SVENSON BARRISTERS

Bail Applications – Tips and Tricks to be Prepared

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What we will cover

1. What test applies, what the tests are, including surrounding circumstances
2. What is exceptional circumstances?
3. What is compelling reasons?
4. Crafting your case
5. Conflicts in material
6. Cross-examination
7. Submissions
8. Risk
9. Conditions
10. Key Recent Cases

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What Test Applies?

The first question you should ask yourself is; what test applies for bail?

- The Act provides that there are three categories:
  - Exceptional circumstances and unacceptable risk
  - Compelling circumstances and unacceptable risk
  - Unacceptable risk (alone) – IE prima facie entitlement to bail subject to risk

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How to Determine What Test Applies

- Flow Chart (per previous slide) s 3D
- s 4AA(1) and (2)
  Exceptional circumstances test applies:
  - Accused of a schedule 1 offence
  - Accused of a schedule 2 offence and terrorism record, risk of committing terrorism offence or offence is alleged to have been committed while on bail/summons/awaiting trial/on CCO/serving sentence/parole for schedule 1 or 2 offence
- s 4AA(3)

Compelling reason test applies:

- For a person accused of a schedule 2 offence if none of the above applies
- Some aspects of the schedules can require a Court to be satisfied of something which prosecutions may not have adequately disclosed – look carefully, do not simply trust what the informant or prosecutions have put (Example on next slide)

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Example

Eg. My client was charged with a breach under s 100 of PSIO Act, had some FVIVO breaches in the previous 10 years on his priors (police had no information on this), and also it was alleged in the police IVO application there had been previous violence.

Schedule 2:

20. An offence against section 100 of the Personal Safety Intervention Orders Act 2010 of contravening an order in the course of committing which the accused is alleged to have used or threatened to use violence and—

(a) the accused has within the preceding 10 years been convicted or found guilty of an offence in the course of committing which the accused used or threatened to use violence against any person; or

(b) the bail decision maker is satisfied that the accused on a separate occasion used or threatened to use violence against the person who is the subject of the order, whether or not the accused has been convicted or found guilty of, or charged with, an offence in connection with that use or threatened use of violence.

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Unacceptable Risk Test

- S 4D Unacceptable risk test applies if:
  - For 2 step tests (IE where there is an initial test for exceptional circumstances or compelling reasons), where they are satisfied there is either exceptional circumstances or compelling reasons justifying bail
- S 4E – for any offence, bail must be refused if bail decision maker is satisfied that:
  - (a) there is a risk that the accused would, if released on bail—
  - (i) endanger the safety or welfare of any person; or
  - (ii) commit an offence while on bail; or
  - (iii) interfere with a witness or otherwise obstruct the course of justice in any matter; or
  - (iv) fail to surrender into custody in accordance with the conditions of bail; and
  - (b) the risk is an unacceptable risk.

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Unacceptable Risk Test Continued

Note: The prosecutor bears the burden of satisfying the Court as to the existence of a risk referred to in s 4E(a) and that the risk is an unacceptable risk.

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What is the Court required to consider?

- In considering whether exceptional circumstances or compelling reasons exist, and whether risk is unacceptable, the Court must take into account the surrounding circumstances (and additional matters if the applicant is Aboriginal and/or a child)
- The Court must also consider, in relation to unacceptable risk, whether there are any conditions of bail that might alleviate risk so that it is not an unacceptable risk

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Surrounding Circumstances

S 3 AAA – must take into account all circumstances that are relevant, including but not limited to:

(a) the nature and seriousness of the alleged offending, including whether it is a serious example of the offence;

(b) the strength of the prosecution case;

(c) the accused's criminal history;

(d) the extent to which the accused has complied with the conditions of any earlier grant of bail;

(e) whether, at the time of the alleged offending, the accused—

(i) was on bail for another offence; or

(ii) was subject to a summons to answer to a charge for another offence; or

(iii) was at large awaiting trial for another offence; or

(iv) was released under a parole order; or

(v) was subject to a community correction order made in respect of, or was otherwise serving a sentence for, another offence;

(f) whether there is in force – FVIVO

(g) the accused's personal circumstances, associations, home environment and background;

(h) any special vulnerability of the accused, including being a child or an Aboriginal person, being in ill health or having a cognitive impairment, an intellectual disability or a mental illness

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Exceptional Circumstances

- Accepted that this is the higher of the two tests
- Not defined in the legislation
  - Beach J stated in Tang (1995) A Crim R 593 that when considering the definition, we should look to the dictionary. "Exceptional" is a word commonly used in legislation. One definition is in The New Shorter Oxford Dictionary is: "Of the nature of or forming an exception, unusual, out of the ordinary, special.... It was the clear intention of the legislature that any person charged with an offence falling within the [exceptional circumstances] provision ...bears an onus of establishing that there is some unusual or uncommon circumstance surrounding his case before a court is justified in releasing him on bail.
- It is a high hurdle, though not impossible (Re CT [2018] VSC 559)
- Exceptional circumstances' may exist because of a single exceptional circumstance or by a combination of circumstances, none of which might individually be considered exceptional - Re Logan [2019] VSC 134
  - Case law has made it quite clear that it is a case by case assessment, can be one ore a number of factors

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What has been exceptional? (What the case law has accepted, either in isolation or in combination)

-Age -Cognitive impairment/functioning –Health (both physical and psychological)
-Availability of treatment (both in and out of custody)
-Nature of case, strength of case, delay, unusual features of alleged offending
-Exposure to repeated violence on remand
-Culture, heritage
-Family bonds
-Potential sentence being less than time on remand
-Lapse of time between alleged offending and laying of charges (seen particularly in circumstances of historical sexual offending – relevant to risk too IE rehabilitation etc)
-Implications of covid-19 (though needs to be relevant, Courts seem to be more tired of this argument – though still very relevant)

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Compelling Reasons

Re Ceylan [2018] VSC 361, Beach J queried the meaning. His Honour concluded that compelling reason was one that is forceful and convincing, that a consideration of all relevant circumstances was required

Further, at paragraph 47 stated: While one must be careful not to substitute other expressions for the language used in the Act, compelling reason would likely be shown if there existed forceful, and therefore convincing, reason showing that, in all the circumstances, the continued detention of the applicant in custody was not justified. It is not, however, necessary for an applicant required to show compelling reason, to show a reason which is irresistible or exceptional. Such a requirement would place the bar at too high a level in a scheme where the exceptional circumstances test exists as the most onerous test under the Act.

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What has been compelling?

-Very similar to exceptional circumstances, given this is a lower threshold

-In the case law, there was nothing (I could find) that was really unique to one test and not the other

-The reality is this is a lower threshold test, and thus can be concluded this test can be satisfied with less convincing circumstances then exceptional circumstances, though clearly those circumstances still need to be forceful and inviting to the Court

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Crafting your case

- Once we are aware of the test, make sure to read the police brief carefully, keeping in mind the tests and surrounding circumstances.
- Personally, at this point I am starting to make notes on the police material – Is the case strong? What is the evidence? Independent witnesses? Are there statements? Word on word dispute? Will there be an evidential delay such as forensics or DNA?
- How serious is the offending – has the client been overcharged?
  - (Eg. Aggravated home invasion includes an accused entering as a trespasser in company of 2 or more – I had a client where witness thought they saw 3 people, CCTV suggested only 2)
  - This was relevant to delay, and issue of time on remand exceeding potential sentence given client may not be subject to mandatory NPP of 3 years on aggravated home invasin

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Crafting continued…

- Have your client conference, but be smart about it (Eg. Don't play 20 questions about the offending if it will give you instructions that are not of assistance)
- Take down there personal details, discuss the case (appropriately as noted above), discuss their criminal history, bail history, family, health, implications of custody, anything that might be relevant and can be used by you
- Keep poking and asking questions (as appropriate)
- Discuss remand, additional issues due to Covid-19
  - We will come to this later, but you need the above to tailor instructions to your client's own circumstances, don't fall into the trap of making generic submissions (Court's hate this), make it personal, relate everything back to your client's case

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Crafting continued

- As you have this conference with your client, and review the material, you should start to see some of the submissions writing themselves
- Start to form the view on how you will attack the test, and what are your absolute strongest points
- Is there material to hand (or material you can get) to support your case
  - IE previous reports, letter from family/employer etc, medical material
  - CISP or other programs, such as rehab, MHCP etc.

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Map out the case

- I like to then dot point my 1-3ish really strong points
  - Note: particularly from the higher Court decisions, they tend to rely upon less but more critical circumstances when determining the tests, as opposed to several less critical circumstances
  - Consider your audience, consider your case – can you go really hard on 1-3 key points that make your matter unique and justify bail, or do you need to make lots of lesser submissions
- Dot point my remaining points, that might be relevant to exceptional circumstances/compelling reasons as well as unacceptable risk
- Then consider what potential bail conditions might be appropriate (we will come to this later)
- And also consider any conflicts (next slide)

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Conflicts in material

- Crucial thing to consider is whether you have material or a submission to make to go towards exceptional circumstances/compelling reason, that may conflict with your argument that risk is acceptable (double edged sword)
  - See this happen constantly and practitioners not being prepared for this
  - Something you should be aware of

Consider:

- you have a psychological report for a client, that is still relevant to present diagnosis, but also talks about violent allegations that aren't priors or goes into detail about client's ability to regulate emotions and high risk of recidivism
- Or you have a child who has been found doli incapax for previous alleged offending

Both documents are likely to be incredibly relevant to the first test, but are clearly going to hurt you when you argue risk

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Conflicts continued…

What should you do?

- Make a forensic judgment, you would rather get to the issue of risk and be refused, then not use a document and fail the first test (IE. Can I overcome the first test without this document? If the answer is no, then you are generally best to use it)
- Can you get around this?
  - If in person, can be easier to hang on to this material (having copies for Magistrate and prosecutions).
  - Often, we are restrained by time, does the Court have time to review a lengthy report – can you make submissions from the table and let the Court know you have the report available should they want to read it
  - If they do, take them to the points that help you, not hinder (but be prepared to answer questions on the points that hinder you)
  - Can the Court give you an indication that they are satisfied of the first test, just address risk (not uncommon for the Court to tell you "compelling reasons isn't your issue, given our time restraints on the link, can you address me on risk"

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XXN of Informant

We are aware of the tests, have conferenced with the client, considered our strongest and weakest submissions, considered our material, we can now consider XXN the informant

- We generally have a really good idea on what the informant is going to say, they are (generally) predictable
  - They read out summaries, then will outline why they say the accused is an unacceptable risk (they rarely go off script!)
  - Like any witness, listen carefully to their evidence, particularly when they do go off script
- But use this predictability to our advantage
- It can also be very useful to have a chat to the informant prior to the matter

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XXN Continued…

- Consider methodically what questions, if any, you are going to ask the informant
- Don't go through the motions of asking questions for the sake of it
- Are you attacking the police case:
  - Ask specific questions about statements, exhibits, evidence, delay in providing material, to get concessions that will support your submission that the case is weak, or there will be considerable delay for a specific reason
- Are you challenging what evidence the informant has given on risk:
  - Eg. Informant says unacceptable risk of failing to answer bail, no priors for this, or historical priors, or no previous offences against the bail act
  - Take the informant to this, ask those specific questions, to set you up to make a good rebuttal/submission

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XXN Continued…

- Is it relevant to ask the informant about your client's circumstances
  - Eg. Family support, professional support etc
  - But consider, whether these circumstances were in place at the time of the alleged offending, and therefore whether you will get a favourable answer, or whether you will get an answer that won't help you
    (Eg. If someone was on a therapeutic CCO at time of offending, and you ask the informant whether they agree the CCO will be a deterrent and provide assistance in the community reducing risk of offending on bail, they are likely to laugh at you and say accused was on this in the past, did nothing… this can blow up in your face)
- Be only as long and as detailed as is necessary, some of the most powerful XXNs in bail applications might only last a couple of minutes, but forensically the practitioner gets major concessions they need to support submissions
- Listen carefully to each response, don't read a script, ask follow up questions as necessary
  - Don't simply bully the informant or ask questions that show errors or incompetence, unless they will actually help your client

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XXN of nominal informant

- This can be tricky, depending on how much they actually know
  - Worth having a conversation to see what knowledge of the matter they have
  - If you can take them to key points in the material to poke holes in the case, worth it even if they know nothing
  - But when it comes to asking questions about your client's circumstances, it might be worth asking a question, and if they can't answer it, tell the Court your remaining questions are wasted on a nominal and you will save the Court time and just incorporate these in submissions

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Submissions

- Be flexible and fluid with these. Whilst you have prepared, and you've got your roadmap on your stronger points down to your weaker points, this may have changed
- Throughout the preliminary discussion with the Court, and the evidence of the informant, circumstances might have changed
- Read the bench – have they asked any questions of the informant that give away their preliminary views
- Try and know your bench (good example is the current Magistrates in Bendigo) – if possible tailor your submissions to them

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Submissions continued…

- Front end your submissions, and start strong
  - The best opportunity to keep the Court onside with an application, is to have an effective XXN transition straight into strong submissions
- Make reference in submissions to the evidence before the Court
  - (Eg. YH heard evidence from the informant that a photo board was conducted and the witness did not identify the accused etc.
  - Make this relevant to your submission (Eg continued. Given the lack of identification evidence, the prosecution case is in dispute, real prospects for an acquittal…)
- Look at the bench, are they nodding, taking notes, shaking their head – get a feel for points that you should discuss in more detail, or perhaps submissions that the bench doesn't agree with and you should move on

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Submissions continued…

- Rebut the informant's concerns where possible, and pre-empt some of the prosecution submissions (though don't give information to the Court that is not required)
- Remember to make submissions relevant and specific to client
  - Eg. Covid-19 submissions, community supports, work etc.
  - Why is this relevant to the Court's consideration, why does it help reduce risk, why is it different to when the alleged offending occurred
- Try and get a gauge whether a summary of circumstances is relevant

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Risk

- Remember risk is considered in light of the surrounding circumstances, as well as when considering whether there are conditions that could be imposed to make risk acceptable
- Thus, a lot of the submissions you make around surrounding circumstances are relevant to risk
- Consider, should submissions on the first test and risk occur at the same time, or are they best separated
- Make it clear if something is both relevant to the first test and risk (IE accommodation, CISP, family support etc.)
- If you have had to use material that is a conflict between the first test and risk as referred to earlier, be prepared to rebut this

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Risk continued…

- Again, make calculated decisions on your risk submissions
- Be sure to consider prior history (how many times have prosecutions alleged CIWOB, fail to answer, interfere with a witness – with no real basis) – make submissions on the history if necessary
- You are trying to convince the Court as to why the risk is acceptable, why they should take the punt on your client, what protective or unique factors are so persuasive that make risk acceptable
- Doesn't need to be simply protective factors, the age of seriousness of the offence itself might itself be relevant when considering risk

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Conditions

- Generally, towards the end of submissions, when addressing risk, you will suggest to the Court that there are bail conditions that can be put in place that make risk acceptable
- Often worth discussing potential conditions with the client, and therefore being able to tell the Court the client is aware of these and has instructed they will comply
- Remember however, "must be no more onerous than is required to reduce the likelihood that the accused may do a thing mentioned in subsection (1)(a) to (d) [the risks prosecution allege)]"
- Often you might have conditions that you think are more onerous than necessary, but the Court might consider (Eg. Surety, geographical exclusion etc.). If you don't get the feeling the Court is buying into your current submissions, you can suggest the more stricter as a last resort

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Conditions continued…

- If bail is granted, the Court seem to as practice ask the prosecutor or informant what conditions are sought, and the Court can treat their requests as a 'low down misère'
- Don't be afraid to jump in and remind the Court that conditions must not be more onerous than required, must be reasonable having regard to the alleged offence and circumstance of the accused
  - Eg. Asking not to drive a motor vehicle when offence is not a motor vehicle offence, asking someone not to associate with co-accused who is a partner of 20 years and they live together and have children together, curfew when offence is alleged to have occurred during the day, or they work overnight etc.
- Tell the Court why a condition does not fit within those sections of the legislation

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Further Applicant/SC Inherent Jurisdiction

- If bail has been refused, a further bail application can be made however, applicant must establish that there are new facts and circumstances(sections 18 and 18AA(1)).
- Don't forget: Supreme Court has an inherent jurisdiction to hear bail case: 18AA(2): "Nothing in this section derogates from the right of a person in custody to apply to the Supreme Court for bail."

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Key Recent Cases

Re Broes [2020] VSC 128

Re Jiang [2021] VSC 148

Re Shea [2021] VSC 207 (Re Raffoul [2020] VSCA 848)

Re Ashton [2020] VSC 231

Re Lowe [2020] VSC 584

Thomas v Kitching [2020] VSC 206

Re Tong [2020] VSC 141

DPP (Cth) v Lee [2020] VSC 275

DPP (Vic) v Walker (a pseudonym) [2020] VCC 447

Re JK [2020] VSC 160

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