***Criminal Law Guidebook* Second Edition – Chapter 4: Public Order Offences**

The following is a suggested solution to the problem on pages 95–96. It represents an answer of an above average standard.
The ILAC approach to problem-solving as set out in the 'How to Answer Questions' section of the preliminary pages of the *Criminal Law Guidebook* Second Edition has been used in devising this solution.

The first incident at the door of Clowney's house when Brunhilda told Crude Law to "get out of here before I call the police' and then he responded by shouting loudly, "You miserable old bitch! You motherfucking slag! You dog-arse cunt! The only reason he spent all his fucking time at the fucking pub was to stay out of your fucking way" raises the issue as to whether a likely charge against Law would be 'offensive language'.[1] It is unlikely that Law would be charged with any other offences, such as 'trespass',[2] in relation to this incident as he entered Clowney's inclosed lands to attend the funeral or wake of his former drinking partner who had lived there and he ran off the lands soon after being requested to leave by Brunhilda.

Law is on Clowney's lands when he shouts these words but is also near or within hearing of a public place, namely the street that is open to the public[3] and a school,[4] which adjoins the Clowney property. It is a strict liability offence[5] so that the only other element to be proved is that the language Law used was 'offensive'. In seeking to prove that language is 'offensive', the word carries its ordinary meaning, and in a general sense, means 'of giving, or of a nature to give offence; displeasing, annoying, insulting'.[6] It is language which arouses 'anger, resentment, disgust or outrage (in) … the reasonable man (who is) … reasonably tolerant and understanding and reasonably contemporary in his reactions'.[7] The entire context in which the language is used is important in determining whether the quality of the words used is 'offensive'.[8] It has been observed that words such as "fuck" or "cunt" are in common usage and have 'lost much of (their) punch',[9] however, such words can be offensive where they are 'so deeply or seriously insulting' to be 'contrary to contemporary standards of public good order, as to warrant the interference of the criminal law'.[10] Law's language, which was shouted loudly in a residential neighbourhood close to a church and school would likely be regarded as offensive in going beyond the expletive 'fuck' to 'motherfucking slag' and 'dog-arse cunt', such that a reasonably tolerant person who was reasonable contemporary in their reactions would regard the language as so deeply or seriously insulting and contrary to standards of public good order

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[1] *Summary Offences Act 1988* (NSW) s 4A; *Summary Offences Act 1966* (Vic) s 17(1)(c) ('profane, indecent or obscene language); *Summary Offences Act 1953* (SA) s 7(1)(c).
[2] *Inclosed Lands Protection Act 1901* (NSW) s 4; *Summary Offences Act 1966* (Vic) s 9(1)(e) and (f); *Summary Offences Act 1953* (SA) s 17A.
[3] *Summary Offences Act 1988* (NSW) s 3; *Summary Offences Act 1966* (Vic) s 3; *Summary Offences Act 1953* (SA) s 4(1).
[4] *Summary Offences Act 1988* (NSW) s 3 meaning of 'school'.
[5] *Police v Pfeifer* (1997) 68 SASR 285; *Police v Rosser* [2008] SASC 151.
[6] *R v Smith* [1974] 2 NSWLR 586.
[7] *Ball v McIntyre* (1966) 9 FLR 237, 245. See also *Stone v Ford* (1992) 65 A Crim R 459.
[8] *Saunders v Herold* (1991) 105 FLR 1.
[9] *Police v Butler* [2003] NSWLC 2.
[10] *Ferguson v Walkley* (2008) 17 VR 647, 657. See also *Coleman v Power* (2004) 220 CLR 1.

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that a criminal charge was justified.[11] It is unlikely that Law could raise the defence of reasonable excuse[12] based on the provocative manner in which Brunhilda addressed him because, even though he reacted immediately,[13] it involved multiple offensive words that were shouted in a tirade of abuse rather than spoken in the form of a reasonably excusable reflex action.[14] Law is likely to be charged with using "offensive language" in respect of this incident.

The second incident when Law purchased a can of red spray paint and spray painted 'FUCKING BITCH FACED SLUT LIVES HERE' on the Clowney garden brick fence, raises the issue of whether Law can be charged with 'intentional damage to property'[15] or the lesser offence of 'marking premises or property with a graffiti implement'.[16] In relation to the former more serious charge, there must be damage, which does not have to be permanent,[17] and the act of damaging the property must be intentionally directed towards the property.[18] In the circumstances, it is strongly arguable that in reacting to the altercation with Brunhilda, including a short period of time deciding what to do next, and then purchasing the can of spray paint and using it along the Clowney garden brick fence that Law acted deliberately and purposefully in spraying offensive words on the fence similar to those he had previously shouted at Brunhilda. Although the paint can probably be removed, it may be difficult and time consuming to do so. The spray painting, albeit temporary, amounts to damage, and there is a strong argument that it was intentional so it is likely that Law will be charged with this offence. As to the lesser alternative charge based on the same facts, Law must have intentionally marked the premises or property of another person with a graffiti implement,[19] which has 'spray paint' as one of its meanings.[20] This is a likely alternative charge and may be used by the Legal Aid solicitor in negotiations about the appropriate charges and pleas by Law.

The third incident is after his drinking session when Law urinates against the front wall of the pub, which raises the issue of whether he can be charged with 'offensive conduct' or 'behaving in an offensive manner' as a result of this action.[21] This charge has similarities to the strict liability[22] 'offensive language'

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[11] *Ferguson v Walkley* (2008) 17 VR 647, 657. See also *Jolly* [2009] NSWDC 212.
[12] *Summary Offences Act 1988* (NSW) s 4A(2).
[13] *Connors v Craigie* (1994) 76 A Crim R 502, 507.
[14] *Karpik v Zisis* (1979) 5 PSR 2055, 2056.
[15] *Crimes Act 1900* (NSW) s 195(1)(a); *Crimes Act 1958* (Vic) s 197(1); *Criminal Law Consolidation Act 1935* (SA) s 85(3).
[16] *Graffiti Control Act 2008* (NSW) s 4; *Graffiti Prevention Act 2007* (Vic) ss 5 and 6; *Graffiti Control Act 2001* (SA) s 9.
[17] *Morphitis v Salmon* [1990] Crim LR 48.
[18] *R v Phillips* [1973] 1 NSWLR 275, 289; *Kippist v Parnell* (1988) 8 PSR 3669. There is an alternative mental state of 'recklessness' available in New South Wales and South Australia – see *CB v Director of Public Prosecutions (NSW)* (2014) 240 A Crim R 451.
[19] Under *Graffiti Control Act 2008* (NSW) s 4(2) & (3), the marking of premises or property is committed in 'circumstances of aggravation' if a graffiti implement is used.
[20] *Graffiti Control Act 2008* (NSW) s 3.
[21] *Summary Offences Act 1988* (NSW) s 4; *Summary Offences Act 1966* (Vic) s 17(1)(d); *Summary Offences Act 1953* (SA) s 7(1)(a). Also, in South Australia, Law could be charged with the specific offence of 'urinating in a public place' under *Summary Offences Act 1953* (SA) s 24.

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charge considered above but extends to conduct or behaviour in a public place, which is offensive. There is no question that Law is in a public place on the street outside the hotel and urinating there in open view of the public would likely be offensive to the reasonably tolerant person who is reasonably contemporary in their reactions. In New South Wales, the main issue is whether Law had a reasonable excuse because of the urgent necessity to urinate.[23] Arguably, he could have gone back inside to the hotel toilets, but he had decided not to bother doing that and anyway he had been told to leave by the publican. In these circumstances although it is likely that Law will be charged with 'offensive conduct' he may have a reasonable excuse for his behaviour due to the urgency of the situation and his inability to access a toilet in time, although he could have been more discreet in seeking out a more private place to urinate.[24]

As to the incidents at the wedding outside the local church, the issues raised are whether Law be charged as a result of his comment to the bridegroom at the church and/or with exposing his genitals in the direction of the bride and groom and shouting, 'Have a good fuckin' night'. The comment shouted at the top of his voice, 'Christ mate. You don't have to get chained down to make sure you get it', raises the potential for another charge of 'offensive language'. Arguably, although these words used by Law are not well chosen, they are unlikely to be regarded as offensive by the reasonably tolerant person who is reasonably contemporary in their reactions.[25]

As to the exposure of his genitals in the direction of the bride and groom for his own amusement, Law is likely to be charged with either 'wilful and obscene exposure' of his person or genitals[26] or another count of 'offensive conduct'[27] or 'behaving in an offensive or indecent manner'.[28] Outside the church is a public place and it can reasonably be inferred that Law's action in jostling against the wedding guests, removing his pants and deliberately exposing his genitals to the bride and groom while shouting' 'Have a good fuckin' night' was wilful and obscene or indecent. In South Australia these circumstances would also raise consideration of a charge of 'intentionally disturbing a wedding (or) … persons proceeding from a wedding in a way that is calculated to be offensive'.[29] Law would likely be charged in respect of this

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[22] See above n 5.
[23] *Summary Offences Act 1988* (NSW) s 4(3). See *State of NSW v Beck* [2013] NSWCA 437 where Beck urinated in a gutter next to a parked car, which obscured his body from the waist down and this was held not to be 'offensive' and he also had a reasonable excuse as he was 'busting', no toilet was available and he was unable to prevent himself from urinating.
[24] The subsequent vomiting by Law in the gutter would probably not be the subject of a further 'offensive conduct' or 'behaving in an offensive manner' charge as the reasonably tolerant person might find that conduct unpleasant but not offensive.
[25] See above n 7.
[26] *Summary Offences Act 1988* (NSW) s 5; *Summary Offences Act 1966* (Vic) s 19; *Summary Offences Act 1953* (SA) s 23(2) – 'wilfuly does a grossly indecent act'.
[27] *Summary Offences Act 1988* (NSW) s 4.
[28] *Summary Offences Act 1966* (Vic) s 17(1)(d); *Summary Offences Act 1953* (SA) ss 7(1)(a) and 23(1)(a).
[29] *Summary Offences Act 1953* (SA) s 7A(1)(a) or (b).

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incident and does not appear to have a reasonable excuse as he clearly intended that the obscene conduct occur in that public place.

The next incident is where Law slowly walks along the street in an area of the town where he could pick up a prostitute and is smiling encouragement to anyone who looked game. This raises consideration of a charge of 'soliciting' for prostitution.[30] As Law made a deliberate decision to go to this area of town where he could pick up a prostitute, it is certainly arguable that his smiles of encouragement could be characterised as soliciting.[31] Gesturing is sufficient in such circumstances and the true intent of the conduct need not reach the mind of the person intended to be solicited.[32] A proper construction of the 'soliciting' provision is that one does not have to succeed in getting a customer but rather by actions or words engage in conduct amounting to soliciting. Law's conduct may be equivocal but because it occurred in an area of town where he could pick up a prostitute it can more confidently be argued to be unequivocally soliciting for the purposes of prostitution. A charge of this nature is likely in the circumstances although it is probably a minor consideration given what occurred after Law was then picked up by the driver of a car when he was leaning against a lamp-post outside a notorious 'pick-up' joint after having an alcoholic top-up.

The driver of the car and Law engaging in an act of mutual masturbation outside the church raises the issue of whether Law can be charged with a public act of prostitution in New South Wales.[33] An 'act of prostitution' for the purposes of this offence includes 'sexual activity between persons of different sexes or of the same sex, comprising … masturbation committed by one person on another, for payment'. The act can take place in a vehicle that is within view of a public place, school, church or dwelling. In these circumstances it is apparent that the actions of Law and the driver of the car outside the church would satisfy all the elements of an offence under s 20(2) *Summary Offences Act 1988* (NSW) apart from being 'for payment'. The acts of masturbation are described as mutual so it can be inferred they were committed by one on the other rather than self manipulation. The act ended by each paying the other $50.00 as a "compromise" so technically each has paid the other and therefore there is "payment". As neither really got a financial advantage, however, it is not clear whether there was a payment as required to amount to an act of prosecution. It may be contended that there is no payment because each exchange of $50.00 cancels out the other and therefore the act was performed by consenting adults without payment and is thus not an act of prostitution. There are some clear doubts about this offence and it seems to be a possible but unlikely charge.

The last incident before Law's arrest is when he decided to cool off in the fountain without his clothes and then proceeded to stand naked in front of the ladies choir leaving the church. This incident raises the potential for charges

[30] *Summary Offences Act 1988* (NSW) ss 19 or 19A; *Sex Work Act 1994* (Vic) ss 12 or 13; *Summary Offences Act 1953* (SA) s 25.
[31] *Coleman v DPP* (2000) 49 NSWLR 371, 379.
[32] *Weisz v Monahan* [1962] 1 All ER 664.
[33] *Summary Offences Act 1988* (NSW) s 20.

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of 'entering a fountain in a public place'[34] and 'wilful and obscene exposure'.[35] Law is strictly liable for the first offence in New South Wales simply by entering upon the fountain in a public place. In Victoria, it must be established that Law polluted or obstructed the fountain, proof of which is not as straightforward on known facts. Law's emerging naked from the fountain just as the ladies were leaving the church and then covering himself and running off when he heard screams raises the question of whether his action was wilful or simply accidental considering his alcohol consumption and his intention was to "cool off". He may have stood in front of them for only a short time out of surprise rather than wilfully intending to expose his genitals to them. On known facts it seems strongly arguable that Law's exposure of his genitals in these circumstances was accidental, which unintentionally coincided with the ladies choir leaving the church. Overall, a charge of entering the fountain is likely in New South Wales but other charges arising from this incident are unlikely.

[34] *Summary Offences Act 1988* (NSW) s 7(b); *Summary Offences Act 1966* (Vic) s 9(1)(a) – 'pollutes or obstructs a fountain'.
[35] *Summary Offences Act 1988* (NSW) s 5; *Summary Offences Act 1966* (Vic) s 19; *Summary Offences Act 1953* (SA) s 23(2) – 'wilfuly does a grossly indecent act'.

Prepared by John Anderson to accompany the *Criminal Law Guidebook* Second Edition.
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