Punishing Multiple Harms

Virginia Campbell Barrister and Solicitor, Supreme Court of Western Australia.
and I.G.Campbell Associate Professor of Law, University of Western Australia.

Introduction

1. Prosecutor's Discretion

The possibility of multiple sentences for multiple harms arising from one act or omission by an offender has rarely arisen for appellate consideration in the common law or under the Criminal Codes in Australia. Perhaps this rarity is due to the manner in which Directors of Public Prosecutions and Crown Prosecutors charge a single, representative charge when the offences are of a serious nature. For example, John Stuart and James Finch were charged with the murder of Jennifer Davie, only one of the possible fifteen murders with which they might have been charged arising out of their notorious firebombing of the Whiskey Au Go Go nightclub in Brisbane in 1973.[1]

Presumably, in deciding to charge Stuart and Finch with one murder only, the prosecution authorities were concerned that, in circumstances of the publicity surrounding the crime, the trial and the subsequent sentence, further trials might not be fair to the accused. There may have been concern that if Stuart and Finch had been tried for others of the remaining fourteen deaths, and a jury had returned a verdict of acquittal, it must necessarily have brought the earlier verdict into disrespect, since the nature of the Crown's case was that Stuart and Finch were guilty of murder for all the deaths, or guilty of none. However, what must have also entered into the prosecutors' deliberations was the requirement that sentences for the murders of fourteen others would have been concurrent with the life sentences which Stuart and Finch received for the murder of Jennifer Davie. As a matter of law, any sentence imposed for a second or later murders must be served concurrently with a life sentence for the first.[2]

The exercise of a prosecutor's discretion in circumstances such as these is inextricably interwoven into the fabric of sentencing principles.

(a) *Concurrent Punishments for One Transaction*

At the beginning, it is necessary to distinguish the circumstances exemplified by the case of Stuart and Finch (in which multiple harms arise from one act) from the situation of multiple harms arising from successive, discrete acts. If there are successive, discrete acts, multiple killings are severally punishable, although, as mentioned, any other sentence of imprisonment must be concurrent with a life sentence. When the offences are punishable by less than life imprisonment, the concurrence rule of life sentences is inapplicable, but there is nonetheless a common law rule that multiple sentences of im-

1 *Stuart and Finch* [1974] Qd.R. 297; *Stuart* (1974) 134 C.L.R. 426.
2 *Foy* (1962) 46 Cr.App.R. 290; *Farlow* [1980] 2 N.S.W.L.R. 166; *Jolly* [1982] V.R. 46; *Fortune* v. *Parre* (1984) 14 A.Crim.R. 289; *Taikmaskis* (1985) 19 A.Crim.R. 383

prisonment shall be served concurrently, unless the court orders that they be served cumulatively.[3] This common law rule is now embodied in statute in most jurisdictions in Australia.[4]

Sentences might be made cumulative if the offences are not manifestations of one criminal enterprise,[5] or one criminal transaction,[6] or one criminal episode although identity of motive will be insufficient to attract the concurrence rule.[7]

The consequence is that, ordinarily, multiple punishments for multiple harms arising from one act or omission will be concurrent, and the fact that separate charges are laid for each of those multiple harms will not make much difference to the actual time spent behind bars. However, this should not be a vital factor in the exercise of the prosecutor's discretion to charge for each and every harm suffered. There are instances in which a prosecutor has declined to call any evidence on later charges having secured a conviction and punishment for the most serious charges,[8] but these may be exceptional. As Ashworth has commented, each separate offence should be clearly and separately labelled in court, in public and in the offender's criminal record, even though this might have no effect on the total sentence.[9] The prosecutor still has an obligation to ensure that the public interest, in labelling each discrete crime, is satisfied. Judicial dicta can be found supporting the propriety of prosecuting multiple charges, even though the effective punishment is not thereby augmented.[10]

If the prosecutor does not lay seek appropriate punishment for each of the multiple harms suffered, there is a danger that, if an appeal against the first sentence is successful, an appellate court will be unable to interfere with the sentences for the other offences which have not been the subject of appeal, leaving the degree of criminality unpunished or virtually unpunished.[11] In this event, an appeal might be brought against the sentences for the second or later harms, but the problem for the prosecutor is that failure to urge an appropriate penalty for the second and later harms may undermine an appeal against these sentences.[12] Each discrete crime must be attended by the punishment which is proper, whether or not that makes a difference to the aggregate sentence imposed.

(b) *Multiple Harms and One Victim*

The prosecutor's discretion appears to be exercised in the same manner in the situation where multiple acts are directed at one victim. The most commonly experienced case is

3 *Longford* [1970] 3 N.S.W.R. 276, 278

4 NSW: s 444 *Crimes Act* 1900; Vic: s 15 *Penalties and Sentences Act* 1985; Qld: s 20 *Criminal Code*; SA: s 31 *Criminal Law (Sentencing) Act* 1988; WA: s 20 *Criminal Code;* ACT: s 443 *Crimes Act* 1900 (NSW); NT: s 405(3) *Criminal Code*; contrast Tas: 391 (1B) *Criminal Code*, which requires an express pronouncement by the judge as to whether sentences are cumulative or concurrent.

5 *Melville* (1956) 73 W.N. (N.S.W.) 579, 583.

6 *Hally* [1965] Qd.R. 582, at 584; *Hayward* (1982) 6 A.Crim.R. 157, 158, 160; *Brown* v. *Lynch* (1982) 15 N.T.R. 9, 11; *Scanlon* (1987) 89 F.L.R. 77, 80-82; *Rumpf* (1987) 29 A.Crim.R. 64, 75-76; *Koushappis* (1988) 34 A.Crim.R. 419, 422; *Shaw* (1989) 39 A.Crim.R. 343, 347; *Davis and Dinah* (1989) 44 A.Crim.R. 113, 118, 119-120.

7 *Spiero* (1981) 26 S.A.S.R. 577; *Dorning* (1981) 27 S.A.S.R. 481; it does not always follow that, from the fact that one transaction or enterprise gives rise to different offences, sentences may not be accumulated, *Robinson* v. *Samuels* (1977) 18 S.A.S.R. 137; *Duff* (1979) 39 F.L.R. 315; furthermore, sentences may be made concurrent in order to avoid a sentence which is, in totality, out of all proportion with the degree of criminality, *Ruane* (1979) 1 A.Crim.R. 284, 286; *Tutchell* [1979] V.R. 248, 252-253.

8 See, for example, *Rhenwick Williams* (1790) 1 Leach 529, 168 E.R. 366, 368; see also *O'Grady* (1941) 28 Cr.App.R. 33; *Edirimanasingham* [1961] A.C. 454.

9 Ashworth, *Sentencing and Penal Policy*, Weidenfeld and Nicholson, London, 1983, p.254.

10 *Kiripatea* (1990) 50 A.Crim.R. 417, 432; *Elhusseini* (1988) 33 A.Crim.R. 155, 170.

11 *Ryan* (1982) 56 A.L.J.R. 422, 428, 430.

12 *Tait and Bartley* (1979) 24 A.L.R. 473, 476-477; see also Campbell "The Role of the Crown Prosecutor on Sentence" (1985) 9 *Crim. L.J.* 202.

the laying of multiple charges for multiple sexual assaults, each representing a discrete offence, committed by the offender, on the one victim, over a period. Each discrete crime must be attended by the appropriate punishment, although it is not uncommon for the sentences, for many or all of these charges, to be made concurrent.

Another example of multiple harms directed at the one victim is inconsistent with this approach, however. The example of a knife being plunged into a victim fifteen different times raises other issues. One charge of wounding, in these circumstances, is obviously appropriate, although, technically, fifteen different woundings could have been charged. It has been said that the practice of charging only one wounding, in these circumstances is justifiable, since the offender should not be made worse off than if a single charge had been laid,[13] but the opposite appears to be the case. The offender is made worse off by charging only one wounding, comprising, as it does, fifteen different stab wounds, rather than fifteen different woundings. The sentence for one count of wounding must necessarily take into account that the crime was one of great determination, ferocity and resultant threat to life, while the punishment for a one-stab wounding (concurrent with the punishment for the other fourteen woundings) would be significantly less than a sentence for a fifteen-stab wounding.[14] So, the prosecution decision to charge one count of wounding is presumably designed to exact the proportional punishment for the transaction. If fifteen separate charges were laid, then the offender would receive a slight sentence for the first, one-stab wounding, and upon which sentences for all other fourteen, one-stab woundings were made concurrent. Indictment on one count only in these circumstances is justifiable, in an endeavour to have the punishment reflect the true gravity of the crime. Indictment on fifteen different counts would not have this effect.

2. Multiple Harms from One Act

These sentencing principles and the principles upon which a prosecutor's discretion is exercised also apply to multiple harms to different victims arising from the one act. Here, the one transaction rule applies, naturally, to the circumstances in which multiple harms arise from the one act of the offender, and indicates that sentences of imprisonment for discrete offences as part of the transaction should be concurrent. For example, in *Wilkins*[15] concurrent sentences were imposed for two counts of culpable driving causing death and one count of culpable driving causing grievous bodily harm, when the appellant's truck collided with a Holden Gemini in which the two deceased people and the one injured person were travelling. The concurrence of these sentences was approved by the New South Wales Court of Criminal Appeal.

However, what constitutes the scope of the transaction is far from certain. In *Wilkins*, there was another charge. The appellant had been convicted upon a fourth count, of culpable driving causing death of a person who had been travelling in a second Gemini which the appellant's truck hit immediately after it struck the first vehicle. The sentence relating to this death was made cumulative upon the other three sentences. With respect to this latter sentence, Carruthers J. applied the one transaction rule in stating that:

> "I would not necessarily treat the culpable driving of the appellant, which was the basis of the various counts in the indictment as part of one incident. I think the view is open that the impact between the appellant's vehicle and the first of the two Geminis was a distinct incident from the impact between the appellant's vehicle and the second of the Geminis. I take this view despite

13 *Merriman* [1973] AC 584; *Robertson*, Full Court of Victoria, 5/12/72, cited by Fox and Frieberg, *Sentencing: State and Federal Law in Victoria*, Oxford University Press, Melbourne, 1985, p.369.

14 The authorities are not abundant for this proposition, but see *Bedington* [1970] Qd.R. 353, *Aidi* [1970] Q.W.N. 4, *Phillips and Lawrence* [1967] Qd.R. 237.

15 (1988) 38 A.Crim.R. 445.

> the fact that the two impacts were closely related in time. The collisions occurred on different parts of the highway. The second impact was further to the south than the first. The first impact occurred due to the fact that the appellant's vehicle continued to be on the incorrect side of the road."[16]

In New South Wales, it seems that the concurrence rule is not invariably followed in the case of multiple harms arising from one act,[17] where it is possible to characterise the offences as discrete. It seems that this is also true in Victoria. In *Williamson*,[18] the Victorian Full Court specifically rejected a submission that, if only one physical act had brought about separate harms, then, as a general rule, one sentence only should be passed.[19]

Nonetheless, the present presumptive requirement of the law is that sentences of imprisonment should be concurrent, unless the trial judge expressly states otherwise,[20] and this applies to the situation of multiple charges for multiple harms arising from one physical act or transaction.

Double Punishment

The approach to charging by the prosecutors, in the cases of *Wilkins* and *Williamson*, can be contrasted with the approach of the prosecutor in Queensland, who was confronted with almost identical circumstances to those arising in the New South Welsh and Victorian cases. In *Calder*,[21] only one charge was laid, dangerous driving causing the death of two people, in the circumstance of the appellant having killed two people in the one vehicle when his vehicle collided with it.

What differentiates the approach of prosecution authorities in New South Wales and Victoria from that in Queensland, and constrained the Queensland prosecutor? It might appear to be that Section 16 of the Queensland Criminal Code contains a prohibition against double punishment, which provides:

> A person cannot be twice punished either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offences of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of some other offence constituted by the act or omission.

Section 16 of the Western Australian Criminal Code differs. It was amended in 1977 to stipulate that it does not prevent conviction for every offence constituted by the same act or omission. The effect of this amendment was to clarify what had been the variable practice in Queensland, where the courts had, on some occasions required that Section 16 constituted a defence,[22] but had more recently indicated that it was not a defence, but a prohibition against punishment only, and not a bar to conviction.[23]

16 Supra, 451; Lee C.J. at C.L. reached the same result as Carruthers J, but by reference to the principle that the total punishment needs to reflect the gravity of the offence, at 450, while Allen J. disagreed with Carruthers J., at 451-452; see also *Kortum*, unreported, Full Court of Victoria, 23/9/77, cited by Fox and Frieberg, ibid p.374.

17 See *Wilkins* (1988) 38 A.Crim.R. 445, 449, 451.

18 Unreported, Full Court of Victoria, 5/6/74, cited by Fox and Frieberg, ibid., p.374.

19 Fox and Freiberg, ibid., p.374.

20 See statutes cited at footnote 4 above.

21 *Calder* (1986) 22 A.Crim.R. 62.

22 See *Donnelly and Maher* [1920] Q.J.P.R. 62; *Dray* v. *Mitchell* [1932] St.R.Qd. 18; *Kelly* v. *Raynbird; ex parte Kelly* [1961] Q.W.N. 25; see also *Gaiari — Ganereba* v. *Giddings* [1967-1968] P. & N.G.L.R. 346; the same view has been offered by Keller R., "Double jeopardy and sections 16 and 17 of the Criminal Code" [1977] *Queensland Lawyer* 78, p.84 where it is asserted that Section 16 gives rise to the plea of autrefois convict.

There is no equivalent provision in the Tasmanian or in the Northern Territory Codes. However, at common law, there is a prohibition against double punishment.[24] It does not protect against multiple punishments for multiple charges arising from one physical act or omission,[25] although some decisions to the contrary can be found,[26] for reasons which will be explored below. In any event, the common law prohibition against double punishment is usually subsumed under the logically anterior question of whether autrefois convict or autrefois acquit pleas will bar the second conviction.

It is in Queensland, and also in Western Australia, that this obvious inhibition upon prosecutorial discretion, to bring multiple charges for multiple harms arising from one transaction, is to be found. Section 16 of the Queensland and Western Australian Codes does not prevent prosecution, or even the conviction of multiple offenders, but the impediment to punishment perhaps explains why the approach to prosecutorial discretion differs in those States.

This invites consideration of the scope of Section 16, and whether it is truly an impediment to separate (albeit concurrent) sentences of imprisonment for multiple harms arising from the one physical act of the offender, as was encountered in *Calder*.

1. Punishable Acts and Essential Elements

The expression, in Section 16 of the Queensland and Western Australian Codes, "the same act or omission", admits of no simple interpretative parameters. It does not bear the meaning assigned to the same words appearing in Section 23.[27] An act or omission can have significance, in Section 16, only if a person is actually punished for an act or omission. Rarely is a physical act or omission, devoid of its circumstances or consequences, punishable.[28] If the words "act or omission" were to be given a meaning to equate it with, for example, the firing of a gun, then it is open to argument that the punishment has been meted out, not for the firing of the gun, but for the fact that it bears a causal relationship with the resultant death or injury. This would render Section 16 meaningless and ineffective. As a consequence, the words "act or omission" in Section 16 have been interpreted to mean an act or omission for which the person can be punished. In *Gordon; ex parte Attorney-General*,[29] Hanger C.J. stated that:

"Section 16, in saying that a person cannot be twice punished for the same act or omission,

23 *Gordon; ex parte Attorney-General* [1975] Qd.R. 301, 306-307; *Kiripatea* (1990) 50 A.Crim.R. 417, 432; in the two recent reviews of these Codes, no change to the post-1977 version of Section 16 was proposed in Western Australia, *The Criminal Code: A General Review*, Crown Law Department, Perth, 1983, Volume 1, p.17, while the Queensland review recommended amendment in that state to bring it in line with Western Australia, *First Interim Report of the Criminal Code Review Committee*, Department of the Attorney-General, Brisbane, 1991, p.88.

24 *Wemyss* v. *Hopkins* (1875) L.R. 10 Q.B. 378, 381-382; *Welton* v. *Taneborne* (1908) 21 Cox C.C. 702, 70; *O'Loughlin; ex parte Ralphs* (1971) 1 S.A.S.R. 219, 225; *Falkner* v. *Barba* [1971] V.R. 332; *Travers* v. *Wakeham* (1991) 54 A.Crim.R. 205.

25 See *McLiney* v. *Minster* [1911] V.L.R. 347; *Hull* v. *Nuske* (1974) 8 S.A.S.R. 587.

26 *Hallion* v. *Samuels* (1978) 17 S.A.S.R. 558.

27 Section 23 has been repeatedly interpreted to mean the physical acts of the accused person, and not the external consequences of the acts: *Kaporonovski* (1973) 133 C.L.R. 209, 215, 231; *Kissier* (1982) 7 A.Crim.R. 171, 172; *Geraldton Fisherman's Co-Operative Ltd.* v. *Munro* [1963] W.A.R. 129, 132; it is questionable whether the physical act or omission is so narrow to exclude external circumstances, such as whether the gun is loaded or whether the hand contains a glass: *Falconer* (1990) 65 A.L.J.R. 20, 23; *Duffy* [1981] W.A.R. 72, 80, 82; of *Geraldton Fisherman's Co-Operative ltd.* v. *Munro* [1963] W.A.R. 129, 132.

28 See Keller R., "Double jeopardy and sections 16 and 17 of the Criminal Code" (1977-1981) 5 *Queensland Lawyer* 78, pp.81, 84.

29 [1975] Qd.R. 301.

must be referring to punishable acts or omissions; and the prohibition applies though the act or omission would constitute two different offences."[30]

Hanger C.J pointed out that the punishable act, of being in charge of a motor vehicle while under the influence of alcohol, was not the same punishable act as dangerous driving causing grievous bodily harm, thereby denying the protection of section 16.[31] It was clearly only one transaction, or physical action, of driving which was proven for both charges, so what took the matter beyond protection of Section 16 was the differences in the quality and character, the punishability, of that driving. For the former charge, it was the external circumstances (which rendered the driving dangerous) and its external consequence (the causing of grievous bodily harm), and in the latter it was different circumstances (the fact that the driver was under the influence).[32]

The same view has been adopted by Minogue J., referring to Section 16 of the Papua-New Guinea Criminal Code, in *Gaiari-Ganereba* v. *Giddings*,[33] in stating that:

". . . one must look for some element or ingredient of that conduct which gives it its punishable character."

What gives conduct its punishable character, at least in these examples, is the surrounding circumstances and its consequences. It is not any circumstance or any consequence, however. Only those circumstances and consequences which have been stipulated by the legislature give the conduct its punishable character.[34]

Of course, to be punishable, an act or omission must constitute an offence, and the impression created, that punishable acts or omissions are indistinguishable from an offence, is reinforced by an obiter statement by Griffith C.J., with Cooper and Real JJ. concurring, in *Hull (No.2)*,[35] that Section 16 required that there be the same "essential elements".[36]

If this view of Section 16 was correct, all that is required, to avoid the protection of the Section, is that the elements of the first and second charges be different. So, for example, punishment for dangerous driving causing death to one occupant of a motor vehicle, will not give rise to a Section 16 protection for dangerous driving causing grievous bodily harm to another occupant, but will, if the second charge is dangerous driving causing death to that second occupant. This seems a curious result, and one dependent upon the entirely fortuitous basis of whether the second occupant was killed or merely seriously injured. It is a triumph of technicality and formality, at the expense of the substantive protection which should underlie Section 16.

Furthermore, such a result offends against the plain meaning of the words used in Section 16. The totality of elements constitutes the offence, but the draftsman did not specify that the offences need be the same. The words of Section 16 can be contrasted with those

30 Supra, 306; this formulation has been approved by Pidgeon J. in the Western Australian Court of Criminal Appeal in *Drage* (1989) 44 A.Crim.R.352, 361.

31 Supra, 307.

32 For a similar analysis of similar statutory charges, decided under the common law prohibition against double punishment, see *Travers* v. *Wakeham* (1991) 54 A.Crim.R. 205.

33 [1967-1968] P. & N.G.L.R. 346, 353.

34 The judgment of Williams J. in *Gordon; ex parte Attorney-General*, supra 313, makes these same distinctions apparent, although he proposed that the fundamental test of whether the act or omission was the same depended upon whether the acts had the same "central theme", "focal point" or were the same "basic act or omission", supra 323; this formulation has been approved by Malcolm C.J. and Wallace J. in *Drage* (1989) 44 A.Crim.R. 352, 357.

35 [1902] St.R.Qd. 53, 58.

36 Supra, 58.

in Section 7 of the *Criminal Code Act* 1899 (Qld),[37] which prohibits double punishment for the same offence.[38]

The fact that some of the elements of the offences are different does not mean that the Section 16 protection is unavailable. The point is well illustrated by the Queensland Court of Criminal Appeal decision in *Kiripatea*.[39] The appellant had been convicted and punished upon a count charging aggravated mutiny under Section 92 of the *Corrective Services Act* 1988 (Qld). The circumstances of aggravation had to be specifically pleaded in the indictment.[40] One of the circumstances of aggravation was escaping from lawful custody. He was also convicted upon another count of escaping from lawful custody under Section 93(1)(a) of the same Act. Williams J. was of the view that the appellant had been punished, as a circumstance of aggravation for the Section 92 conviction, for the punishable act of escaping from lawful custody.[41]

Kiripatea demonstrates that a punishable act does not necessarily coincide with the totality of elements of the offence defined by the legislature,[42] provided that it constitutes at least an included offence. So long as the one punishable act is a common constitutent element, then Section 16 applies. The fact that the physical act is the same is not enough, if it is not punishable, and it is immaterial whether the other elements are the same or not.

This suggests that the second or later charges arising from multiple harms due to the one physical act or omission cannot be punished, whether or not they culminate in different charges. The *Wilkins* and *Williamson* circumstances, arising in Queensland or Western Australia, contain a common essential element of dangerous driving, and the fact that there are differences in the other elements causing death as opposed to grievous bodily harm, or no other elements at all, is immaterial. Dangerous driving, without circumstances of aggravation, is punishable whether or not there is a resultant harm or injury to any person.[43] So long as there is a common element which is a punishable act of culpable (or dangerous) driving, or any other discrete offence, then that is sufficient to attract the Section 16 prohibition. Conversely, if the prosecutor chooses to indict for manslaughter and for dangerous driving causing death or grievous bodily harm, there is no common essential element and hence, on the orthodox view, no common punishable act.

Such an interpretation is also a triumph of technicality, and, furthermore, results in the position that the scope and operation of Section 16 can be determined by the manner in which a prosecutor chooses to frame the charges. It means, however, that the sentencing principles, adverted to earlier, are undermined if there really is no choice as to charge. All but one of the multiple harms arising from one physical act must go unpunished.

Such a view has not appealed to all courts interpreting Section 16. In *Gaiari-Ganereba* v. *Giddings*,[44] there was no common essential element of the two charges, but the Section 16 protection against double punishment, in the Papua-New Guinean Criminal Code, was applied. The appellant had been punished for driving while under the influence, after he had been convicted and punished for manslaughter. There was no

37 The same as Section 6 *Criminal Code Act* 1913 (W.A.).

38 Section 16 also prevents double punishment for conduct which was in breach of two or more different statutes, thereby covering the territory of Section 7: *Gould* v. *Sin On Lee* (1911) 6 Q.J.P.R. 15; *Brennan* v. *Williams* (1951) 53 W.A.L.R. 30.

39 (1990) 50 A.Crim.R. 417.

40 Qld: s 564; see *Kingswell* (1985) 159 C.L.R. 264; *Meaton* (1986) 160 C.L.R. 359; contrast WA: s 582, under which there is no longer such a requirement.

41 Supra, 432; Williams J. renewed the opinion he had expressed in *Elhusseini* (1988) 33 A.Crim.R. 155 at 170; contrast the outcome in *Hogan* [1960] 3 All E.R. 149.

42 In this sense, element includes a pleaded circumstance of aggravation.

43 *McBride* (1966) 115 C.L.R. 44, 50.

44 [1967-1968] P. & N.G.L.R. 346.

common essential element. Nonetheless, Minogue J. ruled that Section 16 prohibited punishment for driving under the influence, principally because the only evidence of criminal negligence, sustaining the unlawfulness of the driving, was the driving while under the influence. Clearly, Minogue J. delved behind the defined elements stated in the complaint and indictment to analyse the evidence to support the defined elements in order to determine whether Section 16 applied.[45]

O'Regan[46] has suggested that *Gordon; ex parte Attorney-General* and *Giddings* are not inconsistent, because, in *Giddings*, the appellant was twice punished for the punishable act of driving under the influence, whereas in *Gordon*, the appellant was not. Such an interpretation is not correct, if punishable act means an essential element of the offence. There was no common essential element.

It seems apparent that the interpretation of Section 16 which equates "acts or omissions" with "punishable acts or omissions" does not command universal judicial support, may place a great deal of scope in a prosecutor's hands to prevent its application and provides a sometimes whimsical impediment to the proper punishment of criminal activity, when it culminates in multiple harms, by focussing on the admittedly certain, but ultimately sterile and technical issue, of whether there is a common essential element.

2. Identity and Evidence

(a) *The Common Law Test of Identity*

This can be contrasted with the common law test of identity for the purposes of double jeopardy. The common law of double jeopardy corresponds with, but is not identical with the Section 16 prohibition against double punishment.[47] It differs in that Section 16 does not prevent double conviction, only double punishment, for the same act or omission, whereas, the common law prevents double jeopardy, or being in peril of being convicted twice for the same or substantially the same offence. *Nemo debet bis vexari pro uno et eadem causa.* There are similarities and differences between the common law of double jeopardy and the Codes of Queensland and Western Australia double jeopardy provisions,[48] which do not require exploration here.

What is significant is that both Section 16 and the common law rest on a concept of identity. At common law, the offences must be the same or substantially the same. This is also the requirement of the Northern Territory Code.[49] In *Connelly* v. *Director of Public Prosecutions*,[50] Lord Morris stated that one test of whether offences are the same or substantially the same is:

> ". . . whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction upon the first indictment."[51]

This test has been approved numerous times at common law in Australia, including in many High Court decisioins which preceded the House of Lords decision in *Connolly* v.

45 For a similar result in similar circumstances at common law, see *Welton* v. *Taneborne* (1908) 21 Cox C.C. 702.

46 O'Regan, *New Essays on the Australian Criminal Codes*, Law Book Co., 1988, 22.

47 *Connolly* v. *Meagher; ex parte Connolly* (1906) 3 C.L.R. 682, 684; *Gordon; ex parte Attorney-General* [1975] Qd.R. 301, 303-305; *Drage* (1989) 44 A.Crim.R. 352, 356-357.

48 Qld: s.17; W.A.: s.17.

49 N.T.: s.18.

50 [1964] A.C. 1254.

51 Supra, 1305; see also *U.S.A.* v. *Atkinson* [1969] 2 All E.R. 1151.

Director of Public Prosecutions by many years,[52] one of which was the decision in *Li Wan Quai* v. *Christie*,[53] mentioned below.

The common law test of identity necessitates determination of whether the evidence adduced at the first trial would have been enough to have obtained a lawful conviction upon the second. To this end, an accused person may:

> ". . . prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him to show that he is being charged with an offence which is either the same, or is substantially the same".[54]

(b) *The Codes and Identity*

The necessity for identity of particulars before the double jeopardy protection can apply, is also part of the Code's protection against double punishment. In *Hull (No.2)*,[55] Griffith C.J., with Cooper and Real JJ. concurring, ruled that there must be identity of time and place for the Section 16 protection to operate. Griffith C.J. reiterated this view in *Connolly* v. *Meagher; ex parte Meagher*,[56] when in the High Court, he pointed out that the punishable act of opening a hotel on Sunday "was momentarily precedent to" the sale of liquor to a minor, and hence Section 16 did not apply.

The significance of, indeed necessity for, identity of time and place for Section 16, as particularised in the indictment or complaint, can be illustrated by several recent decisions in Queensland and Western Australia. In the Western Australian decision in *Drage*,[57] the appellant had driven a motor vehicle at various places around Perth and Fremantle, pursued at high speed by police. He had been convicted and punished in the Childrens' Court upon complaint of dangerous driving, particularised as taking place in several suburbs and on specific streets of Perth. He was convited, at a later stage, in the District Court, upon an indictment charging dangerous driving causing bodily harm at Fremantle. Malcolm C.J. and Wallace J. rejected a submission by the appellant that there was merely one act of dangerous driving, indicating that the submission would only have been correct if dangerous driving in Fremantle had been relied upon in the Children's Court matter, and ruled that the two incidents of dangerous driving had been "clearly separated in both time and space . . .".[58]

It is notable that there were common essential elements in the two charges in question in *Drage*. In fact, the two charges were distinguishable only by the particulars. Nonetheless, the fact that there were common essential elements was insufficient to attract the Section 16 prohibition against double punishment.

Of greater complexity is the Queensland Court of Criminal Appeal decision in *Elhusseini*.[59] The appellant was charged with one count of trafficking in heroin, particularised as having occurred in various places in Queensland (the evidence of which included activities in New South Wales and bringing heroin into Queensland, together with various conversations and sales in Queensland) and several counts of possession and supply of heroin related to individual acts of possession and supply (all of which were particularised and proved to have occurred at some of the places in Queensland

52 *Ex parte Spencer; Sherwood* v. *Spencer* (1905) 2 C.L.R. 250, 251; *Chia Gee* v. *Martin* (1905) 3 C.L.R. 649, 653.
53 (1906) 3 C.L.R. 1125.
54 *Connelly* v. *Director of Public Prosecutions* [1964] A.C. 1254, 1305-1306.
55 [1902] St.R.Qd. 53.
56 [1906] St.R.Qd. 125, 131.
57 (1989) 44 A.Crim.R. 352.
58 Supra 357-358; see also 361.
59 (1988) 33 A.Crim.R. 155.

which had been particularised for the trafficking account). Williams J. in the Queensland Court of Criminal Appeal was of the opinion (obiter) that Section 16 would protect a person from being punished on the individual counts of possession or supply of heroin after he had been punished for trafficking.[60] There was unity of time and place between the trafficking and the individual acts of possession and supply, as pleaded in the indictment, and it was quite clear that the jury may have taken, and probably did take, the individual occurrences of possession and supply into account in determining the evidence against the appellant on the count of trafficking and on which the judge must have punished in imposing the mandatory sentence of life imprisonment for trafficking.

Williams J. was the only member of the Court to advert to Section 16, and he made no reference to the decision in *Hull (No.2)*, although he did cite *Connolly* v. *Meagher; ex parte Connolly*, but on an unrelated issue. Although he avoided expressing any opinion about Section 16, MacPherson J. noted that one sale of heroin was not the same as the continuous activity of a trafficking chain that preceded this sale.[61] As he put it, the individual transactions were "useful, if not essential" to proof of the trafficking. Clearly, he and Williams J. agreed that the trafficking was more extensive (as to time and place) than the individual acts, but undoubtedly encompassed them.

The obiter opinion of Williams J. in *Elhusseini* regarding the application of the protection of Section 16, was endorsed by Thomas J. in the later decision in *Goulden*,[62] but without the benefit of argument on the point.

Again, it is notable that the applicability of the Section 16 protection against double punishment was determined without reference to whether there was a common essential element. Quite clearly, for the opinions of Williams J. in *Elhusseini* and of Malcolm C.J. and Wallace J. in *Drage* to be correct, resting as they do on a line of authority extending back to the draftsman of the Queensland Code, mere comparison of the essential elements of the offences is inadequate as a criterion for the applicability of Section 16.

(c) *Particulars, Evidence and The Codes*

Identity of persons and dates are not elements of the offence. Persons, dates, times and places are, in the absence of something to make them material, merely particulars.[63] That is, they are matters of allegation of the circumstances surrounding the commission of the essential elements of the offences, and must be established by evidence. Persons, dates, times and places are also particulars under the Codes, which require that these particulars be specifically pleaded in the indictment.[64]

There are some judicial dicta suggesting that Section 16 is not governed by the evidence which is presented. In *Hull (No.2)*, Griffith C.J. expressed the opinion that it was misleading to refer only to the "necessary evidence", as the Section 16 prohibition operated even if there had been no evidence but the conviction eventuated from a plea of guilty.[65] However, even in cases determined by a plea of guilty, the court must have a statement of facts before it, as to the circumstances of the offence, upon which it must be determined whether there is a possibility of a Section 16 issue presented. In this sense, and especially in the light of what Griffith C.J. stated about the necessity of establishing identity of time and place if Section 16 were to prevent a punishment being imposed, this

60 Supra, 170.
61 Supra, 165-166.
62 (1991) 53 A.Crim.R. 404, 413.
63 *Wishart* v. *Fraser* (1941) 64 C.L.R. 470, 485-486; *Ex parte Ryan; Re Johnson* (1943) 61 W.N. (N.S.W.) 17, 20; *Wright* v. *O'Sullivan* [1948] S.A.S.R. 307, 316; *Wickham* v. *Cole* [1957] Tas. S.R. 111, 119-120; *Felix* v. *Smerdon* (1944) 18 A.L.J. 30; *Parmeter* v. *Proctor* (1948) 66 W.N. (N.S.W.) 48.
64 Qld: s 564; WA: s.582
65 Supra, 57.

comment must be regarded as being unreflective and confined to the particular submissions before the court on that occasion.

The common law test for double jeopardy, which requires examining the evidence, has been rejected as suitable for determining the application of Section 17 (the double jeopardy provision) of the Queensland Code by Williams J. in *Gordon; ex parte Attorney-General*, and Malcolm C.J. and Wallace J. reiterated this view in *Drage*. This test may be appropriate for the double punishment provision of Section 16.[66] Indeed, it has been so employed on several occasions. In *Kelly* v. *Raynbird; ex parte Kelly*,[67] Townley J., with whom Mack J. agreed, specifically based his approval of the common law test upon the High Court's decision in *Li Wan Quai* v. *Christie* and upon earlier Queensland decision in *Dray* v. *Mitchell*.[68] Neither *Dray* v. *Mitchell* nor *Kelly* v. *Raynbird; ex parte Kelly is sound authority, however, because the respective courts regarded Section 16 as doing no more than reproducing the common law defence* of autrefois convict, which it plainly does not. The same may be said of the Papua-New Guinean decision in *Gaiari-Ganereba* v. *Giddings*.[69]

Nevertheless, as we have endeavoured to emphasise earlier, the simple expedient of comparing the essential elements to find a common punishable act, has proven inadequate as the sole criterion for the applicability of Section 16. The substance of a prohibition to protect an accused against double jeopardy, requires that a court be able to ascertain that an accused person was in jeopardy on some earlier occasion, and should not be constrained by the nature of the essential elements or the nature of the particulars of the charges.[70]

It is our contention that the question of punishability of multiple harms must rest upon a more sophisticated approach, and, a necessary corollary of this contention, the general approach to the interpretation of Section 16 requires re-evaluation. The common law test of identity for the purpose of double jeopardy should be equally applicable as the test of identity for the prohibition of double punishment in Section 16.

Application to Multiple Harms

(a) *The American Prohibition Against Double Punishment*

The application of this test of identity, to prevent multiple convictions and punishments for multiple harms arising from a single physical act, has been infrequently the subject of commentary. One of the two leading treatises on double jeopardy does not even address the question,[71] while the author of the other, Friedland,[72] has asserted that there is uncertainty about whether it applies, providing examples either way from U.S. and English law.

In the United States Constitution, the Fifth Amendment contains the prohibition against double jeopardy. It is a multi-faceted prohibition. The United States Supreme Court in *North Carolina* v. *Pearce*[73] stated that the Fifth Amendment:

> "... protects against a second prosecution for the same offense after acquittal. It protects

66 See the comment of Williams J. in *Gordon; ex parte Attorney-General* [1975] Qd.R. 301, 322, after dealing with the common law test and its unsuitability for Section 17, that such cases "... may yet be appropriately dealt with under Section 16 ...".

67 [1961] Q.W.N. 25.

68 [1932] St.R.Qd. 18; see also *R* v. *Donnelly and Maher* (1920) 14 Q.J.P.R. 62.

69 Supra, 354.

70 See the obiter comments of Dawson J. in *S.* v. *The Queen* (1989) 64 A.L.J.R. 126 at 131.

71 Spencer-Bower & Turner, *The Doctrine of Res Judicata*, 2nd edn., Butterworths, London, 1969.

72 *Double Jeopardy*, Clarendon Press, Oxford, 1969.

73 395 U.S. 711 (1969).

against a second prosecution for the same offense after conviction. *And it protects against multiple punishments for the same offense.*"[74] [emphasis added]

One of the cases, cited by Friedland, as an example of the successful protection by this prohibition concerned transportation in one vehicle on one journey of two women across interstate borders for the purpose of prostitution.[75] The other example which he cited concerned one act of shooting a gun, the bullet from which struck two federal police officers.[76] In both instances, it was held that the appellant could only be punished for one harm, not multiple harms, from his one act.

However, close examination of these decisions of the United States Supreme Court makes plain that neither concerned double punishment issues, but addressed the queston of construction of the legislative intent. So, for example, in the shooting case, *Ladner* v. *United States*, Brennan J., delivering the opinion of the Court, cited the prostitution case, *Bell* v. *United States*, as "a case on all fours with the present case"[77] and went on to say:

"There is no constitutional issue presented. The question for decision is as to the construction to be given . . . (to the penal statute) . . . Did Congress mean that the single discharge of a shotgun would constitute one assault, and thus only one offense, regardless of the number of officers affected, or did Congress declare a separate offense for each federal officer affected by the doing of the act?"[78]

Neither *Bell* nor *Ladner* addressed the protection against double punishment, and neither is of assistance in determining the correct approach under Section 16 of the Queensland and Western Australian Codes.

Nonetheless, *Ladner*, in particular, is instructive, because it concerned two sentences of ten years for each assault, which were made consecutive (or cumulative) upon each other! This is not an isolated example of United States courts' sentencing practices, in which it seems fairly common for cumulative sentences to be imposed for multiple harms arising from a single physical act.[79] In light of the law considered earlier, in which an Australian court would be obliged to make such sentences concurrent, even if one can conceive a ten year prison sentence for assault, it is possible to understand the decision in *Ladner* and in *Bell* as a concern to avoid the awful consequences of such a sentencing policy by interpreting the legislative intent to allow only one charge in these circumstances of multiple harms. As such, these decisions have no application to the present inquiry. Certainly, the approach of finding a legislative intent to penalise only one harm, such as finding that the offence is expressed as endangering one or more persons or a group of persons, avoids inquiry into the applicability of a prohibition against double punishment.[80]

Friedland has suggested that the English courts have taken a different approach to that represented by *Bell* and *Ladner*. He cited the Court of Appeal decision in *Morris*[81] as evidencing this. It was said by Lord Goddard (in obiter) that separate punishments for each watch smuggled were appropriate, although there was only one act of smuggling. Again, however, it is plain that these comments did not address the question of double punishment.

74 Supra 717; see also *Wimberley* v. *State* 698 P.2d 27, 31 (1985 Oklahoma).
75 *Bell* v. *United States* 349 U.S. 81 (1955).
76 *Ladner* v. *United States* 358 U.S. 169 (1958).
77 Supra, 172.
78 Supra, 173; see also *Whalen* v. *United States* 445 U.S. 684, 686-689 (1980); *Jeffers* v. *United States* 432 U.S. 137, 154-155 (1977); *Ex parte Rathmell* 664 S.W.2d 386, 390 (1983).
79 *State* v. *Hoag* 114 A.2d 573 (1955 New Jersey); *Commonwealth* v. *Frisbie* 485 A.2d 1098 (1984 Pennsylvania); *State* v. *Dunlop* 721 P.2d 604 (1986 Alaska).
80 See *Commonwealth* v. *Frisbie* 485 A.2d 1098, 1100 (1984 Pennsylvania).
81 [1951] 1 K.B. 394.

(b) *The American Double Punishment Cases*

There is, accordingly, little assistance to be had from these sources in support of one view or another, as to whether the principles of double jeopardy should protect against multiple punishments for multiple harms arising from one transaction. On the other hand, there is a great deal of assistance to be had from decisions in the United States which have actually considered the applicability of the Fifth Amendment prohibition against double punishment in cases of multiple punishment for the same offence.

For each of the protections of the Fifth Amendment, against double jeopardy and against double punishment, the test of identity which has been employed is whether the evidence produced on the second occasion would have been sufficient to procure a conviction on the former occasion. This is the same as the test laid down by Lord Pearce in *Connolly* v. *Director of Public Prosecutions* for the common law.

The application of this test has denied protection against double punishment in cases of multiple convictions upon four counts of robbery in circumstances in which four victims were held up and robbed simultaneously,[82] in circumstances in which two or more pedestrians were struck as a result of which separate manslaughter convictions were obtained although there was only one act of driving which caused the deaths,[83] or where two or more pedestrians were struck as a result of which separate recklessly endangering convictions were obtained although there was only one act of driving causing injury,[84] in circumstances in which two or more people in another motor vehicle were killed as a result of which manslaughter convictions were obtained although there was only one act of driving which caused the deaths,[85] when a firearm was pointed so as to assault three different people,[86] in a case of five counts of kidnapping when five people were held hostage in one drugstore robbery,[87] and in circumstances in which the defendant was punished for nine separate counts of recklessly endangering another person after he drove his vehicle into a crowded city intersection.[88]

In these double jeopardy inquiries, the fact that there was a common physical act or transaction was insufficient to determine whether the offences were the same or not. As Weygandt C.J. noted for the Ohio Court of Appeals, in *State* v. *Martin*, which concerned two convictions of manslaughter following the defendant's truck colliding with a motor cycle ridden by the two deceased men named Batori and Police:

> "The defendant contents here that the gravamen of the offense here charged is the unlawful operation of the truck, and that the fact that more than one person was killed is immaterial so far as the offense is concerned. One difficulty with this view is that the defendant was not indicted solely for the unlawful operation of his truck. Of course that is an element in the offense; but another essential element is the killing of "another" — a particular person. Another difficulty with this contention is the obvious fact that in the first case the defendant could not have been convicted of killing Batori, since Police was the victim named in that indictment; and in the instant case it is equally obvious that the defendant cannot be convicted of killing Police, since Batori is the victim named."[89]

In *Harrison* v. *State*,[90] the Texas Court of Appeals ruled no double jeopardy and applied the same test, noting that:

82 *State* v. *Hoag* 114 A.2d 573 (1955, New Jersey).
83 *People* v. *Allen* 14 N.E.2d 397, 403 (1938 Illinois); *Fleming* v. *Commonwealth* 144 S.W.2d 220 (1940 Kentucky); *State* v. *Dunlop* 721 P.2d 604 (1986 Alaska).
84 *Commonwealth* v. *Frisbie* 485 A.2d 1098 (1984 Pennsylvania).
85 *State* v. *Martin* 96 N.E. 2d 776 (1951 Ohio).
86 *Wimberley* v. *State* 698 P.2d 27 (1985 Oklahoma).
87 *State* v. *James* 631 P.2d 854 (1981 Utah).
88 *Commonwealth* v. *Frisbie* 485 A.2d 1098 (1984 Pennsylvania).
89 Supra, 778.
90 713 S.W.2d 760 (1986, Texas).

"... conviction for one offense requires proof of a fact that conviction for the other offense does not, ie the identity of the deceased."[91]

In *Wimberly* v. *State*,[92] Bussey J. with Parks and Brett JJ. concurring, stated in the Oklahoma Court of Criminal Appeals that:

"... offenses committed against different individual victims are not the same for double jeopardy purposes though they arise from the same episode."[93]

In all instances, the courts of the United States have applied the test of whether the evidence to procure the conviction on one count would have been sufficient to procure a lawful conviction upon the other. The result is that there are as many different offences, and punishments, as there are victims.

Some American decisions purport to confine this principle to offences against the person.[94] There is one contrary instance, in which the double jeopardy prohibition was not applied to multiple offences for victims arising from the one transaction of property damage. However, this involved destruction of a three-mile length of fence which was owned by three different property owners, each fence was spatially distinct, and each destruction was temporally distinct.[95] Nevertheless, there seems to be no reason in principle why property offences should be treated any differently to offences against the person.

There are as many offences, convictions and punishments as there are victims, even though there might be identity of time and place, there is not identity of victims and presumably also the individual harms suffered by the victims. As was noted in *Neal* v. *State*,[96] the double punishment prohibition is designed to prevent separate charges which might be laid under two or more different statutes for the one offence, and the:

"... distinction between an act of violence against the person that violates more than one statute and such an act that harms for more than one person is well settled."[97]

Conclusion

It is clear that the prohibition against double punishment under Section 16 of the Criminal Codes of Queensland and Western Australia, unlike counterparts at common law and under the United States Constitution, has been interpreted in a narrow and technical manner. The courts interpreting the provision have focussed solely upon the "punishable act or omission", with the consequence that multiple harms arising from one physical act might go unpunished. For reasons which we have suggested earlier, this is undesirable. Further, we have noted, it has been impossible for Codes courts to adhere strictly to this view, made necessary by the need to examine the evidence adduced to determine whether there is identity of time and place in order to determine whether the punishable acts or omissions are identical. Finally, we have suggested that apparently capricious results follow from the application of these principles.

It is our contention that, although it is supported by slender authority in the Code jurisdictions, the common law test of asking if the evidence on one charge would have been sufficient to procure a lawful conviction upon the other would lead to a far more satisfactory result, and should be adopted in the Code jurisdictions. Its adoption would not do violence to the plain words of Section 16. The inquiry whether the act or omission

91 Supra, 763.
92 698 P.2d 27 (1985 Oklahoma).
93 Supra, 31; see also *State* v. *Simpson* 464 So.2d 1104, 1110 (1985 Louisiana).
94 *State* v. *James* 631 P.2d 854, 855 (1981 Utah).
95 *State* v. *Simpson* 464 So.2d 1104 (1985 Louisiana).
96 357 P.2d 839 (1960 California).
97 Supra, 844.

of one charge was the same as the act or omission of the other can be determined by asking if the evidence to render one act punishable would have been sufficient to render the other punishable.

The adoption of such a test is especially significant in the case of multiple harms arising from the one physical act or transaction. It would ensure, given the existing climate of judicial principle and policy in relation to concurrent sentences, that the appropriate punishment is imposed for resultant multiple harms flowing from criminal conduct.