THE MEANING OF PHYSICAL INJURY AND SERIOUS PHYSICAL INJURY UNDER ARTICLE 10.00 OF THE NEW YORK STATE PENAL LAW

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In early June of 1986, Marla Hanson, a 25-year-old model/aspiring actress, was attacked near the Lincoln Tunnel with a razor blade by two men (later identified as Steven Bowman, 26, and Darren Norman,19), who slashed the right side of her face from temple to jaw and sliced open the left side of her face around her eye and on her cheek. The attractive, diminutive woman, whose physical wounds took upwards of 150 stitches to repair, was left looking, for some time, not unlike "Sally" in Tim Burton's "The Nightmare Before Christmas."

The two attackers were later tried and convicted of Assault 1st degree (then a Class C Felony in New York State), and received the maximum (then indeterminate) sentence of five-to-15 years in prison.

The person who was found by the jury to have directed the attack, Steven Roth, 26, (Hanson's former landlord), was convicted as an accomplice and also sentenced to the maximum term of imprisonment. The prosecution theorized that the attack was motivated by a dispute over a security deposit that Hanson demanded he return. They also suspected that she may have spurned his sexual advances. Roth denied any involvement, claiming that he was framed by Bowman with whom he had just broken up.

The crime of Assault 1st degree has long since been elevated to a Class B violent felony (punishable by a determinate of anywhere between 5 to 25 years in prison followed by five years of post release supervision), and even though the law has changed, courts still wrestle with the meaning of serious physical injury (which was not contested in the Hanson case), and its lesser, foundational counterpart, physical injury.

Physical injury (PI) is a fundamental element of misdemeanor Assault whether committed intentionally, recklessly or negligently with a dangerous instrument/deadly weapon (PL 120.00[1],[2],[3]), and of felony Assault committed with a dangerous instrument/deadly weapon (PL 120.05[2]). It is also a component of some Burglary and Robbery offenses (e.g PL 140.25[1][b], PL 160.10[2][a])), when a non-participant is physically harmed during the course of the commission of the crime or when then perpetrator is fleeing from it.

Penal law 10.00(9) defines PI quite succinctly (but not entirely clearly) as "impairment of physical condition or substantial pain." Impairment of physical condition was described by the court in People v Almonte 102 Misc2d 950 (Sup. Ct. NY County 1980), as a weakening or diminution of some physical state of being or health (i.e. affecting a physical condition in an injurious manner).

Noting that the statute requires no specific degree of physical impairment, the court, citing, inter alia, People v McDowell 28 NY2d 373 (1971), said that there must be considerably more than the type of minor and temporary condition (e.g. redness, minor swelling, superficial scratch or bruise) that one would expect to result from a petty slap, moderate shove or harmless kick that one typically associates with the violation of Harassment (PL 240.26). (See, for example, People v Velasquez 202 AD2d 1037 [4th dep't 1994], People v Williams 101 AD2d 870 [2d dep't 1984]).

In Almonte, the elderly robbery victim suffered a lacerated lip from having been punched in the mouth before the defendant stole his property. The victim was treated at the emergency room for a lacerated and bleeding upper lip (which a witness also described), but no proof was adduced as to whether the injury impeded the victim's ability to eat, drink, chew or speak. Nevertheless, the court found that this laceration (which it described as a jagged-edged tear), qualified as a PI. (In contrast. See People v Jimenez 55 NY2d 895 [1982]: once centimeter cut on the lip not enough to establish substantial pain).

See also People v Trombley 97 AD3d 903 (3d dep't 2012 where two lacerations and scars (one below the lip and one below the chin resulting from a punch), resulted in a reduction of an Assault 2d charge to Assault 3d degree (PI but not SPI).

But it in People v McDowell 28 NY2d 373 (1971) supra, the Court found that an incidental reference to a black eye without any development of its appearance, seriousness, swelling or suggestion of any pain was not enough to support the felony Assault charge for lack of evidence of PI. Similarly, in Matter of Philip A, 49 NY2d 198 (1980), red marks on a child's cheek requiring no more than cold water to soothe his short-lived pain did not rise to the level of PI. (See also Matter if Derrick M.

63 AD2d 932 [1st dep't 1978], evidence of a black and blue rib cage with no mention of any bleeding or need for any medical attention was held not to meet the threshold for PI).

In People v McDowell 2011 NY Slip Op. 51646(U) (Lockport City Court 8/16/11), the court ruled that the accusatory instrument charging Assault 3d degree (reduced on the People's motion from Assault 2d degree), was FACIALLY INSUFFICIENT (under CPL 110.15[2] and 100.40), for failing to set forth sufficient facts to support the necessary element of PI, citing inter alia , People v Alejandro 70 NY2d 133 [1987]) and People v Henderson 92 NY2d 677 [1999]).

The information in McDowell alleged in pertinent part that the defendant (the complainant's brother-in-law), hit the complainant in the face causing a laceration of his left cheek. There was no further description of the injury and no mention was made of any pain or need for medical attention beyond some first aid administered by EMT'S at the scene.

The court assembled a fairly comprehensive compilation of cases on PI (including Matter of Philip A. supra and People v Chiddick 8 NY3d 445 [2007] which focused on the "substantial pain" aspect of PI [broken, bloody fingernail from a bite causing much pain was sufficient), and considered several factors including the NATURE OF THE INJURY itself (minor cut/abrasion, minimal swelling [e.g. People v. Powell 153 AD2d 54 (4th dep't 1989) vs. something more substantial like significant bruising, swelling or lacerations [e.g. People v Amin 294 AD2d 863 [4th dep't 2002], unconsciousness [e.g. People v Wooden 275 AD2d 935 (4th dep't 2000) or fractures [e.g. People v Dennee 295 AD2d 1012 (4th dep't 2002), People v Carter 280 AD2d 977 (4th dep't 20010).

The court also considered whether medical attention was sought or required (e.g. People v Owens 256 AD2d 1220 [4th dep't 1998], and whether pain pills or other medication was prescribed or administered to treat the injury (e.g. People v Bowen 17 AD3d 1054 [4th dep't 2005], Peoplev Medor 39 AD3d 362 [2d dep't 2007], matter of Winston W. 29 AD3d 473 [1st dep't 2006]). The court noted, however, that the failure to seek medical treatment, in an of itself, will not necessarily defeat a claim of physical injury that otherwise impairs one's physical condition or causes substantial pain (e.g. People v Gerecke 34 AD3d 1260 [4th dep't 2006]).

Another factor was the extent to which the injury/condition prevented or restricted the victim's performance of daily activity including going to work. (See, for example, People v Carter supra 280 AD2d 977 [4th dep't 2001]: victim out of work for 20 days; People v Wooden supra 275 AD2d 935 [4th dep't 2000] victim out for one week).

In McDowell, the court determined that the information's failure to allege (evidentiary and non-hearsay) facts to support either impairment of a physical condition or substantial pain rendered it jurisdictionally defective.

A similar result was reached in People v Perez 2013 NY Slip Op. 23173 (Crim Ct, Queens County 8/28/13), where the court found the allegation of "substantial pain" as the result of the defendant grabbing and punching the complainant in the back to be unsupported by any facts offered in support thereof. Citing, inter alia, Matter of Philip A. supra, the court noted that purely subjective complaints of pain must be supported by some OBJECTIVE EVIDENCE to meet the standard of PI.

In People v Chiddick supra, for example, the court found legally sufficient evidence of physical injury where the victim described the level of pain that she experienced (and ensuing tetanus shot), as a result of the defendant biting and breaking her fingernail during a violent altercation. (See also People v Giudice 83 NY2d 630 [1994]: Victim experienced substantial pain accompanied by discoloration, swelling and loss of sensation in arm after being hit by a bat; and People v Rojas 61 NY2d 726 [1984]: Victim experienced extended periods of pain from a small gunshot wound; People v Todd 59 NY2d 694 [1983]: Victim experienced pain for three to five weeks from laceration to head, multiple bruises and a sore foot that the victim could not put weight on).

In Perez, the court dismissed the information as insufficient because the reference to substantial pain was CONCLUSORY and lacking in any objective factual support. The court noted that the fundamental principles of justice and fairness require that an information factually describe the elements of the crime and the particular acts of the defendant constituting its commission. It must, therefore, allege facts of an evidentiary character which provide REASONABLE CAUSE to believe the defendant committed the crime charged, and non-hearsay allegations of fact supporting every element thereof. (citing, inter alia People v Suber 19 NY3d 247 [2012] and People v Keizer 100 NY3d 114 [2003]).

In Chiddick supra the court observed that "substantial pain cannot be defined precisely but...it is more than slight or trivial. (However), it need not be severe or intense..." (8 NY3d 445 [2007]). In determining whether pain is substantial, the court, as noted above should consider: 1.the injury itself (viewed objectively); 2. whether it required medical attention (whether or not it was sought); and 3. whether it was inflicted under circumstances evincing that causing such pain was the objective of the attack.

In short, there must be some objective support for the subjective complaint of pain lest assault be misconstrued as mere battery, unlawful touching or harassment that causes incidental pain or transitory discomfort.

SERIOUS PHYSICAL INJURY PL 10.00(10):

PL 10.00 (10) defines serious physical injury (SPI) as a physical injury which: CREATES A SUBSTANTIAL (ACTUAL NOT HYPOTHETICAL) RISK OF DEATH, OR WHICH CAUSES DEATH (e.g as with Murder, Manslaughter or Negligent Homicide); OR CAUSES SERIOUS AND PROTRACTED DISFIGUREMENT, PROTRACTED IMPAIRMENT OF HEALTH OR PROTRACTED LOSS OR IMPAIRMENT OF THE FUNCTION OF ANY BODILY ORGAN.

In People v Garbaud 2018 NY Slip Op. 07927 (11/20/18) the Court of Appeals took a somewhat generous view of the definition when it found that the evidence was legally sufficient to support the element of serious physical injury based, in part, on expert testimony from a doctor who had not personally examined the shooting victim or seen recent medical records pertaining to his injury (bullet fragments left in his thigh).

In that case, the 15-year-old victim was hit in the leg by a stray bullet fired by a gun wielded by the defendant who shot it into a crowd. The victim reported that the wound bled and caused him pain (10/10 an hour after the fact and 0/10 after medication), and x-rays revealed fragments in the soft tissue (near the femoral artery) which doctors elected not to remove due to the risk of excess bleeding or further injury. There was no fracture or neuro-vascular damage.

The victim was given a tetanus shot, a prescription for antibiotics and walked on crutches for two months. He described feeling pain “probably every other day,” and then slight pain four years later when running or playing basketball. He said he still had “little problems” including soreness at night and when it rained. The doctor said that the injury could have been fatal if the femoral artery had been struck (it hadn’t), and that there was a risk of kidney damage if the fragments protruded and leaked chemicals into the blood stream. (The likelihood of that happening was not stated).

The majority, citing, inter alia, People v Danielson 9 NY3d 324 (2004), found that there was a valid line of reasoning and permissible inferences from which a rational jury could conclude that the element of serious physical injury had been proven beyond a reasonable doubt.

The dissent felt that there was no risk, beyond speculation, of death, there was no serious and protracted disfigurement or protracted impairment of health or of the function of any bodily organ inasmuch as the victim basically went on with his life as usual, and his complaints of pain were mostly subjective (i.e. lacking in objective support), relatively slight and short-term in duration. (citing, inter alia, Toure v Avis Rent-A-Car Co. 98 NY2d 345 [2002]). Moreover, the majority, in the dissenter’s view, was wrong to put any stock in the speculative opinion of a non-examining doctor whose testimony would not be accepted as evidence of serious injury in a no-fault or malpractice case. (citing, inter alia, Scheer v Koubek 70 NY2d 678 [1987]).

The dissenter pointed to several cases where SPI had not been established including: People v Stewart 18 NY3d 831 (2011): complaints (from stabbing victim) of persistent discomfort unconnected to an ascertainable impairment of health (other than claims of “pain” from superficial scars), insufficient; People v Horton 9 AD3d 503 [3d dep’t 2004]: bullet fragments left in neck but no harm done to esophagus, trachea or major nerves or blood vessels; People v Matthews 59 Misc3d 1218(A) (Sup Ct NY County 2018): bullet wound caused temporary infection but did not create substantial risk of death inasmuch as no vital organs were injured;

People v Castillo 199 AD2d 276 (2d dep’t 1993): sutured stab wounds which victim said “hurt when the weather changes” 18 months later did not qualify as SPI; People v Daniels 93 AD3d 845 (3d dep’t 2012): no SPI where stabbing victim (who also sustained a concussion) was playing soccer after six months; People v Adames 52 AD3d 617 (2d dep’t 2008): stabbing victim’s claim that “scars still hurt” not enough.

In People v Stewart supra, the Court found that even though the assault was a serious attack with a sharp instrument, the victim’s injuries (including a 7cm sutured scar on the inner forearm) were superficial, only one day was spent in the hospital and the complaints of pain were not connected to any discernible, protracted impairment of health.

A similar conclusion was reached in People v Rosado 88 AD3d 454 (2011) where the victim’s broken nose was surgically repaired and his chipped teeth would probably require resurfacing every ten years. The court reasoned that neither the functioning of his nose or his general health were impaired by the fracture, and the possibility of future repair of the teeth years later did not impair their function or otherwise constitute a serious and protracted disfigurement.

The Court of Appeals defined the terms “disfigurement” and “serious disfigurement” in People v McKinnon 15 NY3d 311 (2001). In that case, a NYC health inspector sustained two bite wounds (one being 3.5cm x 3 cm and the other, 3cm x 3 cm), on her forearm during a altercation with a disturbed individual who attacked her with a knife at a storefront that was used as a summer gathering place for children. The defendant was convicted of Assault 1st degree,(PL 120.10[2]), Assault 2d degree (PL 120.05 (1]and [6]), Attempted Kidnapping and Criminal Possession of Stolen Property (victim’s cell phone).

The only issue on appeal was whether the evidence was sufficient to support the element of serious disfigurement. (The Court did not reach the issues of permanence or intent to cause SPI).

Noting that the statute does not define “serious disfigurement” (just as it does not define “protracted”), the court looked to the case of Fleming v Graham 10 NY3d 296 (2008) which considered the question of “serious facial disfigurement” under the Workers Compensation Law. The Fleming court defined disfigurement as “that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen or imperfect or deforms in some manner.” (citing Pilato v Nigel Enterprises 48 AD3d 1133 [4th dep’t 2008]).

The court in Fleming went on to define serious disfigurement as being a substantially greater degree of disfigurement that renders one’s appearance abhorrently distressing or highly objectionable to a reasonable person, thereby requiring an objective standard (even though deformity, like beauty, is arguably in the eye of the beholder).

The court in McKinnon adapted a somewhat less stringent definition, stating that a person is seriously disfigured when a reasonable observer would find the person’s altered appearance to be distressing or objectionable. By that definition, the majority held that the victim’s bite marks (which required no stitches, did not ooze and were not repaired by plastic surgery), did not qualify. The court noted that no recent photos were presented at trial and even though the victim displayed her arm no the jury, an insufficient record was created by the prosecutor to describe what the jury observed.

The court noted that considering the nature and location of the injuries vis-a-vis the victim’s overall appearance, the evidence was insufficient to support the conclusion that they were distressing or objectionable to a reasonable person.

The dissenter (Pigott J.), felt that the injuries were obviously sufficiently distressing to the jury (who observed them in open court), and it was the defendant’s burden on appeal, not the People’s, to establish the inadequacy of the trial record’s support of this element. In the dissenter’s view, the majority was making its own factual determination in the guise of assessing the legal sufficiency of the evidence presented.

In assessing whether an injury is seriously disfiguring, courts will, as noted above consider both its appearance (i.e. is it distressing to a reasonable person) and the location on the body. In People v Jimenez 155 AD3d 591 (1st dep’t 2017), the court found that the victim’s scar which ran from her forehead to her jaw (as the result of a box-cutter slashing), “viewed as a whole and considering (its) prominent location” on her face supported the conclusion that the injury was seriously disfiguring.

Similarly, in People v Sipp 2019 NY Slip Op. 06432 (8/29/19), the Court of Appeals held that the trial court correctly refused to deny the defendant’s request for a charge down from Assault 2d degree to Assault 3d degree where the evidence established that the victim suffered five displaced orbital fractures and scars around her eye, lip and neck as the result of her boyfriend slicing her face with a sharp instrument and kicking her while wearing boots. (In contrast, see People v Stewart 18 NY3d 183 [2011] supra where the victim’s lacerations (caused by several blows from a sharp instrument), were described as superficial.

In People v Manigault 2016 NY Slip Op. 08617 (4th dep’t 12/23/16), the Fourth Department found that the evidence in support of the Assault 1st degree charge was legally sufficient (and the verdict not against the weight of the evidence) where the defendant, during a fist-fight with the unarmed complainant, slashed him with a box cutter, leaving a 12 cm. laceration across his chest (which required numerous internal and external sutures to close), and a three-inch scar on his face which received five stitches.

On a side note, the court found (citing People v Morgan 111 AD2d 1254 [4th dep’t 2013]), that it was improper for the prosecutor, in summation, to describe the defendant’s version of events a “manufactured story,” but any error attendant thereto in this case was considered to be harmless.

In addition to being on the look-out for prosecutorial overstepping in summation (where, sometimes, the failure to object can result in a finding of ineffective assistance or counsel), counsel should not be too quick to concede critical elements of the People’s proof. In People v Nesbitt 2013 NY Slip Op. 01980 (3/26/13) for example, the Court of Appeals found that counsel was ineffective for throwing in the towel by claiming there was no good-faith basis to challenge the evidence on serious and protracted disfigurement (which the Court felt there was on this record), and not requesting a charge down from Assault 1st degree to second degree. (citing People v Benevento 91 NY2d 708 [1998]).

When defending assault cases (or any charges containing physical or serious physical injury as an element), counsel must be sure to understand the People's theory of injury and listen carefully to the nature and quality of proof offered in support thereof. If a prosecutor skims over the details or otherwise fails to develop the injury sufficiently to meet the statutory/case law standards, (whether through victim/witness testimony, documentary/photographic evidence and/or medical testimony), counsel may be well advised to refrain from "filling in the blanks" with a cross examination that either elicits harmful facts (or puts the prosecutor on alert for redirect examination).

Otherwise, counsel should consider focusing on those factors that can "make or break" an injury (or a serious one), by focusing on things like: the nature and location of the injury (e.g. is it deep or superficial), the degree of pain that it caused (acute or dull, short-term or long-lasting), whether any medical attention was given (e.g. by EMT'S or family/friend), whether the complainant sought/received hospital or doctor's care (e.g. ER visit), and the length of stay or number of appearances, if any scars, what is the size, location on the body and how does it appear now (as opposed to shortly after the incident when injuries usually look their worst), and whether (and to what extent) the complainant's daily activities (e.g. ability to work, do things at home), were limited.

Counsel should also be careful to not allow the fact finder to conflate the heinous nature of an attack with the seriousness of the resulting injury or to confuse "coulda-beens" with actual harm done: (e.g "the bullet wound was very close to the femoral artery" which could well have bled out if it had been struck, or, "chemicals from the bullet fragments could infiltrate the bloodstream and damage kidney function," as was posited in People v Garbaud supra). (See, for example, People v Snipes 112 AD2d 810 [1st dep't 198]: Assault 2d degree reduced to Assault 3d degree where, despite vicious attack on his head and back by several youths, the victim only sustained multiple contusions but no broken bones or internal injuries. Pain lasted two days and no medical follow-up was required).

In contrast, see People v Rumaner 45 AD2d 290 [3d dep't 1974) where the victim suffered a fractured orbit (requiring corrective surgery and which caused double vision), as a result of being kicked in the face by the defendant's boot.

In People v Armstrong 2015 NY Slip Op. 01335 (4th dep't 2/13/15), the Fourth Department, acting in the interest of justice (because the issue was not preserved), reduced the charge of Gang Assault 1st degree (PL 120.07) stemming from the defendant (along with three others) repeatedly kicking the victim), to Attempted Gang Assault because his ACTUAL INJURIES (2-3 inch laceration to the back of the head which was sutured and treated with antibiotics), did not create a substantial risk of death (the doctor only said, "it could have been life threatening"), nor did the scar qualify as a serious and permanent disfigurement. Citing, inter alia, People v McKinnon supra, the court said that it could not infer that what the jury must've seen necessarily supported the verdict.

An objection that evidence of possible consequences of an injury is irrelevant and speculative (absent some indication that such consequence is likely to occur), and unduly prejudicial (by inflaming the jury with the prospect of hypothetical complications), might well be appropriate. Inasmuch there appears to be significant divergence in the case law as to when the threshold for physical/serious physical injury has been satisfied, it is in counsel's (and the client's) best interests to be familiar with the criteria and nuances that may tip the scale one way or the other.