



CHIEF PSYCHIATRIST
of Western Australia

OFFICE of the CHIEF PSYCHIATRIST

**Working with Imminent Risk in a Non-
Authorised Setting - The Legal Context**

Office of the Chief Psychiatrist

Issue

Whether there are circumstances in which clinicians can legally restrain a person in a non-authorised setting - for example, in an emergency department or in the hospital grounds.



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The legal context

Summary

- Restraint under the *Mental Health Act 2014* (MH Act) only applies within an authorised hospital, and the use of force, without legal authority or excuse under the MH Act or another law, will expose the hospital and the staff to potential civil liability for torts such as trespass and false imprisonment, or criminal liability, such as for assault or deprivation of liberty.
- At law, there are very limited circumstances in which clinicians may restrain a person in a non-authorised setting but, please note, **duty of care does not provide the power to restrain a person outside an authorised setting.**
- Duty of care is a legal obligation to take reasonable steps to not cause foreseeable harm to another person or their property. Duty of care is not a power to restrain a person or to treat a person who does not consent to the restraint or treatment.



Summary (continued)

- The circumstances in which clinicians may be able to restrain a person in a non-authorised setting emanate from the WA *Criminal Code* and the common law doctrine of necessity.
- In WA, section 25 of *The Criminal Code* (WA) (Criminal Code) provides that a person is not criminally responsible for an act done, or an omission made, including an assault or depriving a person of their liberty, if the person believes “circumstances of **sudden and extraordinary emergency** exist”.
- Also, in Australia the courts have found that short periods of restraint or detention applied to an individual, who is a danger to himself or herself or others, are lawful based on the doctrine of necessity. However, this power appears to be limited to situations of **imminent peril and an ‘overriding necessity’ for the protection of the person and others.**



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Summary (continued)

- Whether the circumstances of a case will satisfy the elements of the **doctrine of necessity** or fall within the provisions of section 25 of the Criminal Code **will depend upon the specific circumstances** of the case.
- By way of example, it is possible that restraining a patient to prevent him or her jumping into a road in front of approaching traffic may satisfy the requirements of both the Criminal Code and necessity – a determination would need to include consideration of the level of the threat; knowledge by the clinicians of the mental state and behaviour of the patient at the relevant time; and the level and speed of the traffic.
- It is unlikely, however, that restraining the patient in a wheelchair to transport the patient against his or her wishes to another area, for example back to an authorised area, could be defended on the basis of emergency or necessity.



Duty of Care

- At law, duty of care is a legal obligation to take reasonable steps to not cause foreseeable harm to another person or their property.
- It is breached if someone is injured because of the action of another person when it was reasonably foreseeable that the action could cause injury, and a reasonable person in the same position would not have acted that way.
- **Duty of care is an obligation not a power.**
- In the healthcare context, duty of care imposes an obligation on clinicians to carry out two fundamental roles – to provide patients with information on the risks of treatment; and to treat patients according to standards supported by their profession – that is, to provide treatment that is reasonable in the circumstances.
- **Duty of care does not provide clinicians with the power to, for example, prevent a person from leaving a ward of a hospital if the person indicates a desire to do so, or to treat a person who does not consent to or who refuses treatment.**
- Rather, it is the Criminal Code and the doctrine of necessity that provide clinicians with this power.



Common Law Defence of Necessity

- The **doctrine of necessity** is a common law doctrine, which means it has been developed by the courts on a case by case basis.
- Necessity, as it has generally been applied, may provide protection from criminal and/or civil liability for the **very short-term use of restraint (and detention) in situations akin to an emergency.**
- It does not appear, however, to have been applied to provide protection for longer-term restraint and detention of people, even in hospitals and other healthcare facilities.



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Elements of Defence of Necessity

The **doctrine of necessity** has generally been applied where the following three elements can be established:

1. The restraint was done to **avoid an irreparable evil** (such as imminent peril to life or serious injury) to the person or others.
2. The persons carrying out the restraint are acting from an honest and reasonable belief that **the individual was placing him or herself or others in a situation of imminent peril**. If there is an interval of time between the threat and the restraint, it is unlikely that a defence of necessity could apply.
3. The restraint was **proportionate** to the 'evil' or harm about to occur. That is, the persons carrying out the restraint responded in a manner consistent with how a reasonable person would have responded in the circumstances.



Detention of persons with a mental illness

- There is common law authority in Australia for the temporary restraint or detention of people with a mental disorder in order to safeguard them and others from immediate harm. The courts have found that short periods of restraint or detention applied to an individual, who is a danger to him or herself or others, are lawful based on necessity.
- The NSW Supreme Court has referred to the defence in the following terms:

“In general terms, the common law does not confer upon a private individual or an institution the power lawfully to detain, in a situation of necessity, a person of unsound mind who is a danger to himself or others. However, there is a power to impose a temporary restraint on a person ‘who has run amok and is a manifest danger either to himself or to others.’”

- Therefore, it seems that, while temporary restraint and detention may be justified under the common law defence of necessity in situations of imminent danger to the person or others, extended periods of restraint or detention would not be permitted.



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Criminal Code Defence of Emergency

- In WA, if a person restrains another without legal authority to do so, it may be found to be an assault or deprivation of liberty.
- Section 25 of the Criminal Code provides, however, that a person is not criminally responsible for an act done, or an omission made, including an assault or depriving a person of their liberty, if the person believes **“circumstances of sudden or extraordinary emergency exist”**.
- Whether the circumstances of a case will be found to be a “sudden or extraordinary emergency”, will depend upon the specific circumstances of the case.
- In the Supreme Court of Appeal case of *Floyd v The State of Western Australia*, Justice McLure stated that the defence of emergency:

“exists to meet cases where the circumstances overwhelmingly impel disobedience to the law.”

- Example of an ‘emergency case’ – WA Supreme Court case *Dunjey v Cross*.



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Contact

If you wish to discuss queries or share common scenarios, contact us via email. De-identified queries may be featured in a later video and/or information circulated to the Community of Practice network:

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Note: *The information in this presentation cannot be considered as legal advice but rather, outlines the broader legal context and parameters. If legal advice is required, processes may be sought via health services.*



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