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GRAVE AND CRIMINAL ASSAULT—ANOTHER VIEW OF THE LANDSCAPE

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This article looks at the advantages and disadvantages, both practical and theoretical, of the broad offence of grave and criminal assault as opposed to a more structured ladder of offences of non-fatal violence to the person. It examines a group of cases consisting of all convictions for grave and criminal assault during one year in the Royal Court and illustrates those advantages and disadvantages with cases from that group.

1 Any criminal justice system has to deal with the problem of the best way to categorise offences within the broad general categories of offending. Whether by accident or design, each system has to settle on a point on the continuum between two extremes. In relation to offences of violence, at one extreme, there would be only one offence of non-fatal violence to the person, perhaps called simply assault. After conviction of such an offence, all the relevant variables would be catered for as part of the sentencing process. At the other extreme, a large number of offences would be provided dealing with as many as possible of the ways in which one person might unlawfully act violently towards another. The seriousness of the offending behaviour would then broadly be determined by the offence of which the defendant has been convicted. Thus analysed, it can be seen that Jersey and England[1] have positioned themselves towards the opposite outer edges of this continuum.

2 The reason for the different approaches can almost certainly be found in the fact that Jersey criminal law is largely based upon customary law with only a minority of offences derived from statute. English criminal law, although not formally codified, is now largely to be found in statute, each of which provides what is in effect a code in that area of offending. The Offences against the Person Act 1861 was a codification of the common law offences of unlawful violence then existing. Codification inevitably produces a more formal and detailed structure than will be produced by gradual development of the law by judges such as takes place in a system of common or customary law.

3 In England and Wales, the 1861 Act provides not only a hierarchy of offences, based in part on the seriousness of the injury caused and in part on the state of mind of the perpetrator, but also a series of offences dealing with specific kinds of non-fatal violence to the person. In Jersey, on the other hand, the same area of criminality is covered by two offences: assault, and grave and criminal assault.

4 As for the former offence, if there were any doubt that it is the same as a common assault in England, that doubt is removed by the recent decision of the Jersey Court of

[1] Throughout, a reference to England may be taken as a reference to England and Wales.

Appeal in *Att Gen v De la Haye*.[2] It was accepted that in 1974, as stated in the well-known direction to the jury by Ereaut, Deputy Bailiff in the case of *Att Gen v Vaughan*,[3] the definition of assault was the same in Jersey law as in England. It was argued in *De la Haye* that, when it was established in English criminal law that recklessness was sufficient *mens rea* for an offence of assault[4], the law in the two jurisdictions diverged. This argument was rejected by the Court of Appeal.

> "66 We are of the view that in Jersey law the element of *mens rea* in the offences of assault and grave and criminal assault is satisfied by proof that the defendant intentionally or recklessly applied force to the person of another."

5 As to grave and criminal assault, there has never been any doubt that it is an enormously broad offence covering all other unlawful non-fatal violence up to attempted murder. The key word of the offence, "grave", has over the years been interpreted by the courts in Jersey as applying not merely to the nature of the assault but also to the consequences of the assault.

6 It has been said that "a qualitative comparison [of grave and criminal assault] with the structural approach to the offence in the English jurisdiction is probably idle".[5] This is certainly arguable if the comparison is made with the 1861 Act. Despite its continued existence, the offences it created have been regarded for many years as complicated and old-fashioned and expressed in unnecessarily obscure language. The Act should not be regarded as a model for reform of any other system.[6]

7 In 1993, the Law Commission for England and Wales proposed the repeal of the Act and its replacement with a new series of offences.[7] Unlike many Law Commission reports, this was immediately welcomed and broadly accepted by the Government. They issued a further consultation document *Violence: Reforming the Offences against the Person Act 1861* to which a draft Bill was appended. Eighteen years later that Bill remains unenacted despite widespread support for its contents.[8] The reason for this is not clear because the Home Secretary of the day enthusiastically embraced the need for this reform. There seems to be no immediate prospect of the Bill's enactment. The consultation paper and its draft Bill can now only be found in the National Archives.[9]

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[2] [2010] JCA092.
[3] [1974] unreported.
[4] *Venna* (1975) 61 Cr App R 310.
[5] Whelan *Grave and Criminal Assault—the Landscape Past and Present*, (2006) 10 JL Rev 275.
[6] For example, s 17 of the Act is still in force and makes it an offence to impede a person endeavouring to escape from a wreck.
[7] Law Commission Report no 218 *Offences against the Person and General Principles*.
[8] See, however, Professor Ashworth in *Principles of Criminal Law*, 6th ed, p 321 *et seq* where he criticises the proposals as failing to define "injury" and "serious injury" adequately, perpetuating "intention" and "recklessness" as the most significant dividing line in offences of violence, and leaving too wide a prosecutorial and judicial discretion.
[9] http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/cpd/sou/oapdb.htm

8 The qualitative comparison with Jersey is less idle if one considers what both the Law Commission and the Government proposed. The hierarchy of offences would largely have been retained but expressed in modern language and underpinned by more modern concepts of criminal responsibility. There would have been four main offences—

(a) intentionally causing serious injury (maximum penalty life imprisonment);

(b) recklessly causing serious injury (maximum penalty seven years' imprisonment);

(c) intentionally or recklessly causing injury (maximum penalty five years' imprisonment); and

(d) intentionally or recklessly applying force or causing an impact to the body of another or intentionally or recklessly causing that other to believe that such force or impact is imminent (maximum penalty six months' imprisonment).

9 It is clear that the proposed new hierarchy reproduces in more modern guise the existing hierarchy of offences: s 18 of the Offences against the Person Act 1861: wounding or causing grievous bodily harm with intent; s 20: wounding or inflicting grievous bodily harm; s 47: assault occasioning actual bodily harm and common assault. The maximum penalties remain the same save that the maximum for recklessly inflicting serious injury is 7 years as opposed to its equivalent (s 20: wounding) which is 5 years. Some more detailed offences would have been retained in modern guise, for example offences of assaulting police officers in the execution of their duty, resisting arrest, endangering railway passengers and causing serious injury with explosives or other dangerous substances.

10 It is clear that both the Law Commission and the Government intended to retain the sort of framework with which practitioners have become familiar in the past 140 years with the concepts and language of the 1861 Act updated and made comprehensible. A comparison can thus properly be made between the approach in Jersey and the desired approach in England without that comparison becoming bogged down in the use of the word "maliciously" or the difference between "causing" and "inflicting". The next part of this article will examine some aspects of the way in which these two very different approaches work in practice. This is worthwhile despite the differences in approach between the two systems. It is still instructive to compare how each works in reality and to see if any conclusions can be drawn from that exercise. Rather than considering invented factual situations, it may be more interesting for a Jersey readership for this article to consider how the facts of a cohort of real cases in Jersey would have played out in England. The nature and extent of unlawful violence is only too similar between the two jurisdictions.

11 As a representative sample, I have taken all those cases in the Royal Court for a year between 1 October 2009 and 30 September 2010 where there was a conviction, whether following a plea of guilty or the verdict of a jury, for grave and criminal assault. Twenty-

eight defendants were convicted of a total of 32 counts of grave and criminal assault. I have taken the facts from the unreported judgments of the cases and thus have not had access to the statements, photographs or medical reports.

12 To determine what offence would have been charged in England on a particular set of facts, the most reliable guide is the Crown Prosecution Service Charging Standard for Offences against the Person (as at 16 October 2009).[10]

(a) *Assault occasioning actual bodily harm:* the following injuries should normally be prosecuted under s 47 rather than as common assault: loss or breaking of tooth or teeth, temporary loss of sensory functions, which may include loss of consciousness, extensive or multiple bruising, displaced broken nose, minor fractures; minor, but not merely superficial, cuts of a sort probably requiring medical treatment (*e.g*. stitches); psychiatric injury that is more than mere emotions such as fear, distress or panic.

(b) *Section 20 wounding or inflicting grievous bodily harm:* There is an overlap with assault occasioning actual bodily harm. An offence contrary to s 20 should be reserved for those wounds considered to be serious and serious bodily harm. Examples of what would usually amount to serious harm include: injury resulting in permanent disability or permanent loss of sensory function; injury which results in more than minor permanent, visible disfigurement; broken or displaced limbs or bones, including fractured skull; compound fractures, broken cheek bone, jaw, ribs, *etc.*; injuries which cause substantial loss of blood, usually necessitating a transfusion; injuries resulting in lengthy treatment or incapacity; psychiatric injury.

(c) *Section 18 wounding or causing grievous bodily harm with intent:* Serious bodily harm is as set out at (b) above. The gravity of the injury resulting is not the determining factor, although it may provide some evidence of intent. Factors that may indicate the specific intent include: a repeated or planned attack; deliberate selection of a weapon or adaptation of an article to cause injury, such as breaking a glass before an attack; making prior threats; using an offensive weapon against, or kicking the victim's head.

13 I have assumed a strict application of the charging guidelines. In reality, I would expect prosecutors in cases where the attack is vicious but the injuries less than might be expected to charge s 18 wounding or causing grievous bodily harm with intent, expecting a plea of guilty to s 20. This might particularly apply in relation to kicking to the head. Similarly, prosecutors may well prosecute for unlawful wounding where, on a strict application of the guidelines, the extent of the cuts should have been reflected by a charge of assault occasioning actual bodily harm. This strict approach also does not take account of cases where the jury have acquitted of s 18 but convicted of what is normally the alternative, namely s 20. It should also be borne in mind that juries not uncommonly reflect provocative or other bad behaviour by the victim leading up to the violence by acquitting of

[10] http://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/

s 18 and convicting of s 20, producing what may be a just result even if not a legally sound one. The consequence for the figures is that assault occasioning actual bodily harm is over-represented in the sample and s 20 under-represented.

14 Against that background, analysis of the facts of the 32 counts of grave and criminal assault produces the following likely charging outcomes in England.

(a)	Section 18 wounding or causing grievous bodily harm with intent	8
(b)	Section 20 wounding or inflicting grievous bodily harm	6
(c)	Assault occasioning actual bodily harm	14
(d)	None of the above	4

15 In a broad sense, these figures do no more than illustrate that, since grave and criminal assault has to cover all non-fatal violence to the person more serious than assault up to attempted murder, it has inevitably developed into an extraordinarily broad offence. The great range of factual seriousness can be illustrated by two examples of street violence from within the cohort of cases. The first case would beyond question have been charged as s 18 causing grievous bodily harm with intent in England and would be regarded as a bad example of its kind, the second would clearly be at the lower end of assault occasioning actual bodily harm.

(a) *Att Gen v Pallet, M and O*:[11] After an altercation in the street, the defendants, all of whom had been drinking heavily, followed the victim up the street. Pallett grabbed the victim and restrained him whilst M and O hit him repeatedly about the head and face with the heels of M's stiletto shoes. At one point M appeared to press the heel of her shoe into the victim's face. The victim at no point hit out and only defended himself by trying to cover his face. O continued to hit him in the face with the shoe, aiming the blows upwards under the victim's arms. The victim then fell to the floor and was repeatedly kicked by the defendants, with Pallett delivering a blow to the head which was described by a witness as "kicking a football as hard as he could". O stamped on his head whilst wearing stiletto shoes. The victim was treated by the trauma team at the General Hospital. He underwent emergency surgery in an attempt to save the sight in his left eye. This was unfortunately unsuccessful. The victim later underwent reconstructive surgery involving the removal of a rib in order to rebuild his eye socket.

(b) *Att Gen v Wallace*:[12] Following a drink-fuelled altercation with the victim at 05:00 on a Sunday morning, the defendant hit the victim on the head three times with an unopened can of beer, causing it to explode. The victim was at the time sitting on a wall and not in a position to defend himself.

[11] [2009] JRC 241.
[12] [2010] JRC 057.

16 This review is not intended to be about comparative sentencing in the two jurisdictions. The quite different offence structure in England makes reading across from sentencing cases in the English Court of Appeal difficult even if it were desirable. In fact, the Jersey Court of Appeal made clear in *Harrison v Att Gen*[13] that it is not an appropriate exercise.

> "118 The Bailiff raised this matter when this appellant was sentenced in the Royal Court. He said (2003 JLR 480, at para. 9):
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> > 'There is, in this jurisdiction, only one offence, namely grave and criminal assault, compared with a number of different statutory offences in England, and we do not think it is helpful or indeed appropriate to try to identify the precise offence which might have been committed by the defendant in another jurisdiction.'
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> We agree. Such a result would have serious consequences for the administration of justice in this Island, and would increase the likelihood of sentencing in such cases being prefaced by *Newton* hearings at which much of the evidence, on which a decision had already been made by a jury, would have to be rehearsed before a tribunal, differently constituted, as to facts (Jurats in the place of jurors), and possibly as to law (a different judge from the judge who presided at trial as in this case). We do not regard that as desirable. *Newton* hearings have a useful place in the criminal process. But the occasions when it should be necessary to have such a hearing after a contested trial should be rare.
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> 119 We accept that the multiplicity of circumstances which result in charges of grave and criminal assault afford a wide band of sentencing options for the Royal Court, but if the three different English offences were to be introduced into the sentencing process so that the court was required to decide into which English offence the facts of the Jersey offence would fall, the flexibility of the sentencing process would become unnecessarily and artificially restricted."

17 With that caveat in mind, it is interesting to note that, in the group of cases we are examining, the sentence passed in the Royal Court would have been available had sentence been passed for the likely English offence. This includes the four cases where, on the facts, assault occasioning actual bodily harm, unlawful wounding and wounding/causing grievous bodily harm with intent would not have been available to the prosecutor who would have had to look for some other suitable charge. For example, in *Att Gen v Ferguson*[14] the defendant was sentenced to 2 years' imprisonment for a grave and criminal assault upon police officers by pointing an imitation handgun at them at close range, when they had called at his house. They reasonably believed it was real. In England, this would have been charged under the Firearms Act 1968, probably under s

[13] 2004 JLR 111, paras 118–119.
[14] [2010] JRC 159.

16A (possession of a firearm or imitation firearm with intent to cause fear of violence). This carries a maximum of 10 years' imprisonment.

18 The considerable breadth of the offence of grave and criminal assault brings with it both advantages and disadvantages which, to some extent, are the mirror image of the advantages and disadvantages of a modern codified system of non-fatal offences of violence to the person such as that described in paras 6–8 above. The antiquated system in the 1861 Act has disadvantages of its own not mirrored by equivalent advantages.

19 The breadth of the offence makes it extremely flexible in being applied to factual situations which arise with reasonable frequency but may be difficult to fit appropriately into a codified system. For example, where a trivial blow has had unexpectedly grave consequences or, even more so, where a vicious assault has had surprisingly minor consequences. In this latter situation, the defendant's moral blameworthiness springs from the vicious and/or dangerous nature of his actions and there should be a limit to the extent to which he should profit from his good fortune that those actions did not have their expected consequences.

20 This can be seen in Jersey cases by the way that a blow with a knife which is intended to land in the victim's body but does not because, for example, the victim dodges it, can be charged as a grave and criminal assault. That charge accurately describes the conduct. In England, the charge of common assault is inadequate, an offensive weapon charge requires the conduct to be in a public place, and attempted wounding is difficult to prove.

21 Two examples from the group of cases:

(a) *Att Gen v Williamson*:[15] the defendant mistakenly thought the victim had aimed a comment at the occupants of his car. He took a 3 inch serrated knife from the glove box and got out to attack the victim, thrusting the knife in a stabbing motion towards him. Fortunately, Williamson's girlfriend managed to disarm him and retrieve the knife before any contact was made.

(b) *Att Gen v Horn*: the defendant had drunk about four pints of beer. After an argument at home with his daughter he went into the kitchen, pulled out a large butcher's knife, 18 inches long, and threatened his wife and daughter with it, threatening to do them all in, and then do himself. He was ranting and raving whilst waving the knife around, "I'll fucking kill the lot of you I have nothing to lose". His wife and daughter were terrified.

22 In England, Williamson would probably have been charged with affray which carries a maximum sentence of three years. Horn could also be charged with affray because it can be committed in private as well as public but this does not really look like an affray. He would probably be charged with making threats to kill contrary to s 16 of the 1861 Act (as

[15] [2009]JRC 248.

amended) though this can be difficult to prove since it requires the defendant to intend that the recipient of the threats should believe that they will be carried out.

23 Another consequence of the very broad range of factual situations potentially comprised in a grave and criminal assault is that, almost always, placing the offence in the scale of seriousness will be done as part of the sentencing process. This is an efficient way of deciding these issues. The prosecutor has a limited number of charging options. The defendant has only to admit what may be quite a small part of the unlawful violence before he has to plead guilty. The sentencing court resolves all disputed issues, more often than not, on the papers. As Whelan puts it—

> "... because the offence of grave and criminal assault arises at customary law, the sentence is at large, enabling the sentencers to take account of the nature, effects and all other circumstances of the assault in the exercise of an untrammelled discretion to arrive at a sentence precisely matched to the needs of the case. Such a structure has avoided the 'banding' of offences and corresponding penalties encountered in a statutory approach, with some history of attendant difficulties of interpretation."[16]

24 There can be no doubt that the way in which non-fatal offences against the person are categorized in Jersey is eminently practical. Such a solution makes for efficiency of administration and, as a result, is likely to mean a reduction in the cost of the criminal court system. The assessment of culpability is done at the sentencing stage rather than by the label given to the charge. One simple offence is easier for a jury to grasp than a series of offences between which quite subtle and complex differentiation may have to be made.

25 Having said all that, there is no doubt that those advantages come at a price. Efficiency is a desirable goal for a criminal justice system but the structure of available offences in a particular area of the criminal law should also be underpinned by compliance with certain principles. Arguably, an analysis of the Jersey offences of non-fatal violence to the person demonstrates some important areas of non-compliance with modern principles of criminal law.

26 Among the principles underlying the imposition of criminal liability is what academic writers refer to as "fair labelling"—

> "Its concern is to see that widely felt distinctions between kinds of offences and wrong-doing are respected and signalled by the law, and that offences are sub-divided and labelled so as to represent fairly the nature and magnitude of the law-breaking."[17]

27 This principle has two broad purposes. Its first purpose is declaratory, marking the extent to which society regards different forms of law-breaking as more or less serious than one another. To illustrate this from another broad area of the criminal law: sexual

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[16] *Op cit*, para 31.
[17] Ashworth, *op cit*, p 78.

offending. It would no doubt be “practical” and “efficient” in the ways referred to at paras 22 and 23 above to have only two sexual offences in Jersey: sexual assault and grave and criminal sexual assault. In exactly the same way as with non-fatal offences of violence, the crucial issues could be determined at the sentencing stage. Was there full sexual intercourse without the consent of the victim? Was any penetration *per vaginam* or *per anum*? Was the victim a child at the time of the offence? Were victim and perpetrator close relatives? Of course, this is not and never has been the law in Jersey but the fact that one can reasonably anticipate that no-one would suggest that it *should* be demonstrates that the principle of fair labelling has real resonance with ordinary people and is not just legal theory. Where people regard certain kinds of offending behaviour as different in nature and magnitude, the law should reflect that.

28 The second broad purpose of the principle of fair labelling is to differentiate for the public and for those working within the criminal justice system between different kinds of offending behaviour. This may be for quite general purposes where the public may be entitled to some guide as to the level of moral blameworthiness of an offender’s conduct but may also be practical. An employer may need to know how serious a prospective employee’s offence was. Those in the criminal justice system may need similar information where only the fact of a conviction is available and not a detailed description of the offending behaviour.

29 Within the cohort of cases examined for this article, there are two which could be said to illustrate the point.

(a) *Att Gen v Cox*:[18] The accused attacked another woman with a craft knife, causing a number of incised wounds to the victim’s back, chest, shoulder and arm areas, including a 59cm incised wound down the entire length of the back of the right arm and hand. She claimed that the victim attacked her first. Having been charged with grave and criminal assault, the accused appeared before the Magistrate’s Court the following day. She was unexpectedly released on bail and returned home to find her husband having sex with her best friend who was lodging with them. The accused punched her husband to the head several times then did the same to the friend. She also whipped them with a canvas belt about their bodies causing minor bruising, marks, scratches and abrasions. She was charged with three offences of grave and criminal assault.

(b) *Att Gen v Debieuvre and Muir*:[19] There had been angry words exchanged between the two men in their flat, following which Debieuvre went into the kitchen, armed himself with a knife, and returned with a saucepan of boiling oil. He then, in an attack described by the court as “of almost unbelievable ferocity”, poured the boiling oil over Muir’s head and shoulders causing severe burns and excruciating pain. Muir suffered

[18] [2009] JRC 209.
[19] [2010] JRC 125 and [2010] JRC 097.

psychological damage and received medical treatment for his burns over an extended period. The court described that as being as extreme an example of provocation as it is possible to imagine. Muir then kicked Debieuvre, who was lying on the floor semi-conscious through drink, to the head on several occasions. Debieuvre lost two teeth and suffered bruising but was fortunately not injured to any greater extent. He was in hospital for three days but appeared to have made a full recovery. Each was charged with grave and criminal assault.

30 What is at issue in these two cases is not the charges laid, the prosecutor had no choice, nor the sentence passed; in each case the different seriousness of the offences was reflected by very different sentences, but the labels that the behaviour had to be given. In *Cox*, the public, if asked, would surely regard a vicious attack on another woman with a razor-sharp implement as different in kind from minor injuries caused when she caught her husband and his lover *in flagrante*. In *Debieuvre*, the retaliation by Muir is not trivial but it follows such a dreadful attack on him that it should be marked not simply by a different sentence but by a different label. Proportionality lies in more than simply the penalty imposed. In England, Cox would have faced one charge of s 18 wounding with intent and two of assault occasioning actual bodily harm. Debieuvre would have been charged with s 18 causing grievous bodily harm with intent and Muir would probably have been allowed to plead guilty to assault occasioning actual bodily harm.

31 Another quite separate area of principle. Deeply embedded in both Jersey and English criminal jurisprudence are the principles that disputed issues of fact in serious cases should, where possible, be decided by a jury and that where there are disputes of fact, the evidence should, if challenged, be heard orally and tested by cross-examination. A structured ladder of offences is an important part of the process that ensures that that happens. The charges can be chosen to reflect different issues in the case. If a plea of guilty is entered to a particular charge, the defendant has admitted the necessary elements of that charge but no more than that. He cannot be sentenced on the basis of facts that would amount to a more serious offence than that to which he has pleaded guilty. If there is a trial, some issues relevant to sentencing will be decided by the jury's verdicts.

32 Of course, unless the structure includes a ridiculously detailed list of different offences, there will regularly be issues relevant to sentencing unresolved by the trial process which will have to be resolved by the sentencing process. Where there is a substantial issue on the facts and the court is not prepared to sentence on the defence version, a *Newton* hearing must normally be held. There is usually understandable pressure to avoid such a process if possible. It compels the key witnesses to undergo the ordeal of giving oral evidence when a plea of guilty would avoid it. It substantially removes the administrative and financial advantages of avoiding a trial. The defendant loses part of his sentencing discount for a guilty plea if he fails in the *Newton* hearing.

33 The Court of Appeal in *Harrison* drew attention to this aspect of the practical effect of the breadth of grave and criminal assault although they were coming at the problem from a quite different angle.

> "120 In our judgment, in any case of grave and criminal assault the Crown, when drafting the statement of facts, and the Jurats, when addressing themselves to sentence, should make an assessment of the seriousness of the offence and should bear in mind the following factors, though the list is not intended to be exhaustive:
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> (a) the nature of the deliberation with which the assault was carried out;
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> (b) whether the blow was aimed or random;
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> (c) whether the incident arose as a result of a loss of temper or was committed in cold blood;
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> (d) what was the degree of force with which the blow must have been struck;
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> (e) the nature, extent, gravity and permanence of the injury occasioned;
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> (f) if a weapon was used, the nature of such weapon;
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> (g) whether the weapon was carried or seized on the instant;
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> (h) how many were concerned in the assault and the circumstances which gave rise to their involvement;
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> (i) the nature and extent of any provocation offered by the victim; and
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> (j) whether the offender has a record of committing the same or similar offences or constitutes a danger to himself of to the public.
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> *Many of these matters will impact on the state of mind of the offender which the sentencing court should take into account in assessing the gravity of the assault* [Emphasis added]. But we do not believe it is appropriate to introduce into this jurisdiction at the time of sentence an ingredient which forms no necessary part of proof of conviction."

34 The effect of what the Court said is that there will undoubtedly be cases where the intent of the defendant is an issue of importance to sentencing which would have been resolved by the jury in a trial under a system which contained different offences reflecting a different state of mind but will not be resolved by a conviction for grave and criminal assault. If the issue must be resolved and the two factual accounts cannot be reconciled, the solution would appear to be a *Newton* hearing. However, at least following a jury trial, such a hearing is strongly and understandably discouraged by the same judgment of the

Court of Appeal in a passage quoted at para 15 above. The words there quoted are, of course, used in the context of an important procedural difference between Jersey and England. In England, if there has been a trial, the judge can resolve issues relevant to sentencing by making findings based on the evidence in the trial. In Jersey, sentencing, and the factual basis for it, is for the Jurats who have not heard the evidence.

35 In the recent case of *Hamilton v Att Gen*[20] the Court of Appeal considered this difficulty with the Jersey procedure and suggested that more use might be made of the practice of asking the jury to answer supplemental questions.

> "82 It is possible for a jury or Jurats to be asked, when returning a verdict, to answer a supplemental question as to the basis of their verdict. Thus, in England and Wales, juries are often asked, when they return a verdict of manslaughter on a charge of murder, to indicate whether they have found this on the basis of diminished responsibility or provocation if both defences are being run. Although, in that jurisdiction, judges are not generally encouraged to ask supplemental questions of juries in cases other than murder / manslaughter, it is sometimes done. We note that in the recent case of *R v Mendez* [2010] 3 All ER 231, the trial judge left to the jury the possibility of convicting one of the accused of murder either on the basis that he was the person who stabbed the deceased or on the basis that he was a secondary party by way of joint enterprise in that he was one of the group who attacked the deceased. The judge warned the jury in advance that, if they convicted that particular accused of murder, they would be asked a supplemental question as to whether the conviction was on the basis that the accused inflicted the fatal injury or on the basis that he was a secondary party. The jury answered that they convicted him as a secondary party. There was no suggestion in the Court of Appeal that this was an inappropriate procedure to have followed.
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> 83 In our judgment, given the different system in Jersey, this is a practice which could perhaps be followed more often than it is in England and Wales. We suggest that if, during the course of a trial, the judge or counsel identifies that the verdict of the jury or Jurats may be consistent with more than one version of the facts and this may be relevant to sentence, consideration should be given to asking a supplemental question of the fact finding tribunal in order to establish which version of the facts has been accepted. Where this is done, the question should be a reasonably simple one and should be formulated before the tribunal retires so that it may be considered whilst the verdict is reached. It would not be appropriate to spring a supplemental question upon the jury or Jurats following their verdict (see *Archbold* (2010 Edition) para 5–71). Where such a question is posed and answered, sentence must then be passed on the basis of the version of the facts identified as having been found by the jury or Jurats."

[20] [2010] JCA136A.

36 This is a feasible solution when there is a stark difference between the two possible bases of guilt and the matter has inevitably been focussed on during the evidence. However, it is more difficult to apply with subtler differences in the facts such as are set out by the Court of Appeal in *Harrison* at para 120(a)–(j). If questions as to those matters are to be asked of the jury, they would have to be identified early in the case so that advocates for both sides can deal with the issue during the evidence. To do that is to come close to introducing the sort of distinctions into the offence of grave and criminal assault against which the courts in Jersey have set their face.

Conclusion

37 The criminal law in Jersey remains substantially based on customary law developed on a case by case basis by the judges. It is not codified either wholly or in part. The purpose of this article has not been to argue that it should or should not be so codified, but to examine in a comparative way how this plays out in practice in one area of the criminal law. It seeks also to point out the advantages and disadvantages of each system. It is for others to say where the balance of advantage lies.

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