CITATION: *Justin Anthony Firth v JBM [2018] NTLC034*

PARTIES:	Justin Anthony FIRTH v JBM
TITLE OF COURT:	Local Court
JURISDICTION:	Criminal
FILE NO(s):	21744064, 21758768, 21759965
DELIVERED ON:	30 July 2018
DELIVERED AT:	Darwin
HEARING DATE(s):	27 February 2018
JUDGMENT OF:	Chief Judge Lowndes

CATCHWORDS:

CRIMINAL LAW – MENTAL IMPAIRMENT DEFENCE – DISMISSAL PROCESS UNDER SECTION 77 OF THE MENTAL HEALTH AND RELATED SERVICES ACT – LACK OF KNOWLEDGE THAT CONDUCT WAS WRONG

Mental Health and Related Services Act s 77
O'Neill v Lockeyer [2012] NTSC 10 followed
R v Porter (1933) 55 CLR 182 followed

REPRESENTATION:

Counsel:

Complainant:	Mr D Dalrymple
Defendant:	Ms M Chen

Solicitors:

Complainant:	DPP
Defendant:	NTLAC

Judgment category classification:	B
Judgment ID number:	[2018] NTLC 34
Number of paragraphs:	150

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21744064, 21758768, 21759965

BETWEEN:

Justin Anthony Firth
Complainant

AND:

JBM
Defendant

REASONS FOR JUDGMENT

(Delivered 30 July 2018)

CHIEF JUDGE LOWNDES

INTRODUCTION

1. The defendant was charged with the following offences:

- Three counts of engaging in conduct that contravenes a domestic violence order (file number 21744064);
- One count of damage to property (file number 21758768); and
- One count of breach of bail, one count of drive unregistered, one count of drive uninsured and one count of failing to produce a licence on request (file number 21759965).

2. The defendant sought to have all the charges dismissed pursuant to s 77 of the *Mental Health and Related Services Act* (MHRSA). To that end certificates pursuant to s 77(2) of the MHRSA were requested and in due course provided to the Court.

3. The Chief Health Officer, Dr Heggie, provided a s 77 certificate in relation to each of the three criminal files. In accordance with s 77(3) of the Act those certificates were issued on the basis of advice from a designated mental health practitioner, Mr Tim Jacobs.

4. In relation to file numbers 217444064 and 21758768 Dr Heggie certified that:

   (a) the defendant was suffering from a mental illness or mental disturbance at the time of carrying out the conduct constituting the alleged offences and

   (b) that the mental illness or mental disturbance was likely to have materially contributed to the conduct.

5. With respect to file number 21759965 Dr Heggie certified that although the defendant was suffering from a mental illness or mental disturbance at the time of carrying out the conduct constituting the alleged offences, that mental illness or mental disturbance was not likely to have materially contributed to the conduct.

6. The advice from Mr Jacobs, which took the form of a report, supported the above certifications as well as documenting the reasons for the opinions he had formed (Exhibit 2).

7. The application for dismissal of charges was heard by the Court on 27 February 2018. The only witness called to give evidence at the hearing was Mr Jacobs.

THE DISMISSAL PROCESS UNDER SECTION 77 OF THE ACT

8. The process for dismissal of charges under s 77 of the MHRSA begins with a request made by the Court to the Chief Health Officer for a certificate in the approved form stating:

   (a) whether at the time of carrying out the conduct constituting the alleged offence the person was suffering from a mental illness or mental disturbance; and

   (b) if the person was suffering from a mental illness or mental disturbance – whether the mental illness or disturbance is likely to have materially contributed to the conduct: s 77 (2) of the MHRSA.

9. At the next stage of the process, the Chief Health Officer must not give the Court the certificate unless he or she has received and considered advice on the person from an authorised psychiatric practitioner of designated mental health practitioner: s 77(3) of the MHRSA.

10. Section 77(4) then goes on to state:

> After receiving the certificate, the court must dismiss the charge if satisfied that at the time of carrying out the conduct constituting the alleged offence:
>
> (a) the person was suffering from a mental illness or mental disturbance; and
>
> (b) as a consequence of the mental illness or disturbance, the person:
>
> (i) did not know the nature and quality of the conduct; or
>
> (ii) did not know the conduct was wrong; or
>
> (iii) was not able to control his or her actions

11. In *Police v K* (a decision of the Local Court, delivered on 21 December 2017, pp 6-8) I had occasion to refer to the comprehensive discussion by Barr J in *O'Neill v Lockeyer* [2012] NTSC 10 pp 6-7 concerning the purpose and evidentiary effect of a s 77(2) certificate:

In that case Barr J held that the court could not rely on the certificate alone, without further evidence for a number of reasons:

- "The statements made by the Chief Health Officer in the certificate are necessarily based on opinion: the opinion of the Chief Health Officer, informed by the advice (factual details and opinion) of an "authorised psychiatric practitioner or designated mental health practitioner" under s 77(3);"

- "The opinion of the Chief Health Officer may be an expert opinion actually reached by the Chief Health Officer himself or herself, or may be a simple transmission of the opinion of another person, that is, of the psychiatric practitioner or mental health practitioner who provided the advice under s 77(3);"

- "The opinion of the Chief Health Officer may be a combination of both;"

- "The court should not rely exclusively on a s 77(2) certificate for the purpose of satisfying itself under s 77(4) that "at the time of carrying out the conduct constituting the alleged offence the person was suffering from a mental illness or disturbance";"

- "In many cases the court ought not to rely at all on a s77(2) certificate for the purpose of satisfying itself under s 77(4)(a). The

certificate may not be admissible in evidence, and even if admissible the weight to be accorded to it may be nil or slight;"

- "The certificate is not binding on the court, and the court must consider all the evidence;" [1]

- "An examination by the court of the evidence will reveal the basis on which the Chief Health Officer made the statements in the certificate. If they represent an expert opinion actually reached by the Chief Health Officer himself or herself; or if, on the evidence, the facts on which the expert opinion is based are established, then the statements of opinion would probably be admissible and entitled to such weight as the court thinks fit. If the statements in the certificate are merely a transmission of the opinion of another person, then the certificate will be inadmissible for the purposes of the court's consideration of the s77(4) matters, and would in any event have little evidentiary weight."

12. In the same case I made reference to His Honour's statement that the court should always "go behind the certificate".[2] I also referred to the following observation made by His Honour:[3]

> Whether the court should receive as evidence the report on which the Chief Health Officer has relied is a separate question, to be answered by the court by reference to relevance and admissibility, as well as the principles relating to the receipt of expert evidence.

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[1] See *Mununggurr v Gordon & Anor, Mununggurr v Balchin & Anor* [2011] NTSC 82 at [19] and [20] where Kelly J said in relation to s 77(4)(a):

> " …the Court must undertake its own assessment of those matters, which it can only do by considering relevant evidence…the subsection plainly requires the Court to be satisfied of the relevant matters; it does not require, or authorise, the Court to accept the certificate of the Chief Health Officer as determinative of those questions."

[2] *O'Neill v Lockeyer* [2012] NTSC 10, p9.

[3] *O'Neill v Lockeyer* [2012] NTSC 10, p9.

13. As stated in *Police v K* (p 7), His Honour concluded that the court's power to dismiss charges pursuant to s 77(4) of the Act was not dependent on an initial establishment of the causal link between the defendant's mental state and the conduct in question through the s 77 certificate":[4]

> The court's power to dismiss charges pursuant to s 77 (4) can only be exercised after the court has received a certificate from the Chief Medical Officer requested by the court under s 77(2)…
>
> …notwithstanding the requirement that the court first receive a certificate from the Chief Health Officer before proceeding under s 77(4), the court's power to dismiss charges pursuant to s 77(4) is not dependent on the establishment of the causal link, via the s 77 certificate, between the defendant's mental state and the conduct in question.
> The court has an independent role to consider and assess the evidence in any criminal proceeding where it is exercising summary jurisdiction. The court hears the evidence in chief and cross-examination of all prosecution and defence witnesses (including possibly the defendant). It therefore follows that the court's findings and conclusions may be different from the matters stated by the Chief Health Officer in the s 77(2) certificate. So, for example, even if the certificate of the Chief Health Officer certifies in the negative to the issue in s77 (2)(a), or in the affirmative to the issue in s 77(2)(a) but in the negative in s77(2)(b), the court might well arrive at an opposite conclusion after considering the identical issue to s 77(2)(a) as part of its s 77(4)(a) deliberations and may make findings under s77(4)(b) inconsistent with the certificate of the Chief Health Officer under s77(2)(b).

14. As stated by Barr J in *O'Neill v Lockeyer* , "it is for the court and not the Chief Health Officer to consider the matters in s 77(4)(b)" and "the Chief Health Officer

[4] *O'Neill v Lockeyer* [2012] NTSC 10, pp 10-11.

must leave the s 77(4)(b) matters for the consideration and determination of the court".[5] The reasons for that were explained by Kelly J in *Mununggurr* at [16]:

> …the certificate is directed to a different question from that to be decided by the Court under s 77(4). Both the Chief Medical Officer and the Court must determine whether at the time of carrying out the conduct constituting the alleged offence the person was suffering from a mental illness or mental disturbance. Thereafter the enquiries differ. The Chief Health Medical Officer must state whether the mental illness or disturbance is likely to have materially contributed to the conduct. That is a different matter from that which the Court must determine under s 77(4), namely whether, as a consequence of the mental illness or disturbance, the person: (1) did not know the nature and quality of the conduct; or (2) did not know the conduct was wrong; or (3) was not able to control his or her actions.

15. Finally, but not least, it is important to bear in mind Barr J's observations as to the purpose of a s 77 certificate:[6]

> The purpose of the s77(2) certificate is to give a preliminary indication to the court and to the parties as to whether the defence of mental illness/mental disturbance might be available. In practice, given that the court has to request the certificate, the court could probably have already detected in the facts or evidence some indication of mental illness/mental disturbance on the part of the defendant. The certificate takes the consideration to the next stage by providing an opinion or statement as to whether (or not) at the time of the alleged offence the defendant was suffering from a mental illness or mental disturbance; and whether the mental illness or disturbance is likely to have materially contributed to the offending conduct.
>
> …the s 77(2) certificate cannot be other than a preliminary indication, a "red flag" as it was described in the submissions before me. Whatever the certificate might say, the onus is on the defendant to satisfy the court as to the matters set out in s77(4) (a) and (b), on the balance of probabilities.

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[5] [2012] NTSC 10, p 8.

[6] *O'Neill v Lockeyer* [2012] NTSC 10, pp 13-14.

THE RELEVANT EVIDENCE

- **The Section 77 Certificates**

16. In my opinion, the s 77 certificates that have been provided to the Court are not admissible as evidence of the matters that are required to be satisfied in accordance with s 77(4) (a) and (b) of the MRHSA.

17. As the certificates of Dr Heggie purport to be opinions, the admissibility of those opinions is governed by the provisions of s 79 (1) of the Evidence (National Legislation) Act.

18. The preconditions for admissibility of opinion evidence under s 79(1) are:

    1. The person expressing the opinion must have specialised knowledge;
    2. That specialised knowledge must be based on the person's training, study or experience; and
    3. The opinion must be wholly or substantially based on that specialised knowledge.

19. These preconditions have not been satisfied, and therefore the certificates are not admissible under s 79 of the Act as an exception to s76 which establishes the "opinion rule" – which operates to exclude evidence of an opinion which a party seeks to use in order "to prove the existence of a fact about the existence of which the opinion was expressed".[7] However, even if the certificates were admissible under s79(1) of the Act they should be given no weight.

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[7] S Odgers "Uniform Evidence Act" 11th edition at [1.3.400).

- **Mr Jacobs' Evidence**

20. It remains to consider the evidence given by Mr Jacobs - both documentary and oral. This evidence is constituted by the written advice/report he gave to the Chief Health Officer as well as the evidence he gave at the hearing of the s 77 application on 27 February 2018.

21. It is proposed to first set out in detail Mr Jacobs' evidence. That will be followed by a consideration of the admissibility of his evidence and the weight, if any, to be accorded to that evidence.

- **Mr Jacobs' Advice/Report to the Chief Health Officer**

22. By way of preamble to his advice, Mr Jacobs listed the following qualifications:

> Designated Mental Health Practitioner(DMHP) since May 2016 and a member of the Top End Health Service Forensic Team (FMHT) since 21 April 2016 – registered nurse with the Australian Health Practitioner Regulation Agency – academic qualifications Batchelor of Nursing (University of Tasmania 2000); Graduate Diploma in Nursing (Flinders University 2004); and Masters in Forensic Mental Health (Griffith University 2014) – currently undertaking a Batchelor of Behavioural Studies Psychology through Swinburne University.

23. In his advice to the Chief Heath Officer Mr Jacobs formed the following opinions:

    1. In relation to file numbers 21744064 and 21758768 he expressed the opinion that the defendant was suffering from a mental illness or mental disturbance at the time of the alleged offences and that his mental illness or disturbance was likely to have materially contributed to the conduct constituting the offences.

    2. In relation to file number 217599965 he expressed the opinion that although the defendant was suffering from a mental illness or mental

disturbance at the time of the alleged offences his mental illness or disturbance was not likely to have materially contributed to the conduct constituting the offences.

24. In reaching these opinions, Mr Jacobs relied upon the following information.

1. The defendant was involuntarily admitted to the Top End Mental Health Services (TEMHS) inpatient psychiatric facility from 4 to 8 August 2017 (which was during the same month as the offences alleged on file number 21744064). The Discharge Summary completed by Dr Sarah Elbelassi (resident medical officer) stated that the diagnosis was "Relapse Schizophrenia due to non - compliance (likely substance use may be contributing)". It was also reported that the defendant had experienced suicidal ideation, and was suffering from paranoid delusions that his former girlfriend (Ms Ricki Killeen, the victim in the matter) was involved with outlaw motor cycle gangs and that they had been injecting him with methamphetamines without his consent.

2. On 10 August 2017, 3 days prior to the alleged offences on file number 21744064, the defendant was assessed at his place of residence by Dr Rajiv Weerasundera (psychiatrist) who reported that he was "anxious and paranoid", presenting with "persecutory delusions of being poisoned". The psychiatrist also noted "schizophrenia, early signs of relapse" plus high risk of deterioration.

3. On 21 August 2107, two days following the third alleged offence on file 21744064, the defendant was assessed by a social worker, Ms Sophie Smith, who noted that the defendant's thought content included: " paranoid and persecutory delusions, continues to voice concerns about being poisoned and his ex - girlfriend having

revenge on him having injected him with drugs". When she subsequently assessed the defendant on 29 August 2017 the social worker recorded that he was experiencing: "ongoing paranoid and persecutory delusions, these seen to have diminished slightly (sitting under the surface) still believes that there was a revenge attack against him and people were injecting his feet with drugs at night".

4. On 13 September 2017, the defendant was again assessed by the social worker, it being noted that he "continued to be preoccupied discussing the 'revenge attack' that he felt had happened to him. It was difficult to interrupt [the defendant] when he was discussing this and he spoke over [his] CM (case- manager) to continue this conversation. [The defendant] spoke about this at some length".

5. On 28 September 2017 the defendant was again assessed by the psychiatrist (Dr Rajiv Weerasundera) when "paranoid and persecutory delusions" were noted.

6. On 11 October 2017, about 12 days prior to the alleged offence associated with file number 21758768, the defendant was once again reviewed by the social worker. It was recorded that ongoing paranoid and persecutory delusions remained, including the defendant's belief that he had been previously assaulted by his former girlfriend ("revenge attack").

7. On 30 October 2017, about 7 days after the alleged offence associated with file number 21758768, the defendant was again reviewed by the social worker, with the following being noted: " ongoing paranoid and persecutory delusions remain, and this included [the defendant's] belief that he was previously assaulted by his ex-girlfriend: revenge attack".

8. On 15 November 2017, Dr Gregory Spicer (psychiatric registrar) assessed the defendant, recording that he had stated that the mafia might have been involved in his girlfriend injecting him with drugs previously. The defendant was assessed as being “delusional, potentially experiencing perceptual disturbances, and requiring inpatient psychiatric assessment and admission”.

9. On 15 November up until 20 December 2017, the defendant was admitted to the TEMHS inpatient psychiatric facility.[8] According to the discharge summary completed by the resident medical officer, Dr Emma Martin, the defendant’s admission was due to “…relapse of his condition (chronic schizophrenia secondary to medication non-compliance and substance use – THC and ice”. It was reported that the defendant’s “thought content included the mafia sending him messages, attempting to recruit him” Auditory hallucinations and lack of insight into his mental health symptoms were also recorded. It was further recorded that over the course of his admission his auditory hallucinations resolved; however, the mental state examination conducted at the time of his discharge revealed “ongoing symptomology, yet of a reduced intensity”. His “persistent paranoid/persecutory delusions regarding the mafia” were also recorded.

25. During the period of his inpatient admission, the defendant was also assessed by Dr Ranjit Kini (forensic psychiatrist) for the purposes of providing an assessment on patient risk and management.[9] Dr Kini recorded the following on 8 December 2017:

[8] Alleged offences associated with file 21759965 occurred on 29 December 2017, 9 days after the defendant was discharged from the inpatient facility.
[9] Dr Kini was not the defendant’s treating psychiatrist.

> On occasions, it was difficult to understand [the defendant's] rationale/thread of thinking suggesting hints of underlying formal thought disorder. He continued to express a range of delusional beliefs (paranoid, persecutory, reference, grandiose themes). He continued to express delusional perception. He did not report passivity experiences, but his accounts suggested some thought interference – he believed that the mafia could put voices into his head, to manipulate his thinking. His insight into his mental illness was poor, he remained convinced that his beliefs about persecution by the mafia were based in reality.

26. Furthermore, whilst perceptual disturbances were not evident at the time of Dr Kini's assessment, Dr Kini noted the following on 8 December 2017:

> Prior to [the defendant's] admission, for 2 -3 months, he reported hearing male and female voices speaking in English. He said that at times they repeated his name tried to get his attention by explaining "situations I didn't know". He alluded to auditory hallucinations both in 2nd and 3rd person, including command hallucinations – the voices "were guiding me along a path". He said that the voices did not command him to harm himself or others. However, he said that the voices explained "a story about the mafia". In short, the voices were instrumental to perpetuating his delusional belief system about the Italian mafia targeting him either for recruitment or for harm. He believes that the voices belong to the mafia.

27. During the defendant's inpatient admission it was also recorded in a "Clinical Details and Management Plan re Community Management Order" dated 19 December 2017 that the defendant had delusional beliefs that the Chinese and Italian mafia were "after him because he noticed signs indicating this such as the knob on his window being black". The defendant admitted to slashing the victim's tyres in relation to the alleged offence associated with file 21758768, and that he did so in an attempt to alert police officers about activities of the mafia in the neighbourhood.

28. On 27 December 2017, 2 days before the alleged offences associated with file number 217759965, the defendant was assessed by Dr Spicer who recorded in the medical records that his delusional content remained.

29. Dr Spicer reviewed the defendant on 2 January 2018, 4 days after the alleged offences associated with file number 217599965. The following impression appeared in the medical records: "schizophrenia/persistent delusional disorder not fully stabilised…" Dr Spicer's notes recorded the following:

> Fixed delusions persist. "The mafia thing" – today relates that he is "fairly sure" the mafia are using "child-like people to enter your house while you're sleeping…they inject you with drugs to obtain information from you". States that he knows this because he saw two of these "little guys" about 8 months ago and prior to that he saw a "head at the end of a couch and two little hands". Feels the mafia have been doing this "for quite a while, but I've only {recently] started to realise what they've been doing".
>
> Continues to lack insight – deterioration of presentation last week. Blames his partner for the "methamphetamine overdose" that led to his breach of bail over the DVO – states his then partner injected him with the drug "while I was sleeping". Feels she was responsible for him starting to inject meth.

30. At the time of Mr Jacobs' report the defendant remained under the psychiatric care of the Top End Mental Health Adult Team, his case worker being Ms Sophie Smith. At that time the defendant also remained on a Community Management Order for a period of 6 months from 21 December 2017 to 21 May 2018, receiving a fortnightly depot Zyprexa Relprevv 405mg.

31. In preparing his advice to the Chief Health Officer, Mr Jacobs interviewed the defendant on 4 January 2018. During that interview the defendant advised that he

had not used methamphetamines since prior to his last psychiatric inpatient admission which occurred in November/December 2017. The defendant also reported that he previously smoked methamphetamines on a fortnightly basis for approximately 3 days in a row, but he never injected. He informed Mr Jacobs that he used the drug as a means of coping with his father's illness. The defendant also reported that he consumes cannabis approximately 5 days per fortnight to calm himself and to manage the stress associated with his father's illness.

32. In his advice to the Chief Health Officer, Mr Jacobs dealt with the relationship between the defendant's mental illness and the alleged offences.

33. In relation to the alleged offences associated with file number 21744064 Mr Jacobs reported as follows:

    1. The defendant admitted that he had sent text messages to the victim;

    2. The defendant explained that the reasons for doing so were that he believed that the victim had previously assaulted him by deliberately injecting him without his consent with methamphetamines whilst he was asleep;

    3. The defendant reported that this was a "revenge attack" against him by the victim;

    4. The defendant stated that the effects of the supposed injection of methamphetamines lasted from 3 to 7 days, and described symptoms at the time as feeling anxious, confused thinking and impaired memory;

    5. The defendant believed that the intoxicating effects from the injection caused him to text the victim, thereby breaching the DVO;

6. As to the likely reasons for the "revenge attack", the defendant stated that the victim had a "deep connection" with him, and was very upset that he had ended their relationship. He also indicated that the victim was angry, as she believed that he had been having sexual relationships with other people whilst they were together, and that injecting him would cause his mental health to deteriorate. Mr Jacobs stated that "his explanation for his belief that the victim had injected him was unclear, and likely to be indicative of mental health symptomology; likely a delusion";

7. When asked how he would know he had been injected if he was asleep at the time, the defendant "advised somewhat incomprehensibly, that the mafia were responsible for making him sleep heavily". He also indicated that the methamphetamine effects may have partially woken him and knew he had been injected because he saw blood on the floor, which he regarded as being the result of the injection;

8. The defendant reported that his "capacity to know right from wrong was impaired at the material times". He indicated that at the times he breached the DVO he believed that it was something he needed to do "to help the situation". He referred to a number of matters he believed that had occurred while they were living together and to the belief that the victim thought he was trying to arrange someone to sexually assault. However, he now considered that he did the wrong thing;

9. The defendant also reported that he believed he was becoming mentally unwell at around the time of the alleged offences, and therefore "forgot about the DVO requirements" and that he was "not in the right frame of mind" at the time due to his mental illness.;

10. The defendant denied substance abuse at the time of the alleged offences; however, he believed that "he was intoxicated with the methamphetamines he believed had non -consensually been injected with whilst he was asleep";

34. With respect to the alleged offences associated with file number 21758768, Mr Jacobs stated as follows:

1. The defendant reported that at the material time he had been receiving what he considered to be "subliminal messages" from Facebook, and that these subliminal messages "presented in the form of a voice in his head (auditory hallucination) telling him that should damage the tyres of parked red and black car which be believed was owned by the victim in the matter, Ms Keeley Atkins, boyfriend";

2. The defendant reported that he believed at the material time, and still at the time he was interviewed by Mr Jacobs, that the red and black colours of the car he damaged signified that it was a car owned by the mafia. The defendant reported that he believed that if he did something to the car, then he might get "credit" from his police officer neighbours for not joining the mafia. He also reported that damaging the tyres was a means to communicate with his police officer neighbours about the mafia's presence, as he reported that "they, his neighbours, were not easily contactable due to the security of their house, and that he would be unable to shout his concerns over the fence and walls of his neighbours property; and that he no longer had the phone number of his neighbours to phone them";

3. The defendant reported that he believed at the time that the boyfriend of the victim, who the defendant believed owned the vehicle, was involved in getting information about him and his family through his relationship with the victim, and that this information was for the purposes of the mafia. The defendant also reported that at the time there was a silver car in the same location and that this car belonged to the police who were "looking after him" in regards to the mafia, and that these guys were "the good guys";

4. The defendant reported that he believed at the material time that he did the right thing, and still believes he did; however, in hindsight he reported that instead of

trying to communicate his concerns in the way that he did (by damaging the tyres), he could have telephoned Australian intelligence services and advised them of his concerns. He stated that he now feels “sorry” for the victim’s boyfriend who he believes owned the vehicle that he damaged. The defendant indicated that at the time he believed that the boyfriend had willingly joined the mafia; however he now knows that “no body deliberately chooses to join the mafia, instead that the mafia choose them”;

5. When asked whether he was using any illicit substances at the material time, the defendant answered “No I wasn’t; I don’t think”.

35. In relation to the alleged offences associated with file number 21759965, Mr Jacobs reported as follows:

1. The defendant explained that he had breached the curfew conditions of his bail because at the material time he received a phone call from a girlfriend who needed cigarettes and wanted his company;

2. The defendant reported that he knew he would be breaching his curfew by driving; however, as he had already done so on a number of other occasions he believed he would not be caught by police. The defendant also indicated that because he had no money he did not take his wallet with him which contained his driver’s licence. Therefore, he was unable to produce his licence when requested to do so by police;

3. The defendant reported that he had failed to attend to the registration of his motor vehicle and third party insurance because he had “ a lot on his mind with mental health”;

4. The defendant did not recall any particular symptomology at the time of the alleged offences;

5. The defendant said that he had only recently been discharged from psychiatric impatient care and was not intoxicated at the time with any substances.

36. Mr Jacobs made the following statements and observations, and proffered the following opinions in relation to the defendant and the alleged offending associated with file number 21744064:

1. He noted that whilst the defendant's use of illicit substances such as methamphetamine and cannabis were apparent in the clinical databases , also apparent were "multiple episodes of diagnosed mental illness and psychotic symptomology- both before and after the alleged offences";

2. He stated that "it was evident from examination of the clinical databases that [the defendant] has a diagnosis of schizophrenia". He noted that during the month of August 2017 in which the alleged offences occurred, the defendant "received a number of psychiatric assessments including an involuntary psychiatric inpatient admission". He also noted that "the primary impressions of such assessments were that he was experiencing paranoid and persecutory delusions that incorporated the victim in the matter, Ms Ricki Killeen". Accordingly, there was "available indication that [the defendant] had experienced symptomology of schizophrenia that would equate to the definition of mental illness as per the MHRSA (paranoid and persecutory delusions and likely perceptual disturbances around the time of the alleged offences, and due to the enduring nature of his symptoms, on the balance of probability, [the defendant] was more likely than not to have had a mental illness at the time of the alleged offence".

3. He expressed the opinion that "the documented paranoid and persecutory delusional beliefs involving the victim in the matter … and associated limited insight and impaired judgment resulted in [the defendant] acting on such beliefs in a way that breached the DVO requirements, and therefore his symptoms of mental illness materially contributed to the offending behaviour";

4. He stated that "his explanation at the index offence interviews for his alleged behaviour were at times difficult to follow, and in my opinion often illogical and at times incomprehensible; also included the self-reported symptoms of anxiety, confusion and impaired memory". He further stated: "In addition, he reportedly believed that by contacting the victim in the matter that he was somehow doing something to …'help the situation'; thereby, clearly, in my opinion, clearly exhibiting impaired judgment";

5. He expressed the opinion that the defendant's symptoms of "severe mental illness at around the time of the alleged offences, which included delusions that incorporated the victim in the matter, likely disturbances in perception, limited insight and impaired judgment secondary to severe mental illness and self-reported confused thinking and impaired memory resulted in [the defendant's] lack of capacity to reason with a moderate degree of sense and composure about whether his conduct as perceived by a reasonable person was wrong at the time of the alleged offences";

6. He expressed the opinion that the defendant was suffering from a mental illness or mental disturbance at the time of the alleged offences and that mental illness or mental disturbance was likely to have contributed to the conduct.

37. With respect to the alleged offending associated with file number 21758768, Mr Jacobs stated and opined as follows:

1. He again noted that although the defendant's use of illicit substances was apparent in the clinical databases, the defendant also had "multiple episodes of mental illness and psychotic symptomology";

2. He stated that "it was evident from examination of the clinical databases that [the defendant] has a diagnosis of schizophrenia and at around the time of the alleged offence that he was experiencing symptomology of schizophrenia that

would equate to the definition of mental illness as per the MHRSA". He opined that "it was more likely than not that [the defendant] was also experiencing a mental illness at the time of the alleged offence due to his recorded history both prior and post the alleged offence of enduring symptomology". He noted that during the month of October 2017 in which the alleged offence occurred he received a number of psychiatric assessments and also required an inpatient psychiatric admission in the following month (about 3 weeks after the alleged offence). Mr Jacobs noted that "the primary impression recorded in CCIS was that he was experiencing persistent paranoid and persecutory delusions";

3. Mr Jacobs expressed the opinion that "[the defendant] acted on his delusional beliefs about the mafia, thereby resulting in the alleged offence, due to the intensity and nature of the delusion, his limited insight and impaired judgment secondary to mental illness, as well as likely perceptual disturbances". He noted that it was recorded in CCIS documentation that the defendant had reported that he damaged the victim's tyres in an attempt to alert his police officers neighbours that mafia activity was occurring in the area ("victim was the daughter of the police officer, although [the defendant] reportedly believed that the vehicle was owned by the victims boyfriend/mafia") and that he was also likely to have been experiencing auditory hallucinations about his neighbours;

4. He noted that during the index offence interview the defendant reported that he felt compelled to communicate in this way (that is damaging the vehicle's tyres) with his police officer neighbours so that they may appreciate his efforts of abstaining from joining the mafia. He also noted that the defendant reported during the interview that he believed the vehicle he damaged belonged to the mafia and the person who owned the vehicle was working for the mafia to gather information on both him and his family. Mr Jacobs opined that "due to his delusional beliefs and likely perceptual disturbance around the time of the alleged offence … these symptoms of mental illness materially contributed to the offending behaviour";

5. Mr Jacobs was of the further opinion that the defendant's "severe symptoms of mental illness at around the time of the alleged offences, which included delusions, likely disturbances in perception and limited insight and impaired judgment secondary to mental illness resulted in [the defendant's] lack of capacity to reason with a moderate degree of sense and composure whether his conduct as perceived by a reasonable person was wrong at the time of the alleged offences";

6. Mr Jacobs expressed the final opinion that the defendant was suffering from a mental illness or mental disturbance at the time of the alleged offending and that mental illness or mental disturbance was likely to have materially contributed to the conduct.

38. In relation to the alleged offending associated with file number 21759965 Mr Jacobs made the following statements and observations and expressed the following opinions:

1. He expressed the opinion that "on the balance of probability it is more likely than not that the defendant was still experiencing a mental illness, as defined by the MHRSA, at the time of the alleged offence due to his documented enduring symptomology". He noted that there were a number of assessments around the time of the alleged offence – including a discharge from inpatient psychiatric care on 20 December 2017 and assessments by Dr Spicer (psychiatric registrar) on 27 December 2017 (2 days after prior to the alleged offending) and also on 2 January 2018. It was "considered that he remained delusional;

2. Mr Jacobs was unable to provide an opinion that the defendant's mental illness materially contributed to the alleged offending for a number of reasons. First, the defendant was at the material time visiting his girlfriend and he was aware that he was breaching his bail conditions. Secondly, due to previous undetected breaches of the bail conditions, the defendant thought he could so again without being detected. Thirdly, Mr Jacobs thought that the defendant's failure to

produce his driver's appeared to be explicable on the basis that he was not carrying his wallet (which contained his licence) because he had no money. Mr Jacobs was of the opinion that "these explanations…were not indicative of mental health symptomology";

3. Mr Jacobs also stated: " In addition, due to the extended time period in which his car registration and third party insurance had not been renewed (allegedly expired on 12 August 2016) resulted in difficulties linking his failure to attend to this matter over an extended time period with symptoms of mental illness at the material time of the alleged offence";

4. Mr Jacobs stated that the PCIS records recorded that the defendant was intoxicated due to the consumption of alcohol at the time of his arrest. Although he was not able to substantiate that report, this "element limited [his] capacity to consider that symptoms of mental illness materially contributed to the alleged offence". Mr Jacobs also noted that "no mention of acute mental health symptoms were recorded in PCIS at that time";

5. Mr Jacobs expressed the opinion that whilst the defendant was suffering from a mental illness or mental disturbance at the time of the alleged offending that mental illness or disturbance was not likely to have materially contributed to the conduct.

- **Mr Jacobs' Oral Evidence**

39. Mr Jacobs repeated the qualifications referred to in his advice to the Chief Health Officer. He gave the following evidence concerning his work experience since 2001.

40. Mr Jacobs began nursing in 2001 and has worked in the mental health environment since 2003. He commenced at Risdon Prison in 2003 and worked there for a period of 12 months. That position involved general nursing as well as working as a

psychiatric liaison person alongside the psychiatric director. From there he relocated to the psychiatric intensive care unit at Royal Hobart Hospital and remained in that position until mid - 2005. His work at the hospital involved working with severely disturbed people with mental illness in a secure unit. He subsequently went overseas and worked in the UK for over12 months. During that time he worked in mental health settings as well as alcohol and other settings. Mr Jacobs returned to Australia in 2006, working for an 18 month period first in a mental health unit in Alice Springs before transferring to Top End Services at the Cowdy Ward Joan Ridley Unit. Mr Jacobs then worked with Alcohol and Other Drugs Services in the Top End before moving to Tasmania where he worked for Drug and Alcohol Services as well as in a secure mental health forensic unit on a casual basis. He returned to Alice Springs in 2010 where he worked at the Mental Health Unit of the Alice Springs Hospital. He then transferred to the Alcohol and Other Drug Services in Alice Springs where he remained until May 2011. He subsequently worked for International Health and Medical Services, involving the psychiatric care of refugees. In 2012 Mr Jacobs commenced employment at the Frankland Ward of Graylands, Perth, which is a secure forensic mental health unit, and worked there for 12 months. In January 2014 he returned to work at the Mental Health Unit in Alice Springs as well as working as a psychiatric liaison person with the Alice Springs Hospital. Around April 2016, Mr Jacobs took up a secondment with the Forensic Mental Health Team initially with Central Australia Mental Health Services and since July 2017 in the Top End, where he continued to be employed as at the date of the hearing.

41. In his oral evidence given at the hearing, Mr Jacobs adhered to the opinions that he had expressed in his report to the Chief Health Officer.

42. In writing the report Jacobs said that he had interviewed the defendant a number of times, reviewed the primary information system, Community Care Information System (CCIS) as well as the primary care information system (PCIS). He also reviewed the information in relation to the alleged offending.

43. Mr Jacobs told the court that CCIS primarily contained information concerning a person's mental health. He said that PCIS also contained mental health information but was "more geared towards the general health of people".

44. Mr Jacobs gave evidence that CCIS contained discharge summaries concerning inpatients and psychiatric inpatient care. He said that some mental health services also write all their notes in CCIS, while other mental health services only write summaries of occurrences or significant events in CCIS, and then make notes on the patient's medical file.

45. In the defendant's case, Mr Jacobs told the court that he obtained a "selective history" from the past psychiatric history primarily from CCIS. The information included a number of assessments completed around the time of the alleged offending, details of the defendant's admissions, his psychiatric involuntary admission on 10 August 2017 and his subsequent psychiatric admission on 15 November 2017.

46. In relation to file number 21744064 (alleged breaches of domestic violence orders) Mr Jacobs said that he availed himself of the following information: the details of

the inpatient involuntary psychiatric admission on 4 – 8 August 2017, a note by Dr Sarah Al Balushi, subsequent notes placed in CCIS including a note by Dr Rajiv Vasundhara (psychiatrist) on 10 August 2017, an associated note on 21 August 2017 by the defendant's case manager (Ms Sophie Smith, social worker) and further assessments by Ms Smith as well as Dr Vasundhara.

47. In relation to the alleged offending associated with file number 21758768, Mr Jacobs accessed information on CCIS which included further indications leading all the way up to the 15th November when the defendant was again admitted to a psychiatric facility, notes made by his case manager and Dr Spicer. He said that he had access to the discharge summary in relation to the 15th November admission as well as information from Dr Kini. Dr Kini's notes pertained to an assessment undertaken during the defendant's admission that commenced on 15th November 2017. Dr Kini's assessment made on 8 December 2017 was also elicited from CCIS.

48. With respect to the alleged offending on file 21759965, Mr Jacobs examined notes recorded in CCIS, including ongoing assessments indicative of enduring mental illness, a note by Dr Spicer dated 2 January 2018 and a record of placement on a community management order which involved receiving a depot antipsychotic injection.

49. Mr Jacobs told the court that the interviews he had with the defendant were conducted on a "one-on-one" basis. The interviews were conducted with a view to "systematically examining [the defendant's] mental state, but primarily to discuss the alleged offences".

50. He said that he conducted a mental state examination, which included a combination of formal and informal questions. Mr Jacobs described the process this way:

> …questions in regards to the alleged offending behaviour, he's asked his explanation of what was occurring at the time, what he thought was happening, what his potential symptoms were, what the reasons were around why he did what he did and were there other alternative reasons for his offending behaviour. It is basically to try and determine whether he did have a mental illness or mental disturbance at the time and whether or not symptoms of such materially contributed to the offending behaviour.

51. Mr Jacobs gave evidence that as regards the alleged offending on file number 21744064 the defendant had explained that he had a belief – recorded in the notes as a delusional belief – that the victim had entered his accommodation without his consent while he was asleep and injected his feet with methamphetamines. The defendant also reported that he believed that this was a revenge attack and "the reasons for such was he felt that the victim…was upset with[him] because she believed he broke up the relationship". Mr Jacobs stated that "looking through his history" the defendant's belief that he had been assaulted had been "very much recorded as [being] delusional".

52. Mr Jacobs said that with respect to the alleged offending associated with file number 21758768, the defendant gave a number of explanations. He believed the vehicle was owned by the victim's boyfriend. He believed that he was getting auditory hallucinations from Facebook and was receiving subliminal messages telling him to damage the vehicle. He felt that he wanted to communicate with police officer neighbours that mafia activity was occurring in the neighbourhood. The defendant wanted to earn credit with his neighbours, explaining that he had not joined the

mafia, even though they continued to try and get him to do so. The defendant also believed that the victim's boyfriend was trying to get information about him and his family. He explained that he could not communicate with his neighbours in any other way than by slashing the tyres of the vehicle. He felt that he couldn't call over the fence and he didn't have the neighbour's number. There were also various security measures in place that prevented contact. The defendant stated that he couldn't just "be shouting on the streets about mafia activity". He was of the view that due to the colours of the vehicle it looked like a mafia vehicle. He also observed another vehicle – which was silver in colour. He connected that vehicle with police officers who were trying to assist him. He believed that this vehicle was "a good vehicle" whilst the other vehicle was connected to the mafia.

53. In relation to the alleged offending on file number 21759965, Mr Jacobs stated that the defendant had told him he breached his bail before and thought he could do so again. The defendant reported that he had been contacted by his girlfriend at the time who wanted him to come over to her house. The defendant felt that she needed him. As regards not having his licence, the defendant said that he did not have his wallet with him at the time because he did not have any money. He said that he had not "completed the registration and licensing information because he simply didn't get around to it". Mr Jacobs stated that the defendant had been suffering from mental illness for a period of time and he had not managed to attend to those matters.

54. In relation to file number 21744064 Mr Jacobs stated that "it would seem very evident to me that both before the alleged offence, after the alleged offence and including an inpatient psychiatric admission in the same month of the alleged

offence, seemed to me, looking at the clinical details as well as the interview with [the defendant], very clearly was indicative of an enduring severe mental health symptomology". He felt that it "was improbable that at the time of the alleged offences that [the defendant] was not suffering from a mental illness when he was before and he was after and he was subsequent the number of assessments completed afterwards". Mr Jacobs believed that "his severe symptomology materially contributed to him acting on his delusional beliefs". Mr Jacobs noted that persecutory delusions that he been injected by the victim were recorded throughout the notes. He stated that the defendant's explanations were unclear, but he felt that due to being injected his memory had been interfered with and was confused and anxious. Mr Jacobs said that the defendant had explained that he wanted to speak to the victim because he could not understand why she had injected him. He felt quite aggrieved by that. Mr Jacobs also said that the defendant wanted to speak to the victim about an unrelated matter – namely his belief that the victim thought that he had organised an assault on her. Mr Jacobs said that the defendant had indicated that he felt he was mentally ill at the material time and forgot the requirements of the domestic violence order. He went on to say that "he felt that in accordance with the associated diagnostic symptomology of schizophrenia that [the defendant's] explanations of mood disturbance, anxiety, confusion and loss of memory were congruent with very well recognised symptoms of cognitive impairment associated with such disorder". Mr Jacobs referred to a history of perceptual disturbances recorded in the notes, indicating that the defendant was likely experiencing perceptual disturbances at the material time. Mr Jacobs formed the opinion that the defendant lacked "insight due to his severe enduring mental symptomology". He

went on to opine that "[the defendant] lacked judgment, profoundly impaired judgment which [he] considered secondary to the cognitive symptomology associated with schizophrenia". Mr Jacobs was of the opinion that a "combination of all these factors resulted in [the defendant's] offending".

55. With respect to file number 21758768 Mr Jacobs told the court that the defendant had a well recorded history and he had reported to him symptoms – albeit somewhat after the alleged offending – that he was suffering from delusional beliefs about the mafia. Mr Jacobs said that in his report he had detailed the notes made by Dr Kini, which were to the following effect:

> Voices explained a story about the mafia. In short, the voices were instrumental to perpetuating his delusional belief about the Italian mafia targeting him either for recruitment of for harm. He believes that the voice belongs to the mafia.

56. Mr Jacobs said the following was noted: "He admitted to slashing the victim's…tyres and did so in an attempt to alert police officers about the activities of the mafia in the neighbourhood". Mr Jacobs went on to say that [the defendant's] explanation to me in his recorded previous explanations during assessments completed during his inpatient admission were very similar and I considered ….there is sufficient indication that [the defendant] had a mental illness around the time of the alleged offence, both offences". In relation to file number 21758768 Mr Jacobs was of the opinion that the defendant's "delusional beliefs, fixed false delusional beliefs as well as his recorded perceptual disturbances, impairment in insight and judgment" all materially contributed to his offending behaviour (which involve slashing the tyres of the vehicle).

57. Regarding the alleged offending on file 21744064, Mr Jacobs believed that the defendant's mental illness materially contributed to the conduct in that he acted on his delusional beliefs. He stated that the defendant had a persecutory belief that the victim had harmed him. He said that it is common for a person with such a belief to actually act upon it. Mr Jacobs said that it was a fixed, false belief and he believed that the defendant was also suffering from perceptual disturbances at the time. He also believed that the defendant's own self report of cognitive issues materially contributed to the alleged offending. Mr Jacobs said that the defendant indicated that he was confused, anxious and was having problems with his memory. Mr Jacobs believed that these factors also made a material contribution to the alleged offending.

58. With respect to the alleged offending associated with file number 21759965, Mr Jacobs stated that he considered that the defendant retained severe enduring symptomology associated with mental illness, although he was unable to conclude that the symptoms materially contributed to the offending.

59. In relation to file numbers 21744064 and 21758768 Mr Jacobs was taken to his opinion that "[the defendant's] mental illness resulted in his lack of capacity to reason with a moderate degree of sense and composure about whether his conduct as perceived by a reasonable person was wrong. Mr Jacobs said he that stood by that opinion, stating:

> ...there's well documented history that [the defendant] was suffering from a severe enduring psychotic mental condition at the time. He was symptomatic. To me it would clearly seem that [the defendant] lacked a capacity to reason

> with a moderate degree of sense and composure about whether his conduct at the material time, as per a reasonable person, was wrong.
>
> To me it would be more likely than not that [the defendant] would meet the s 74(b) criteria. But I must acknowledge that it is up to the court to be satisfied whether or not that criteria has been met. However, I indicated my opinion in that report.

60. In saying that his opinion extended to the alleged offending associated with both files, Mr Jacobs went on to state:

> There's slightly different symptoms…slightly different in their context, however perceptual difficulties, very clear in file ending 8768. Perceptual disturbances most likely in 4064. Both files very clear delusional material. Both files very clear lack of insight….
>
> Both files, it would seem, that [the defendant] was experiencing cognitive difficulties, which again is an associated symptom of schizophrenia in the diagnosis and statistical …version five.

61. Mr Jacobs gave the following evidence during cross–examination.

62. Mr Jacobs agreed that a diagnosis of schizophrenia is a matter for a qualified psychiatrist. He also agreed that the approach he took in relation to his assessment of the defendant was "one of essentially bootstrapping the conclusions [he] drew on the different recorded diagnoses by a qualified psychiatrist in the documentary record". Mr Jacobs stated that he did not have the qualifications to make a diagnosis. He stated that he relied upon the diagnosis of schizophrenia which had been recorded in CCIS since 2013.

63. Mr Jacobs stated that the defendant had an enduring diagnosis, with periods of psychosis secondary to his schizophrenia. He said that diagnosis was maintained by other non-psychiatric personnel who were looking after the defendant.

64. Mr Jacobs told the court that his reasoning process was "essentially to have regard to the timeframe of those different confirmed diagnosis and extrapolate from that the likelihood of [the defendants] mental state at particular times, in terms of proximity to those times of diagnosis". He also relied upon the other associated assessments of the defendant.

65. Mr Jacobs said that he had not formally discussed the defendant's file with Dr Kini. Nor had he based his opinions on any discussion with Dr Kini. However, he stated that he had included in his report "Dr Kini's interactions with [the defendant]".

66. When asked by the prosecutor whether he was calling upon his own judgment rather than the judgment of an associated psychiatrist in assessing the likely mental state of the defendant at particular times connected with the alleged offending, Mr Jacobs replied as follows:

> I mean yes and no. I mean the psychiatrist that I discussed the case with was familiar with [the defendant], and was able to give me indication that he was someone with an enduring mental health condition, with ongoing symptomology.
>
> That part was discussed with a psychiatrist. The psychiatrist was not actually involved as a clinician with [the defendant]. So I am basing, primarily my opinions, as a designated mental health practitioner, from reviewing the clinical information available in the clinical databases.

67. Mr Jacobs said that he had conducted multiple interviews with the defendant regarding the various criminal files.

68. The prosecutor took Mr Jacobs to the statement of facts relating to file number 21744064 and asked him a number of questions in relation to the texts that were the subject of the charges. When it was put to Mr Jacobs that there was nothing in the text messages that referred in any way to the matters that had been reported by the defendant during the interview, and they were simply of a sexualised nature, reflecting hostility and a belief as to the victim's lack of continuing commitment and attraction to him, Mr Jacobs answered as follows:

> Looking at the text, to me, I mean again I'm not some sort of text…analysis expert or something along those lines. But they seem to me to be indicative of a number of things.
>
> It did seem to me to be…some sort of sexualised material. They also seem to be somewhat nonsensical as well. So I did ask [the defendant] about this and [the defendant's] explanation was not included in the report was that there were other texts as well that haven't been included in the statement of alleged facts. [The defendant's] explanation also was that he believed that he wrote some of them, but not all of them. He felt that the victim in the matter may have altered or added information to the text that we see before us.
>
> I was also drawn to the various assessments that both before and after, indicating a persecutory delusional belief of the victim. So to me it would seem like his anger and his animosity and hostility towards the victim could very much be congruent with someone experiencing a delusional – persecutory delusional belief. So I mean looking further through the texts, to me, again, all I can say is from my opinion, it does seem to be a mix of different things.
>
> [The defendant's] explanation when he was texting was the victim had injected him, which is delusional. And he believed that due to that injection, that he

> was confused. He was anxious. His memory was impaired. To me, all those cognitive deficits associated with his explanation which it made sense to me were very much fitting schizophrenia, rather than someone being injected with methamphetamines, which has been recorded throughout as delusional. It seemed to me these texts could very much meet someone experiencing, or someone exhibiting symptoms of mental illness, beyond simply just texting someone.

69. Mr Jacobs accepted that people breaking up in a relationship breach a domestic violence order for a number of reasons other than mental illness However, he went on to say:

> To me it would seem though that the nature of the text, and you would seem to have a different view, but to me, looking at the text, to me they were somewhat incomprehensible at times. But primarily …[the defendant] has both prior to the alleged offence, and his admission is indicative, his inpatient admission prior to these alleged offence, was of a persecutory delusion that the victim in the matter had injected him.
>
> So my opinion that [the defendant] was acting – on the balance of probability, on that delusion, due to his well –recognised enduring mental health condition, I thought that was more likely than [the defendant] acting on – just simply being responding to a domestic violence issue. I felt that it was his delusional beliefs. He was acting on such, which is associated with his schizophrenia.

70. When again asked why there was no reference to the defendant’s delusional belief in the texts, Mr Jacobs gave the following evidence:

> [The defendant’s]explanation was that there were other texts, and that also some of these texts are not exactly as – they’re been altered by the victim. Again, I consider that delusional. From what I drew from this is [the defendant’s] acting in anger. Mr Moore’s acting in a way that fitted someone with a persecutory delusion.

> The exact content may not be specific to the injection that be believed had occurred, however, in his mind that happened. That totally happened. So he would not need to be sort of guessing that with the victim. In his mind that was a fixed, false delusional belief that occurred.

71. Mr Jacobs added that the defendant's delusional belief was well documented throughout the defendant's history and did only emerge during the "index offence" interview. He also stated that because the defendant had an enduring symptomology "at times it [was] difficult to follow a logical, sequential explanation of why he did what he did". Mr Jacobs said all things considered , he felt, on the balance of probability, "[the defendant's] actions in regards to these texts, also his self-reports of confusion, loss of memory and anxiety, to me on the balance of probability, more likely would materially contribute to the alleged offence and the symptoms of such".

72. When it was put to Mr Jacobs that the defendant was "a person of sufficient intelligence and complexity who would be able to understand that [his delusional belief] was something that formed part of his mental landscape but be able to dissemble to you about that being a causal factor in relation to these texts that breached the domestic violence order", and whether he had considered that as part of his assessment of [the defendant], Mr Jacobs gave this evidence:

> I certainly considered it. I mean, again difficult to expand beyond what I have mentioned, other than a multitude of assessments around the time of the alleged offence, including an inpatient admission a number of days before the first alleged offence associated with file 4064. Again I sort of would indicate that this is someone with a severe enduring mental illness. Would they still have the capacity to tell me something for some other mechanisms; for instance to try and bring the matters to the court in a favourable manner" is that possible" It is possible, I would say yes. But on the balance of probability in my opinion [the defendant's] explanation was congruent with the various

> assessments around the time of the alleged offence, and I considered he's symptomatic – the response in texting the victim was symptomatic of his mental illness.

73. Mr Jacobs said that in relation to the breach of bail matter he was satisfied that the explanation given by the defendant for the offence was logical and rational.

74. The following exchange occurred between the prosecutor and Mr Jacobs:

> Q: The interaction that he had with you in relation to the texts – and this is in particular set out at page 7 of your report in the second paragraph there "When questioned, [the defendant] reported that his capacity to know right from wrong was in fear at the material times" Did he use those words" Did he say to you that…?
>
> A: No, I …
>
> Q: did he speak to you in terms of the capacity to know right from wrong?
>
> A: No. They were words that I asked him questions. And I asked him directly, "Did you feel that what you did was right or wrong?" And that was his response after me asking him that question.
>
> Q: See, he's – apparently the same conversation, it appeared to twist and turn a bit in relation to the issue. At one point he's telling you that it would appear that he knowingly breached the DVO, believing it was something he needed to do to help the situation?
>
> A: I think that's in – he's indicated that he's texting the victim at the time. Not necessarily that he's breaching the DVO, that he's texting victim to communicate for the various reasons he has indicated, not that he's texting the victim deliberately.
>
> Q: …I read that as him speaking to you in cognisance…of breaching the DVO, but you're saying that he didn't say that?

A: No, that's perhaps slightly unclear in the report. No.

75. When asked why the involuntary injection of methamphetamines was a cause of the sending of the texts, Mr Jacobs responded as follows:

> [The defendant's] explanation of that is the result of the intoxication from the methamphetamines was one of confusion, loss of memory and anxiety. So he believed that he was unwell because of the injections of the methamphetamines. His explanation also included forgetting the elements of the domestic violence order.

76. Mr Jacobs stated that he had considered the likelihood of the defendant being under the influence of methamphetamines at the time of sending the texts. He said "…I asked [the defendant] [whether] he was under the influence of methamphetamines. His answer was yes, it was in relation to having been injected by the victim". Mr Jacobs went on to say:

> I would simply have to go what evidentiary material that there is. I have nothing to indicate to me that [the defendant] was texting in the context of intoxication with such substances. Is that possible? Yes, it is possible. But again I kept drawing back to the various assessments, both prior and post, in which this ongoing delusional belief continued. Also particularly in relation to – on page 4, para 3" Continued to be preoccupied discussing the revenge attack that he felt had happened to him". This is someone who has very much fixated with this delusional belief. And.. the nature of the psychosis is it is wavy, it is flexible; at times he had been more coherent than others. My understanding, based on the various assessments, is that it was more likely than not, or on the balance of probability, driven by his ongoing symptomology. Also accepting that…he does use substances. It is well-known that people with schizophrenia do use substances…so it is not an uncommon thing, a comorbid substance abuse and axis 1 major mental illness are not unknown and uncommon factors. But I'm basing my opinion primarily on a

mix of different things, which also includes [the defendant's] self-reports of what was occurring at the time; but not entirely on his self-reports, also very much including the psychiatric admission from 4th to 8th , just prior to the alleged offence; the assessment on 10 August, three days before the alleged offence – one of the alleged offences – by the psychiatrist, who indicated "Anxious, paranoid, persecutory delusions of being poisoned." The impression made was "includes schizophrenia, early relapse and that his risk of deterioration was high". Also on 21 August..."paranoid and persecutory delusions; continued to voice concerns about being poisoned; and his ex girlfriend having revenge on him, having injected him with drugs:. If [the defendant] was intoxicated at the time of the alleged offence, I had no such indication as such. And even if he had been, there would be an argument to be made that he was still psychotic. Even if he had been using substances at the time, the substances would have been an additional factor, but he still maintains the enduring psychotic mental illness of schizophrenia.

77. The prosecutor asked Mr Jacobs whether he had discussed with the defendant the victim's plea that he not contact her again and that she would take legal action if he persisted in contacting her. Mr Jacob's evidence was as follows:

> I don't recall, and I'm pretty sure that I didn't ask him that exact element in regards to para 6. I did ask him what were some of the reasons for sending such texts and he did express – I think I mentioned earlier – some beliefs that he didn't actually send all these texts or some of the words had been altered. He also mentioned that he was having considerable difficulties with his memory at the time and general difficulties with cognition. And again I do refer you to the DSM version 5 in regards to cognitive deficits is a very common associated feature of clients with schizophrenia.

78. When it was put to Mr Jacobs that the defendant didn't have much difficulty reporting to him about the breach of bail, Mr Jacobs said:

> I interviewed [the defendant] so I'm attempting to elicit information from him, as successfully as I can. When I interviewed [the defendant] I felt that I was able to

interview him, I was able to form – we were able to have a conversation, but it was very obvious during the interview process that [the defendant] was impaired at that time. This is interviewing someone who has symptomology. [The defendant] still was clearly very delusional. So again, many of the aspects in regards to [the defendant's] explanations of his behaviour, explained in the context of continued mental illness; both his explanations for around the time of his offending, and his demeanour during the interview.

- **The admissibility of Mr Jacobs' Evidence and Probative Weight**

79. As Mr Jacob's evidence purports to be opinion evidence it needs to satisfy the requirements of s 79(1) of the Evidence (National Legislation) Act to be admissible.

80. The threshold question is: does Mr Jacobs possess "specialised knowledge".

81. Mr Jacobs is a "designated mental health practitioner". A "designated mental health practitioner" is defined in s 1 of the MHRSA as meaning " a person appointed to be a designated mental health practitioner under section 23".

Section 23 (3) of the Act provides that a person cannot be appointed as a designated mental health practitioner unless he or she:

(a) is:

(i) a psychologist; or

(ii) a registered nurse; or

(iii) a person registered under the Health Practitioner Regulation National Law to practise in the occupational therapy profession (other than a student); or

(iv) an Aboriginal and Torres Strait Islander health practitioner; or

(v) a social worker; or

(vi) an ambulance officer; and

(b) has not less than 2 years approved clinical experience; and

(c) has successfully completed an approved training and orientation course.

82. Having been appointed as a designated mental health practitioner, Mr Jacobs is assumed to have the necessary qualifications. Indeed he has given evidence of his qualifications, which, in my opinion, conform to the statutory requirements.

83. A mandatory qualification for appointment as a designated mental health practitioner is not only two years approved clinical experience but completion of an approved training and orientation course.

84. Clinical experience in the context of s 23 of the Act connotes the use of clinical practices in the treatment of mental illnesses and disturbances.

85. The clinical experience that is required to be possessed in order to be a designated mental health practitioner is reflected in various sections of the MHRSA.

86. Section 32(4) provides that if a designated mental health practitioner receives a request pursuant to either subsection (1) or (2) to assess a person to determine whether they are in need of treatment that practitioner must assess the person and determine whether they are in need of treatment unless the practitioner is otherwise satisfied that the person is not in need of treatment under the Act.

87. In order to perform this function the designated mental health practitioner requires sufficient knowledge and clinical experience to assess whether the person is in need of treatment because of their mental condition.

88. Section 34 (1) provides that a designated mental health practitioner must make a recommendation for a psychiatric examination of a person if, after assessing the

person, the practitioner is satisfied that the person fulfils the criteria for involuntary admission on the grounds of mental illness or mental disturbance.

89. Section 14 deals with involuntary admission on the grounds of mental illness:

> The criteria for the involuntary admission of a person on the grounds of mental illness are that:
>
> (a) the person has a mental illness; and
>
> (b) as a result of the mental illness:
>
> (i) the person requires treatment that is available at an approved treatment facility; and
>
> (ii) without treatment the person is likely to:
>
> (A) cause serious harm to himself or herself or to someone else; or
>
> (B) suffer serious mental or physical deterioration; and
>
> (iii) the person is not capable of giving informed consent to the treatment or has unreasonably refused to consent to the treatment; or
>
> (c) there is no less restrictive means of ensuring that the person receives the treatment.

90. In performing this statutory function the designated mental health practitioner is required to be satisfied amongst other things that the person has a mental illness and as result of that illness requires treatment. It is implicit that the practitioner has the requisite knowledge and clinical experience to reach that state of satisfaction.

91. Most relevantly, s 77 (3) of the Act implicitly recognises and accepts that a designated mental health practitioner has the requisite knowledge and clinical experience to provide the Chief Health officer with advice so as to enable the Chief

Health Officer to give a certificate to the Court addressing the matters specified in s 77(2).[10]

92. In my opinion, as a designated mental health practitioner coupled with his qualifications and relevant history, Mr Jacobs possesses the specialised knowledge within the meaning of s 79 (1) of the Evidence (National Legislation) Act to proffer an opinion as to whether at the time of the alleged offending the defendant was suffering from a mental illness for the purposes of s 77(4) (a) of the MHRSA.

93. It is noted that 77(4)(a) does not require proof that the person was suffering from a particular mental illness or mental disturbance, which could only be determined by a psychiatric examination and diagnosis by a psychiatrist or some other suitably qualified professional. Had the section required such proof, then I would not have considered Mr Jacobs to possess the specialised knowledge to proffer an opinion as whether a person was suffering from a particular psychiatric illness at the material time. First, only "authorised psychiatric practitioners" are able to conduct psychiatric examinations and make assessments under the MHRSA. Such examinations and assessments are beyond the expertise of a designated mental health practitioner. Secondly, Mr Jacobs conceded that "a diagnosis of schizophrenia is a matter for a qualified psychiatrist" and he "did not have the qualifications to make a diagnosis".

94. However, as was canvassed in *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [1428] – [1432], it does not necessarily follow that a person

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[10] One of those matters concerns whether a person was suffering from a mental illness or mental disturbance at the material time.

with a particular title or formal designation does not possess specialised knowledge to express a specific expert opinion:[11]

> …while the specialised knowledge connoted by the title of a consultant psychologist may be an insufficient basis for an opinion that a person suffered from a particular psychiatric illness, the particular psychologist may have specialised knowledge sufficient for that purpose based on his or her training , study or experience beyond the specialised knowledge connoted by the title:

95. Consistent with this approach, it may well be that, despite one's formal designation, a designated mental health practitioner may be able to demonstrate that they have specialised knowledge based on their training, study or experience to make a psychiatric diagnosis of a person like the defendant. However, such specialised knowledge was not demonstrated in Mr Jacobs' case.

96. I am satisfied that the specialised knowledge that Mr Jacobs possesses is based on his training, study and experience and that is opinion as to whether the defendant was at the material time suffering from a mental illness is wholly or substantially based on that specialised knowledge. As regards the latter, to paraphrase the words used by Odgers, the reasoning process leading to the formation of Mr Jacob's opinion was exposed and made transparent -in both his report and oral evidence- so as to demonstrate that his opinion was wholly or substantially based on his specialised knowledge.[12]

97. Therefore, I am satisfied that the opinion evidence given by Mr Jacobs in relation to s77(4)(a) is admissible in accordance with s 79(1) of the Act.

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[11] Odgers n 7 at [1.3.4260]

[12] Odgers n 7 at [1.3.4300].

98. Although at common law, the admissibility of expert opinion evidence may have depended on proper disclosure and evidence of the factual basis of the opinion, this does not appear to be a precondition for admissibility of expert opinion evidence under s 79)1) of the Act.[13] If opinion evidence is admitted pursuant to s79(1), then the weight to be accorded to that evidence will necessarily depend upon whether any facts or assumed facts on which the opinion is founded have been established to exist.

99. It follows that whether or not the opinion evidence of Mr Jacob's is sufficient to establish that the defendant was suffering from a mental illness at the material time depends upon the weight to be given to that evidence – which in turns depends upon proof of the factual substratum for the opinions he formed.

100. The admissibility of Mr Jacobs' opinion evidence in relation to the s 77(b) criteria is problematic.

101. In my opinion Mr Jacobs has not demonstrated specialised knowledge within the meaning of s 79(1) of the *Evidence (National Legislation) Act* to render his opinion that at the time of the alleged offending on file numbers 21744064 and 21758768 the defendant did not know the conduct (constituting the offending) was wrong admissible evidence under s 79(1) of the Act.

102. Mr Jacobs admits that he is not qualified to diagnose a particular psychiatric illness, and there is nothing in his work history and clinical experience to demonstrate that he has in the past performed a diagnostic role in the treatment care and management

[13] *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588.

of mentally ill persons. It seems to me that in order to proffer an expert opinion about whether a person meets one of the s 77(4)(b) criteria it is necessary to demonstrate specialised knowledge in relation to the diagnosis of psychiatric illnesses and how the symptomology of a particular diagnosed mental illness may affect a person's knowledge of the nature and quality of their conduct or the wrongness of their conduct or ability to control their actions.

103. Although I find that Mr Jacobs does possess the specialised knowledge that is required to enable him to provide an opinion as to whether it is likely that any mental illness suffered by the defendant materially contributed to the conduct constituting the alleged offending, whether or not a person's mental illness made a material contribution is a different question to that which must be answered for the purposes of s 77 (4) (b). However, that is not to say that Mr Jacob's opinion as to whether it is likely that the defendant's mental illness materially contributed to the alleged relevant is irrelevant for the purposes of the s 77(4)(b) criteria.

104. As stated by Barr J in *O'Neill v Lockeyer*:[14]

> A useful test as to whether a mental illness or mental disturbance materially contributed to conduct constituting an alleged offence is whether the mental illness or mental disturbance was a factor that operated actively to bring about the conduct".

105. An opinion that there is likely to have been a causal link between a mental illness and conduct may provide a foundation for satisfying one of the s77(4)(b) criteria – though there is a significant difference between an opinion that mental illness

[14] *O'Neill v Lockeyer* [2012] NTSC 10, p 8.

operated actively to bring about particular conduct and an opinion that as a consequence of a mental illness a person:

(a) did not the know the nature and quality of the conduct; or
(b) did not know the conduct was wrong; or
(c) was not able to control his or her actions.

ASSESSMENT OF THE WHOLE OF THE EVIDENCE

106. All that remains to consider is whether the defendant has discharged the onus of proof by establishing the defence of mental impairment under s 77 of the MHRSA.

107. Having admitted Mr Jacobs' opinion evidence that the defendant was suffering from a mental illness at the time of the alleged offending (in relation to all three files) it remains to consider what weight should be attributed to that evidence and whether the court can be satisfied that at the material time the defendant was suffering from a mental illness.

108. As is clear from Mr Jacobs' advice to the Chief Health Officer and the oral evidence he gave at the hearing, he based his opinion on not only the clinical records in CCIS and PCIS but also on the multiple interviews with the defendant.

109. The clinical records contained a number of observations and opinions from diverse mental health professionals (including psychiatrists). Taking into account the difficulty of differentiating between the facts upon which an opinion is based and the opinion in question in relation to the clinical records,[15] I am reasonably satisfied that one can glean from those records a sufficient factual substratum for Mr Jacobs

[15] *HG v The Queen* (1999) 197 CLR 414 at [39] – [44].

opinion that at the time of the alleged offending the defendant was suffering from a mental illness. Furthermore, I am reasonably satisfied that the information provided by the defendant during the various interviews provides a further factual basis for Mr Jacobs' opinion. In particular, it is noted that there is a significant level of consistency between what was recorded in the clinical notes and the defendant's self –reporting of symptoms during the interview process. This leads to me believe that throughout his interaction with mental health professionals – including in particular Mr Jacobs – the defendant was accurately reporting the symptoms he was experiencing at various times.

110. The difficulties of expressing an opinion as to whether at the time of the commission of a criminal offence a person was suffering from a mental illness are well recognised. There is rarely precise and contemporaneous evidence of a person's state of mind at the time of an alleged offence. Most times any such opinion must be predicated upon the history taken from the person and from any other available sources tending to corroborate the information (particularly symptomology). Most times any such opinion amounts to a "retrospective inference about the state of a person's mind at some time in the past".[16] Most times, any such opinion must inevitably be based on a reasoned conclusion drawn from all of the available information. This is the very process that Mr Jacobs followed.

111. Given that the factual substratum of Mr Jacobs' opinion has been established and that Mr Jacobs has demonstrated the reasoning upon which that opinion is based, I

[16] P Shea "Psychiatry in Court" second edition p 95.

am reasonably satisfied on the balance of probabilities that the defendant was suffering from a mental illness at the time of the alleged offences.

112. However, in order for the court to dismiss the charges the court must also be reasonably satisfied on the balance of probabilities that as a consequence of his mental illness the defendant:

(a) did not know the nature and quality of his conduct; or

(b) did not know that the conduct was wrong; or

(c) was not able to control his actions

113. Although Mr Jacobs formed the opinion that in relation to the alleged offending on file numbers 21744064 and 21758768 the defendant did not know that the conduct constituting those offences was wrong, court considered that this opinion evidence was not admissible under s 79(1) of the Evidence (National Legislation) Act.

114. Apart from the evidence given by Mr Jacobs as to how the mental illness operated on the defendant's mind, there is no record in the clinical databases of any other mental health practitioner (in particular a psychiatrist) expressing the opinion that the defendant did not know that his conduct was wrong at the material time.

115. The question is whether, in the absence of expert opinion evidence in relation to the s77(4)(b) criteria, the court can be satisfied that one of the criteria have been met.

116. It is important to bear in mind that expert opinion evidence (of a medical nature) is not always indispensable to the establishment of a defence of insanity or mental impairment: *Lucas v The Queen* (1990) 120 CLR 171; *AG v Brown* [1960] AC 432 at

452. However, in the first mentioned case, although the defence of insanity was properly left to the jury, the court concluded that the material before the court was insufficient to found the defence:[17]

> No medical evidence was called as to the existence of any mental disease or disorder …there was, in our opinion, nothing on which it could have been concluded that any mental disease or disorders supervened so that by reason of that disease or disorder he was unable to know what he was doing or to appreciate its quality.

117. Unlike in *Lucas v The Queen*, in the present case there is sufficient evidence of an expert nature to establish that at the material times the defendant was suffering from not only a mental illness, but that mental illness materially contributed to the alleged offending.

118. In my opinion, the observation made in *Lucas v The Queen* that medical evidence is not always indispensable to the establishment of a defence of insanity or mental impairment applies equally to proof of the criteria prescribed by s 77(4)(b); and this is particularly the case where there is expert evidence that at the relevant time the person was suffering from a mental illness as well as there being expert evidence of a causal link between the mental illness and the alleged offending, as in the present case.

119. It is helpful to revisit the observations made by *Dixon J R v Porter* (1933) 55 CLR 182 at 189 -190 in relation to the defence of insanity:

> If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could

[17] (1970) 120 CLR 171 at 174.

> not know what he was doing was wrong. What is meant by "wrong"? What is meant by wrong is wrong having regard to the everyday standards of reasonable people. If you think that at the time he administered the poison to the child he had such a mental disorder or disturbance or derangement that he was incapable of reasoning about the rightness or wrongness, according to ordinary standards, of the thing which he was doing, not that he reasoned wrongly, or that he being a responsible person he had queer or unsound ideas, but that he was quite incapable of taking into account the considerations which go to make right or wrong, then you should find him not guilty upon the ground that he was insane at the time he committed the acts charged. In considering these matters from the point of view of fact you must be guided by his outward actions to a very large extent. The only other matter which can help you really is the medical opinion. I think the evidence may be described as his outward conduct and the medical opinion. It is upon this you must act. The medical opinion included explanations of the course of mental conditions in human beings…
>
> I consider the main question of the case and it is whether you are of the opinion that at the stage of administering the poison to the child… the man had such a mental disorder or diseased intelligence at that moment that he was disabled from knowing that it was a wrong act to commit and that he was disabled from considering with some degree of composure and reason what he was doing and its wrongness.

120. It is clear from his Honour's observations that when the trier of fact is required to consider whether an accused person did not know that their conduct was wrong by reason of mental illness, the accused's outward actions are a primary guide; though relevant medical opinion may also assist in determining the matter. The issue is therefore to be determined by reference to the evidence of the accused's outward conduct and any medical evidence that is before the court.

121. In my opinion, in determining that issue, the trier of fact (in this case the court) is also entitled to infer from the whole of the evidence before it[18] that an accused did not know that his or her conduct was wrong, provided the inference is capable of being properly drawn.

122. In the present context, it is also important to bear in mind the following observations made by Dixon CJ, Webb and Kitto JJ in *R v Stapleton* (1952) 86 CLR 358 at 375:

> …in certain cases, where the insane motives of the accused arise from complete incapacity to reason as to what is right or wrong (his insane judgment even treating the act was one of inexorable obligation or inescapable necessity) he may yet have at the back of his mind an awareness that the act he proposes to do is punishable by law.

123. These observations highlight the relationship between "insane motives" behind a mentally ill person's conduct and that person's incapacity to know that the conduct is wrong according to the principles of reasonable people. In my opinion, not only can the "insane motives of an accused" arise from a complete incapacity to reason as to what is wrong and right (in the relevant sense), but the presence of "insane motives" may reflect an incapacity to know that one's conduct is wrong. There is a reciprocal relationship between the two.

124. Howard and Westmore give prime examples of people unable to appreciate with a moderate degree of composure and sense that what they are doing is wrong by the ordinary standards of reasonable people.[19] The authors refer to the case of *R v Hadfield* [1800] 27 St Tr 1218. In that case Hadfield sought to murder the King of

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[18] This is particularly the case where there is expert evidence of a causal link between the mental illness and the conduct constituting the alleged offending.

[19] D Howard and B Westmore " Crime and Mental Health Law in NSW" 2nd edition at [6.43].

England because he knew it was unlawful and would result (he hoped) in his own execution.[20] The authors give the further example of a severely depressed person who takes his or her own life's child in the hope of being able to care for the child in a better world, although full aware of committing a crime.[21]

125. The observations made in *Stapleton* and the examples given by Howard and Westmore assume particular significance in the present case.

126. It is clearly the case that a mental illness "may undermine the capacity for normative appreciation" and "insane delusions [may] prevent a person from knowing right from wrong".[22]

127. Albeit in relation to a different statutory provision the following observations made by Lamer CJ in *Chaulk* (1991) 62 CCC (3d) 193 at 236 demonstrate the interaction between a delusional belief and the capacity to know that one's conduct is wrong:

> An accused person will be able to bring his claim within the scope of the second branch of the test set out in s 16(2) if he proves that he was incapable of knowing that his conduct was morally wrong in the particular circumstances, for example, if he believed that the act was necessary to protect his life. If he is not able to establish this fact, it must be concluded that that he either knew or was capable of knowing that the act was wrong in the circumstances.

128. Before proceeding to determine whether it has been established that the defendant did not know that the alleged conduct was wrong, it is necessary to refer to the legal test that is applied in relation to proof of that criteria.

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[20] Howard and Westmore n 19 at [6.43].

[21] Howard and Westmore n 22 at [6.43].

[22] A Fairall " The Exculpatory Force of Delusions – A Note on the Insanity Defence" 1994 Bond Law Review Vol 6 Issue 57 at 58 and 59.

129. As stated in *Police v B* (Local Court delivered on 7 November 2016, p 9):

> The key statement of the applicable law is to be found in *R v Porter* (1933) 55 CLR 182 at 190:
>
> > What is meant by wrong is wrong having regard to the everyday standards of reasonable people…The main question …is whether… [the accused] was disabled from knowing that it was a wrong act to commit in the sense that ordinary reasonable [people] understand right and wrong and that he was disabled from considering with some degree of composure and reason what he was doing and its wrongness.[23]
>
> As explained in *R v Barker* and *R v McGuickin* the question is whether the mental illness or mental disturbance was such that the person could not think rationally about the matter with a moderate degree of sense and composure; and a moderate degree of sense and composure means something more than a basic degree and something less than a perfect degree.

130. In my opinion, s 77(4)(b) (ii) should be construed in the same terms as the equivalent provision in s 43C(1)(b) of the *Criminal Code* (NT) – namely: "did not know that the conduct was wrong (that he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).[24]

131. Applying that legal test, I am reasonably satisfied on the balance of probabilities that at the time of the alleged offending on file numbers 21744064 and 21758768 the defendant did not know that the conduct constituting the offences was wrong for the following reasons.

132. The evidence discloses the following:

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[23] This statement was approved in *R v Stapleton.*

[24] *Police v B* (Local Court decision 7 November 2016, p 8).

(a) the defendant was suffering from paranoid delusions that his former girlfriend was involved with outlaw motor cycle gangs and that they had been injecting him with methamphetamines without his consent;

(b) the defendant was suffering from the delusional belief that the mafia had been involved in his girlfriend injecting with him drugs;

(c) the defendant's "thought content included the mafia sending him messages, attempting to recruit him and this was accompanied by auditory hallucinations;

(d) the defendant believed that the mafia had put voices in his head to manipulate his thinking;

(e) the voices were instrumental in perpetuating his delusional belief about the mafia targeting him either for recruitment or belief;

(f) the defendant believed that he was receiving "subliminal messages" from Facebook and that these subliminal messages assumed the form of an auditory hallucination telling him that he should damage the tyres of the motor vehicle (who he believed to have been owned by the boyfriend of the victim who was connected with the mafia

(g) the defendant admitted to slashing the tyres of the vehicle in an attempt to alert police about the activities of the mafia in the neighbourhood;

(h) the defendant believed that by damaging the vehicle he might "get credit" from his police officer neighbours for not joining the mafia;

(i) the defendant believed that he did the right thing at the time;

(j) the defendant believed that the victim had launched a "revenge attack" against him by injecting him with methamphetamines because he had ended their relationship;

(k) the defendant believed that the intoxicating effects from the involuntary injections had caused him to text the victim;

(l) the defendant reported that at the time he sent the text messages he believed that it was something he needed to do “to help the situation;

(m) the defendant believed at the time of sending the texts messages he had forgotten about the domestic violence orders and was “not in the right frame of mind”;

(n) the defendant believed that he was not the author of some of the text messages and some had been altered or added to by the victim;

(o) the defendant reported that “his capacity to know right from wrong was in fear at the material times”; however he now considered that he did the wrong thing.

133. There is also a significant body of clinical evidence that the defendant was throughout his interaction with the mental health professionals suffering from an underlying thought disorder linked to his delusional beliefs and perceptions – as well as limited insight into his illness, impaired judgment and memory and confused thinking. This is not to overlook Mr Jacobs’ evidence that at the time of the alleged offending the defendant’s mental illness (and inferentially its symptomology) was a factor that actively operated to bring about the alleged conduct.

134. I deal first with the offence on file number 21758768 (damage property).

135. When one has regard to the defendant’s outward conduct and his explanations for engaging in the conduct, including his delusional beliefs and the auditory hallucinations from which he was suffering – as well as his likely thought disorder and impaired judgment at the material time – I am persuaded that the defendant

would have been incapable of thinking rationally. In my opinion, it is more likely than not that the defendant would have been unable to reason with a moderate degree of sense and composure that the conduct engaged in was wrong according to the standards of reasonable people.

136. In my opinion, the defendant had "insane motives" (in the *Stapleton* sense) for committing the alleged offence. By reason of those motives the defendant treated the act of damaging the tyres of the vehicle as either "one of inexorable obligation or inescapable necessity". In my opinion, those motives – which involved an "insane judgment" about the matter – clearly reflect an incapacity to know that the conduct in question was wrong according to ordinary standards. Furthermore, the fact that the defendant believed that he did the right thing by damaging the tyres of the vehicle also bespeaks an incapacity to know that the conduct was wrong.

137. While it is accepted that in relation to the offences on file number 21744064 (breaches of the domestic violence orders) satisfaction of the s 77(4) (b) (ii) criteria is not as straightforward, I am reasonably satisfied on the balance of probabilities that the defendant did not know his conduct was wrong at the material time.

138. At the material time the defendant was suffering from a delusional belief that the victim had launched a "revenge attack" against him by injecting him with methamphetamines. He was also suffering from a delusional belief that the intoxicating effects of those injections caused him to send the offending texts to the victim.[25] Furthermore, he was suffering from a delusional belief that he was not the

[25] There is no evidence that the defendant was suffering from the effects of a voluntary injected drug.

author of all the texts and some had either been altered or added to do by the victim. Finally, but not least, he held the delusional and somewhat incomprehensible belief that it was necessary to send the messages to "help the situation".

139. The defendant's belief system at the time was both delusional and complex. In addition the defendant self –reported that he had forgotten about the domestic violence orders, and was "not in a right frame of mind" when he sent the text messages.

140. Apart from challenging Mr Jacobs' expertise to testify as to the s 77(4)(b)(ii) criteria, the prosecution submitted that the court could not be satisfied on the balance of probabilities that at the material time the defendant did not know that the conduct he engaged in was wrong for a number of reasons:

- the Statement of Facts (Exhibit 3) revealed that there was nothing in the text messages that referred or alluded to the delusional beliefs held by the defendant at the time of sending the messages; and the messages were simply of a sexualised nature, reflecting hostility and a belief as to the victim's lack of continuing commitment and attraction to him;

- the defendant was capable of dissembling to Mr Jacobs about the delusional belief as being a causal factor in relation to the sending of the text messages;

- the defendant did not have much difficulty in providing a rational and coherent explanation for the offending in relation to file number 21759965; and

- the likelihood that the defendant was simply under the influence of methamphetamines at the time he sent the text messages.

141. In my opinion, the fact that the text messages made no reference to the defendant's delusional beliefs does not mean that he was not acting on those delusional beliefs at the time of sending the text messages.

142. There is an abundance of evidence in the clinical databases that indicates that it is more likely than not that the defendant was suffering from those delusional beliefs at the material time and that those beliefs provided the motivation for sending the text messages. It does not follow that because the text messages did not reveal the motives for sending the texts that the defendant did not have those "insane motives" for sending the texts.

143. What is particularly telling is that the defendant believed it was necessary to send the text messages to "help the situation". This is indicative of someone making an "insane judgment", treating their actions as "one of inexorable obligation or inescapable necessity". Moreover, the motivation for sending the texts was both irrational and nonsensical.

144. The fact that the messages were of a highly sexualised nature and displayed animosity towards the victim in no way detracts from the hypothesis that the defendant was acting on his delusional beliefs at the time of sending the text messages. The emotional content of the text messages is consistent with a delusional belief that he had been injected with methamphetamines by his former girlfriend as a part of a "revenge attack".

145. Given the well documented history of the defendant's severe and enduring psychiatric illness – and the consistency of the defendant's explanation with the various assessments around the time of the alleged offending - I think it is unlikely

that the defendant had dissembled to Mr Jacobs about his delusional beliefs being a causal factor in relation to the sending of the text messages. I think it is unlikely that the defendant was concealing or disguising his true feelings or beliefs and reasons for sending the text messages. As stated earlier, I am satisfied that the defendant's self-reports were accurate.

146. The fact that the defendant was able to provide a rational and coherent explanation for breaching his bail and committing the traffic offences (which led Mr Jacobs to conclude that the defendant's mental illness did not materially contribute to the offending) in no way undermines the hypothesis that in sending the text messages he was acting on his delusional beliefs. It is a well- recognised phenomenon that the symptoms of mental illness can fluctuate significantly over a period of time and in particular circumstances. They can ebb and flow.

147. In my opinion, the hypothesis that the defendant was simply under the influence of methamphetamines at the time he sent the text messages can be excluded. There is no evidence that the defendant was under the actual influence of a drug or other intoxicating substance at the material time, except for the defendant's delusional belief that the intoxicating effects from the injections administered by the victim had caused him to send the text messages. The latter only goes to reinforce the hypothesis that the defendant was acting on a set of delusional beliefs at the time he sent the text messages.

148. I am reasonably satisfied on the balance of probabilities that due to his delusional belief system the defendant – at the time he sent the text messages - was unable to reason with a moderate degree of sense and composure that what he was doing was

wrong by the ordinary standards of reasonable people. In accordance with that false belief system the defendant acted upon a set of “insane motives” for sending the text messages to the defendant. The defendant felt there was an “inexorable obligation” or “inescapable necessity” to send the messages in order “to help the situation. The “insane motives” that led the defendant to engage in the conduct clearly reflect an incapacity to know that the conduct was wrong according to the ordinary standards of reasonable people. The motives made no sense. Clearly the defendant would have also been suffering from an underlying thought disorder and impaired judgement at the time. The defendant’s reporting that “his capacity to know right from wrong was in fear at the material times” is particularly telling. This nonsensical self-report clearly shows that at the material times the defendant was unable to reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong. Furthermore, the fact that the defendant now considers what he did was wrong is further indicative of his impaired judgment at the material time. Finally, but not least, the defendant reported that he had forgotten about the existence of the domestic violence orders. I consider this likely to have been the case due to the defendant’s severe mental impairment at the time. This is yet another circumstance that leads me to be satisfied that the defendant did not know that his conduct was wrong.

149. In conclusion I turn to the alleged offending on file number 21759965. Although I accept that the defendant is likely to have been suffering from a mental illness at the material time, I am not satisfied on the balance of probabilities that he did not know that the conduct constituting the offences was wrong.

DECISION

150. I dismiss the charges laid on file numbers 21744064 and 21758768, but decline to dismiss the charges on file number 21759965.

Dated 30 July 2018

…………………………………

Dr John Lowndes

Chief Judge of the Local Court of the Northern Territory