 133

EVIDENCE OF IDENTIFICATION

199. The present case was not an identification case: no issue was taken that the defendant was the person who struck the victim with the glass. There was sufficient evidence linking the defendant to the criminal act: see Mr Casey's evidence, which went unchallenged and which was uncontradicted.

FINDING OF GUILT

200. I am satisfied beyond reasonable doubt that all of the elements of the offence have been made out. I am satisfied beyond reasonable doubt that the prosecution has excluded the defence of accident, particularly by reference to intoxication, consensual fight (including a mistaken belief as to consent) and defensive conduct (including a mistaken belief as to the reasonableness of the response), as well as the defence of provocation.

Dated this 23rd day of January 2008.

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Dr John Allan Lowndes
STIPENDIARY MAGISTRATE