



NEW JERSEY LAW REVISION COMMISSION

Final Report Regarding the Intent Necessary for the Aggravated Assault Upon an Officer under N.J.S. 2C:12-13

July 30, 2020

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes in order to determine the law of the State.

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Executive Summary¹

In the case of *State v. Majewski*², the Appellate Division considered whether N.J.S. 2C:12-13, which prohibits the throwing of bodily fluids at law enforcement officers, required the State to prove that the defendant intended to hit the officer with bodily fluid, or if intent was irrelevant under the doctrine of transferred intent.³

The Court decided that both aspects of the statute, including throwing bodily fluids at law enforcement and causing (in some other way) contact of bodily fluid with an officer, call for purposeful conduct in order for a defendant to be considered guilty of aggravated assault.⁴ For this reason, the Court reversed the previous decision, vacated the defendant's conviction, and dismissed the indictment without prejudice.⁵

The Commission authorized this project to amend the statute so that it would clearly express this judicial interpretation, and the following pages also address current conditions.

Background

On June 14, 2015, during a “routine move” of an inmate at the county jail, where the defendant was also an inmate, the defendant allegedly spit in the face of one of the corrections officers, which another officer witnessed.⁶ The defendant and other inmate witnesses told the investigating sheriff's officer that the defendant's target was the inmate the officer was escorting, not the officer specifically. The defendant was accused of “throw[ing] bodily fluids at [the correction's officer] ... [while the] said officer...was acting in the performance of her duties while in uniform or exhibiting evidence of her authority,” contrary to N.J.S. 2C: 12-13.⁷

The defendant moved to dismiss the indictment, arguing that the statute required the State to prove that the defendant intended to hit the officer with bodily fluid. The defendant said that even if it was an offense, “spitting at someone” should not be elevated into aggravated assault simply because the fluid accidentally hit an officer.⁸ The defendant also contended that the Court should dismiss the indictment on the grounds that the State failed to present exculpatory evidence to the jury, which included the investigating sheriff's officer's administrative disciplinary charge and interviews. In this charge, the sheriff's officer concluded that the defendant did, in fact, spit at the other inmate and not the officer, as the other inmates insisted.⁹

The State acknowledged the statute's ambiguity regarding the requisite mental state, but argued that the statute explicitly incorporated the doctrine of transferred intent because it

¹ Preliminary work on this subject was performed by Eileen Funnell, a former law clerk to the New Jersey Law Revision Commission.

² *State v. Majewski*, 450 N.J. Super. 353 (App. Div. 2017).

³ *Id.* at 360.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 358.

⁷ *Id.* at 359.

⁸ *Id.*

⁹ *Id.*

criminalized not only the throwing of a bodily fluid at an officer, but also conduct that “otherwise purposely subjected [the officer] to contact with a bodily fluid.”¹⁰ The State also contended that the statements of the other inmates were not clearly exculpatory evidence that negated the defendant’s guilt, and therefore there was no obligation to charge the grand jury “regarding a potential defense.”¹¹

The Trial Court concluded that the investigative report and statements from the sheriff’s officer were not clearly exculpatory and therefore the prosecutor did not violate *State v. Hogan* by not producing them before the jury.¹² However, the Court specifically “left for another day” any decision regarding the culpable mental state required by statute, noting there was “some further analysis that need be considered... before the matter is listed for trial.”¹³ The Court denied the defendant’s motion. Three days later, the defendant entered her guilty plea and admitted under oath that she had gotten into an altercation with another inmate and spat at her. The defendant also admitted that her spit landed on the corrections officer, who was holding her intended target.¹⁴

Statute

N.J.S. 2C: 12-13

A person who throws a bodily fluid at a Department of Corrections employee, county correctional police officer, juvenile correctional police officer, State juvenile facility employee, juvenile detention staff member, probation officer, any sheriff, undersheriff or sheriff's officer or any municipal, county, or State law enforcement officer while in the performance of the person's duties or otherwise purposely subjects such employee to contact with a bodily fluid commits an aggravated assault. If the victim suffers bodily injury, this shall be a crime of the third degree. Otherwise, this shall be a crime of the fourth degree. A term of imprisonment imposed for this offense shall run consecutively to any term of imprisonment currently being served and to any other term imposed for another offense committed at the time of the assault. Nothing herein shall be deemed to preclude, if the evidence so warrants, an indictment and conviction for a violation or attempted violation of chapter 11 of Title 2C of the New Jersey Statutes or subsection b. of N.J.S.2C:12-1 or any other provision of the criminal laws.¹⁵

On appeal, the Appellate Division indicated that the main ambiguity in the statute was the lack of clarity regarding whether the Legislature intended the same culpable mental state—“purposely”—that expressly applies to “subject[ing] [an officer] to contact with a bodily fluid”

¹⁰ *Id.* at 360.

¹¹ *Id.*

¹² *State v. Hogan*, 144 N.J. 216, 237 (1996).

¹³ *State v. Majewski*, 450 N.J. Super. 353, 360 (App. Div. 2017).

¹⁴ *Id.*

¹⁵ N.J.S. 2C: 12-13.

also applies to “throw[ing] a bodily fluid at” such an officer.¹⁶ The Court noted that since its enactment in 1997, no published decision has construed this specific statute.¹⁷

The Appellate Division recognized that “the absence of an explicitly stated culpability requirement in the first portion of the statute could support an argument that knowledge applies under N.J.S. 2C:2-2(c)(3).”¹⁸ However, the Model Criminal Jury Charge Committee explains in a footnote that the subsequent statutory reference to “purpose” requires that “purpose” be applied to all material elements of offense under N.J.S. 2C: 2-C(1).¹⁹

The Appellate Division determined that in order for a defendant to be found guilty of aggravated assault under N.J.S. 2C: 12-13, the State must prove that: (1) the defendant acted purposely in throwing bodily fluid or otherwise purposely subjected the victim to contact with a bodily fluid; (2) the State must prove beyond a reasonable doubt that the victim was an employee of one of the law enforcement agencies set forth in the statute; and, (3) the State must prove beyond a reasonable doubt that the victim was engaged in the performance of the duties of his/her office at the time of the offense.²⁰

As set forth in N.J.S. 2C: 2-2(c)(3) “[w]hen the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all material elements of the offense, unless a contrary purpose plainly appears.”²¹

The Court suggested that the scant legislative history of the statute demonstrates that the Legislature intended to broadly criminalize certain conduct specified in the statute, and although the statute does define two different types of aggravated assault, there was nothing to indicate that the Legislature intended two different levels of culpability.²²

The Appellate Division concluded that N.J.S. 2C: 12-13 does, in fact, require the State to prove that a defendant acted purposely, whether throwing bodily fluid or otherwise subjecting an officer to it.²³ Additionally, the Court determined that the doctrine of transferred intent does not apply because a defendant does not violate the statute unless the conduct was purposeful and the result was within his or her design.²⁴ Finally, the Appellate Division concluded that the Trial Court mistakenly exercised its discretion by not dismissing the indictment because the State failed to properly charge the grand jury on the elements of N.J.S. 2C: 12-13.

¹⁶ *State v. Majewski*, 450 N.J. Super. 353, 361 (App. Div. 2017).

¹⁷ *Id.* at 360.

¹⁸ *Id.* at 361.

¹⁹ *Model Jury Charge (Criminal)*, “Aggravated Assault (Throwing Bodily Fluid at a Corrections Employee) (N.J.S.A. 2C:12-13),” n.1, (June 10, 2002) (the “Model Charge”).

²⁰ *Id.* at 1-2.

²¹ N.J.S. 2C: 2-2(c)(3).

²² *State v. Majewski*, 450 N.J. Super. 353, 362 (App. Div. 2017).

²³ *Id.*

²⁴ *Id.* at 364.

Recent Developments

The Coronavirus disease 2019 (“COVID-19”) is a contagious, and at times fatal, respiratory disease caused by the SARS-CoV-2 virus.²⁵ On March 9, 2020, as part of New Jersey’s coordinated response to address the Coronavirus, Governor Phil Murphy declared a State of Emergency and a Public Health Emergency.²⁶ The issuance of Executive Order No. 103 declared that New Jersey was in a state of emergency as a result of a public health emergency across all 21 counties in New Jersey.²⁷

In early March 2020, an individual was arrested for coughing at a supermarket employee and claiming to be infected with the corona virus. Other individuals, in separate instances, were arrested and charged with aggravated assault – throwing bodily fluid on a police officer.²⁸ Each of the individuals claimed to be infected with the coronavirus and coughed on the responding police officers.²⁹

These recent events demonstrate that deliberately coughing or sneezing at another person with the intent of causing that person to believe that they would be infected with a virus, is not included in assault statutes.

As a result, Staff attempted to address this behavior by way of additional modifications to New Jersey’s aggravated assault statute, N.J.S. 2C:12-1.

Outreach

In connection with this Report, the Commission sought comments from knowledgeable individuals and organizations, including: the Attorney General of New Jersey; the New Jersey Administrative Office of the Courts; the New Jersey Municipal Prosecutor’s Association; Association of Criminal Defense Lawyers; the Office of the Public Defender; the Criminal Law Section of the New Jersey State Bar Association; the New Jersey County Prosecutor’s Association and each of the County Prosecutors; private criminal defense attorneys; the New Jersey State League of Municipalities; the New Jersey Association of Counties; New Jersey State Association of Chiefs of Police; and the New Jersey Police Traffic Officers Association.

The Commission received comments from the Cape May County Prosecutor’s Office; the Appellate Section of the Office of the Public Defender; and the County Prosecutors Association of New Jersey.

²⁵ Exec. Order No. 103, Governor Murphy, (Mar. 09, 2020).

²⁶ *Id.* See Press Release, Office of the Governor, Governor Murphy Declares State of Emergency, Public Health Emergency to Strengthen State Preparedness to Contain the Spread of COVID-19 (Mar. 09, 2020) (<https://nj.gov/governor/news/news/562020/approved/20200309b.shtml>) (last visited April 03, 2020).

²⁷ *Id.*

²⁸ Press Release, Office of the Attorney General, AG Grewal: If You Threaten a Cop with COVID-19, You will Face the Maximum Criminal Charges (Apr. 1, 2020) (<https://www.nj.gov/oag/newsreleases20/pr20200401a.html>) (last visited April 03, 2020). The additional charges filed against each of these individuals are more fully set forth in the Attorney General’s Press Release. References to these charges have been omitted here from because as discussion of them exceed the scope of this Memorandum.

²⁹ *Id.*

- *Cape May County Prosecutor’s Request for Modification*

In addition to amending N.J.S. 2C:12-13 to reflect the purposeful mental state as discussed in *Majewski*, one stakeholder recommended additional modifications to this statute.³⁰ The request for these modifications is based on the legislative history of the statute and the mental element set forth in similar statutes.

- *Legislative History*

The legislation that would eventually become N.J.S. 2C:12-13 was accompanied by a statement from one of its co-sponsors³¹ explicitly stating that it “...is intended to protect the health and well-being of corrections and parole officers by designating the act of throwing bodily fluids at such officers an aggravated assault.”³² The Assembly Judiciary Committee reported favorably on this legislation³³ and its Committee Report referenced the intent of the legislation.³⁴ Subsequently, “the scope of the statute has been repeatedly broadened ensure that all types of officers can seek the protections of the statute.”³⁵

The decision of the *Majewski* Court may have unintended consequences.³⁶ Stakeholders involved in prosecuting violations of N.J.S. 2C:12-13 have provided the Commission with insight as to the potential unintended consequences of the decision.³⁷ By holding that N.J.S. 2C:12-13 requires that an actor act purposely “provides all defendants the absolute defense of claiming that they intended to hit someone else...or, alternatively, that they hit the officer accidentally with their bodily fluids.”³⁸ An intoxicated individual assaulting an arresting officer with bodily fluids could raise the defense of intoxication to negate the purposeful mental state required by *Majewski*.³⁹ Even if an actor purposefully assaults one officer with bodily fluids, a second officer may suffer incidental exposure to the fluids.⁴⁰ In either of the latter two hypotheticals, the stakeholder noted that “[t]he risk of infection to another officer struck by bodily fluids from another person is the same, regardless of whether or not the officer intended to strike that officer or someone else.” An examination of New Jersey’s assault statute may address these concerns.

³⁰ See letter from Ed Shim, Senior Assistant Prosecutor, Cape May County, to the New Jersey Law Revision Commission (July 08, 2020) (on file with the NJLRC). Assistant Prosecutor Shim was the attorney who argued the motion to dismiss the indictment at the trial level in *State v. Majewski*.

³¹ A. 1598, 1996 Leg. Sess. (N.J. Feb. 29, 1996) (Statement of Assemblyman Zisa).

³² *Id.*

³³ A. 1598, 1996 Leg. Sess. (N.J. June 10, 1996) (Statement to Assembly Judiciary Committee).

³⁴ *Id.* (stating that “[t]his bill is intended to protect corrections and parole officers by designating that the act of throwing bodily fluids at such persons... [is an] aggravated assault....”)

³⁵ Shim, *supra* note 30, at *2-3. See L. 1997, c. 182, §2; L. 1999, c. 429, §1; and, L. 2003, c. 283, §1.

³⁶ *Id.* at *1-2.

³⁷ Shim, *supra* note 30, at *2-3.

³⁸ *Id.* at *3.

³⁹ *Id.*

⁴⁰ *Id.* at *4.

• *Assault – N.J.S. 2C:12-1*

The current assault statute provides that a person is guilty of simple assault if the person, “[a]ttempts to cause or purposely, knowingly or recklessly causes bodily injury to another...”⁴¹

Almost 25 years ago the Legislature dealt with the issue of subjecting another to unwanted bodily fluids, recognizing “[t]he need to impose tough sanctions for this vile and disgusting act” and that such behavior “takes on greater urgency in an era when such fluids can [sic] serve as the medium for the transmission of life-threatening diseases.”⁴²

The proposed modifications of N.J.S. 2C:12-1 and N.J.S. 2C:12-13, discussed below, were drafted to reflect the original intent of the Legislature and to address the concerns raised by this stakeholder.⁴³

• *Office of the Public Defender – Appellate Section*

The Office of the Public Defender (OPD) does not object to modifications to N.J.S. 2C:12-13 that would make “the requirements of a higher mental state for all elements more explicit in the statutory text...”⁴⁴ The OPD expressed concern, however, that the Commission’s modifications “would invite unwarranted prosecutions and would stigmatize severe respiratory illness during a pandemic.”⁴⁵

• *Statutory Construction*

The OPD indicated that, in its current form, N.J.S. 2C:12-13 only seeks to punish those individuals who “throw” bodily fluid at a protected person.⁴⁶ The statute, however, states that individuals who throw bodily fluids “**or** otherwise purposely subject[]” a protected person “to contact with a bodily fluid commits an aggravated assault.”⁴⁷ OPD suggested that this phrase is “...restricted because it is preceded by the specific term ‘throws’.”⁴⁸ That may be a more narrow interpretation than would be employed by a court.

It is not disputed that the current statute prohibits individuals from “throwing” bodily fluids on any of the persons enumerated in the statute, but additional methods of transmitting bodily fluids to another are also addressed by the current statute. The word “or” in a statute is to

⁴¹ N.J.S. 2C:12-1(a)(1).

⁴² A. 1598, 1996 Leg. Sess. (N.J. Feb. 29, 1996) (Statement of Assemblyman Zisa).

⁴³ The modification of N.J.S. 2C:12-13 to reflect the same mental elements as set forth in the simple assault statute (N.J.S. 2C:12-1) would broaden the statute beyond the scope authorized by the Commission in connection with this Report.

⁴⁴ Letter from Joseph J. Russo, Deputy Public Defender, Appellate Section, to the New Jersey Law Revision Commission *1 (July 10, 2020) (on file with the NJLRC).

⁴⁵ *Id.* at *1.

⁴⁶ *Id.*

⁴⁷ N.J.S. 2C:12-13 (emphasis added).

⁴⁸ Russo, *supra* note 45, at *1.

be considered a disjunctive particle indicating an alternative.⁴⁹ A plain reading of the phrase “...or otherwise purposely subjects...” suggests that the Legislature intended to curtail additional means of transmitting bodily fluids to the victim. On its face, the statute would also prohibit the transmission of bodily fluids by coughing, spitting, licking, or urinating on the protected individuals.⁵⁰

• *Title of the Statute*

The Office of the Public Defender further objects to the Commission’s modifications claiming that statute is restricted to the “throwing” of bodily fluids because that is the only means of transmission set forth in the title of the statute.⁵¹ In New Jersey, “the constitutional standard does not require that the title of the act index all its provisions.”⁵² It is sufficient that “the title express[] the general purpose and all of the statute’s provisions appear to be in furtherance of that purpose and appropriate to the end expressed.”⁵³ Where legislatures are give notice “of the subject to which the at relates, and the public is informed of the kind of legislation under consideration” the constitutional standard is satisfied.⁵⁴ There is “no question that the Legislature may proscribe two or more separate and distinct criminal acts within the same statute.”⁵⁵ A statute should not include legislation that is so incongruous that it could not be considered germane to one general subject.⁵⁶

While the title to N.J.S. 2C:12-13 does not index every means by which bodily fluids may be delivered to a victim, the delivery methods contained within the statute clearly relate to one another and inform the public of the prohibited conduct.⁵⁷

• *The Assault Statute*

Concern about the proposed modifications to N.J.S. 2C:12-1(a)(4) suggested that it could be interpreted to punish a broader category of conduct than contemplated by the Legislature, since the proposed language would proscribe “[a]ttempts to put a person in reasonable fear of infection by intentionally placing them in contact with bodily fluid or otherwise having physical

⁴⁹ *In re Estate of Fisher*, 443 N.J. Super. 180 (App. Div. 2015) citing *State v. Kress*, 105 N.J. Super. 514, (Law. Div. 1969), *Murphy v. Zink*, 136 N.J.L. 235, (Sup. Ct. 1947), affirmed 136 N.J.L. 635 (E. & A. 1948). See *Nielsen v. Preap*, 139 S. Ct. 954 (2019).

⁵⁰ See Assembly Committee Statement, A.B. 1598 207th Leg. Sess., 207th Leg. (June 10, 1996) (stating that “[t]his bill is intended to protect corrections and parole officers by designating the act of throwing bodily fluids at such persons, or otherwise subjecting the person to contact with bodily fluids, an aggravated assault.”) Statute has been amended four times since 1996 to protect a broader range of law enforcement officers from the conduct contemplated in the statute.

⁵¹ Russo, *supra* note 45, at *2.

⁵² *State v. Malik*, 365 N.J. Super. 267, 282 (App. Div. 2003).

⁵³ *Id.* (citations omitted).

⁵⁴ *Id.*

⁵⁵ *Id.* at 282-283.

⁵⁶ *Id.* at 282-283.

⁵⁷ See N.J.S. 1:1-6 (providing that “[i]n the construction of the Revised Statutes... no outline or analysis of the contents of any title... shall be deemed to be a part of the Revised Statutes or such statute.”).

contact with the person.”⁵⁸ These concerns were shared by the County Prosecutors Association of New Jersey.⁵⁹

- *County Prosecutors Association of New Jersey (CPANJ)*

CPANJ supplied the Commission with several recommendations designed to ameliorate language viewed as overbroad.⁶⁰

CPANJ recommended that the term “reasonable fear” be defined in the newly drafted section of the assault statute. In the Code, the term means “to cause fear which a reasonable victim, similarly situated, would have under the circumstances.”⁶¹

To avoid uncertainty as to the culpability required for an assault, the CPANJ recommended that in section (a)(4) the pre-Code term “intentionally” be replaced with the word “purposely”⁶² to “serve the legislature’s intent to promote the clarity of definitions of specific crimes and dispel obscurity with which the culpability requirement is often treated when concepts such as ‘general criminal intent’ ... ‘presumed intent,’ ... and the like are used.”⁶³

Finally, the CPANJ recommended the replacement of the phrase, “placing [protected individuals] in contact with bodily fluid” with more limited language requiring that an actor “subject[] the individual to contact with bodily fluid or otherwise hav[e] physical contact with the individual, for no lawful purpose.”⁶⁴ This, according to CPANJ, “would protect first responders and health care workers from culpability under the statute.”⁶⁵

The recommendations of those who responded to Commission outreach have been incorporated into the Appendix.

Conclusion

N.J.S. 2C:12-13 does not clearly state that purposeful conduct is required for a defendant to be found guilty of aggravated assault when throwing bodily fluid at certain enumerated law enforcement employees. In addition, recent circumstances led the Commission consider the modification of the aggravated assault statute.

The following pages propose modifications to both N.J.S. 2C:12-13 and N.J.S. 2C:12-1 to address these circumstances.

⁵⁸ See Appendix.

⁵⁹ Letter from Angelo J. Onofri, Mercer County Prosecutor and President of the County Prosecutors of New Jersey, to the New Jersey Law Revision Commission *3 (July 10, 2020) (on file with the NJLRC).

⁶⁰ The CPANJ generously provided additional drafting recommendations which are reflected in the Appendix and addressed in the Comments that follow the section in which each proposed modification appears.

⁶¹ See N.J.S. 2C:12-10(4).

⁶² Onofri, *supra* note 58, at *3.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

Appendix

The Commission recommends the following amendment(s) to **N.J.S. 2C:12-13** (new language underlined; deletions indicated by ~~strikeouts~~; and, comments from stakeholders in *italics*).

a. ~~A person who throws a bodily fluid at a~~ An actor commits an aggravated assault if the actor he or she purposely subjects any of the following individuals persons to contact with a bodily fluid with knowledge that such person was, at the time, engaged in the performance of while in the performance of the individual's [their] duties as a(n):

(1) Department of Corrections employee;

(2) county correctional police officer;

(3) county corrections employee;

(4) juvenile correctional police officer;

(5) State juvenile facility employee;

(6) juvenile detention staff member;

(7) probation officer;

(8) any sheriff, undersheriff or sheriff's officer; or

(9) municipal, county, or State law enforcement officer, while in the performance of his duties or otherwise purposely subjects such employee to contact with a bodily fluid commits an aggravated assault.;

(10) parole officer;

(11) member of the Parole Board; or,

(12) Adult Diagnostic and Treatment Center employee.

b. If the victim suffers bodily injury, this shall be a crime of the third degree. Otherwise, this shall be a crime of the fourth degree.

c. A term of imprisonment imposed for this offense shall run consecutively to any term of imprisonment currently being served and to any other term imposed for another offense committed at the time of the assault.

d. ~~Nothing herein shall be deemed to preclude; if the evidence so warrants,~~

(1) an indictment and conviction for a violation or attempted violation of chapter 11 of Title 2C of the New Jersey Statutes; or,

(2) any other provision of the criminal laws.

Comments

In newly created section a., the term “a person” has been eliminated from the first sentence and the phrase “an actor” has been inserted in its place. In 2018, the Legislature proposed modifications to N.J.S. 2C:12-13.⁶⁶ Although never enacted, the prior legislative work included the removal of the term ‘his duties’ from what is now newly modified subsection (a)(9) and replaced it with the phrase ‘the person’s duties’. This portion of the sentence has been moved to the opening sentence of section a. The use of the term ‘person’ twice in one sentence has the potential to cause confusion regarding which individual the statute is referring and has therefore been eliminated from this section.

- *Purposely*

*The language of the statute has been modified to make it clear that the mental element – purposely – as discussed in State v. Majewski, 450 N.J. Super. 353, 360 (App. Div. 2017) is clearly stated in the statute.*⁶⁷

- *Knowledge Element*

*The Model Jury Charge for N.J.S. 2C:12-13 provide that the State must prove that the defendant knew that the victim was one of the enumerated law enforcement officers or employees and knew that at the time of the incident they were engaged in the performance of his or her duties. The language set forth in section a. is derived from the Model Jury Charge and the comments of the County Prosecutors Association of New Jersey.*⁶⁸

In addition to “officers”, the plain language of the statute seeks to protect the employees of correctional facilities from contact with the bodily fluids of inmates. The statute explicitly protects “Department of Corrections employees”, and “juvenile detention staff members” from bodily fluid assaults by inmates. County correctional institutions frequently employ individuals such as: clerical staff; pre-trial services officers; medical doctors and nurses; social workers; case workers; substance abuse counselors; members of the clergy; and, psychologists etc. Thus, (a)(3) of the statute has been modified to include county corrections employees in an effort to protect them from the types of attacks set forth in the statute. Finally, other individuals – such as Parole and Probation Officers - may appear in correctional facilities to perform their duties. A reference to these individuals has been added to this section as (a)(7) and (a)(8).⁶⁹

Inmates are not only held in correctional facilities. The court shall, upon the recommendation of the Department of Corrections, sentence an offender to a term of incarceration to be served in the custody of the commissioner at the Adult Diagnostic and Treatment Center for sex offender treatment.⁷⁰ Section (a)(1) has been added to this provision to protect the individuals and officers that work in these facilities.

The balance of the statute has been subdivided for ease of accessibility and reference.

⁶⁶ A3236, 218th Leg., First Annual Sess. (N.J. 2018).

⁶⁷ See also Russo, *supra* note 45; and, Onofri, *supra* note 58.

⁶⁸ Onofri, *supra* note 58, at *2

⁶⁹ See Aggravated Harassment of an Employee by an Inmate, 40 N.Y. Penal, Title N, § 240.32 (2013) (considers individuals from the board of parole or the office of mental health employees for purposes of aggravated harassment by an inmate).

⁷⁰ See N.J.S. 2C:47-3.

In addition, the Commission recommends a new section set forth below:

2C:12-1. Assault.

a. Simple assault. ~~A person~~ An actor is guilty of assault if ~~the person~~ he or she:

(1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(2) Negligently causes bodily injury to another with a deadly weapon; or

(3) Attempts by physical menace to put another in fear of imminent serious bodily injury ~~or,~~

(4) Attempts to put ~~person~~ another in reasonable fear of contracting a contagious disease by ~~intentionally purposely coughing, sneezing, spitting, or placing them in contact with bodily fluid~~ *subjecting the individual to contact with bodily fluid, or otherwise having physical contact with the person, for no lawful reason.*

A. As used in this section “cause a reasonable person to fear” means to cause fear which a reasonable victim, similarly situated, would have under the circumstances.

B. The definition of “contagious disease” as defined in N.J.S. 26:13-2, shall apply to this section.

Simple assault is a disorderly persons offense unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty disorderly persons offense.

b. Aggravated Assault. A person is guilty of aggravated assault if the person:

[...]

(5) Commits a simple assault as defined in paragraph (1), (2), ~~or~~ (3), or (4) of subsection a. of this section upon:

(a) Any law enforcement officer acting in the performance of the officer's duties while in uniform or exhibiting evidence of authority or because of the officer's status as a law enforcement officer; or

(b) Any paid or volunteer firefighter acting in the performance of the firefighter's duties while in uniform or otherwise clearly identifiable as being engaged in the performance of the duties of a firefighter; or

(c) Any person engaged in emergency first-aid or medical services acting in the performance of the person's duties while in uniform or otherwise clearly identifiable as being engaged in the performance of emergency first-aid or medical services; or

(d) Any school board member, school administrator, teacher, school bus driver, or other employee of a public or nonpublic school or school board while clearly identifiable as being engaged in the performance of the person's duties or because of the person's status as a member or employee of a public or nonpublic school or school board or any school bus driver employed by an operator under contract to a public or nonpublic school or school board while clearly identifiable as being engaged in the performance of the person's duties or because of the person's status as a school bus driver; or

(e) Any employee of the Division of Child Protection and Permanency while clearly identifiable as being engaged in the performance of the employee's duties or because of the status as an employee of the division; or

(f) Any justice of the Supreme Court, judge of the Superior Court, judge of the Tax Court or municipal judge while clearly identifiable as being engaged in the performance of judicial duties or because of the status as a member of the judiciary; or

(g) Any operator of a motorbus or the operator's supervisor or any employee of a rail passenger service while clearly identifiable as being engaged in the performance of the person's duties or because of the status as an operator of a motorbus or as the operator's supervisor or as an employee of a rail passenger service; or

(h) Any Department of Corrections employee, county correctional police officer, juvenile correctional police officer, State juvenile facility employee, juvenile detention staff member, juvenile detention officer, probation officer or any sheriff, undersheriff, or sheriff's officer acting in the performance of the person's duties while in uniform or exhibiting evidence of the person's authority or because of the status as a Department of Corrections employee, county correctional police officer, juvenile correctional police officer, State juvenile facility employee, juvenile detention staff member, juvenile detention officer, probation officer, parole officer, member of the Parole Board, sheriff, undersheriff, or sheriff's officer; or₂

(i) Any employee, including any person employed under contract, of a utility company as defined in section 2 of P.L.1971, c. 224 (C.2A:42-86) or a cable television company subject to the provisions of the "Cable Television Act," P.L.1972, c. 186 (C.48:5A-1 et seq.) while clearly identifiable as being engaged in the performance of the employee's duties in regard to connecting, disconnecting, or repairing or attempting to connect, disconnect, or repair any gas, electric, or water utility, or cable television or telecommunication service; or

(j) Any health care worker employed by a licensed health care facility to provide direct patient care, any health care professional licensed or otherwise

authorized pursuant to Title 26 or Title 45 of the Revised Statutes to practice a health care profession, except a direct care worker at a State or county psychiatric hospital or State developmental center or veterans' memorial home, while clearly identifiable as being engaged in the duties of providing direct patient care or practicing the health care profession; or

(k) Any direct care worker at a State or county psychiatric hospital or State developmental center or veterans' memorial home, while clearly identifiable as being engaged in the duties of providing direct patient care or practicing the health care profession, provided that the actor is not a patient or resident at the facility who is classified by the facility as having a mental illness or developmental disability; [...]

Comments

Section a.

- *Another*

The word “another” replaces the word “person” in the first line of subsection a.(4). The use of the term “person” is consistent with the use of the term in subsections (1), (2) and (3).⁷¹

- *Cause a reasonable person to fear*

The term “cause a reasonable person to fear” is used in the Code of Criminal Justice (“Code.”)⁷² The importation of this definition to this portion of the Code provides clarity to the instant statute and is consistent with the usage of the term in the Code.

- *Purposely*

In a.(4) the word “intentionally” has been replaced with the word “purposely” to eliminate any uncertainty regarding the culpability required as an element of assault.⁷³ The County Prosecutors Association of New Jersey believes that, “[u]sing the term “purposely,” which appears in N.J.S. 2C:2-2... to describe the mental element of the offense of assault would serve the Legislature’s intent to promote clarity of definitions of specific crimes and dispel the obscurity with which the culpability requirement is often treated when concepts such as “general criminal intent,” ... ‘presumed intent’ and the like are used.”⁷⁴

- *Subjecting the individual to contact*

To address the concerns raised by stakeholders⁷⁵ and to be consistent with the proposed modifications to N.J.S. 2C:12-13, the phrase “placing them in contact with bodily fluid” has been replaced with the phrase “subjecting the individual to contact with bodily fluid.”⁷⁶

- *Contagious Disease*

⁷¹ Onofri, *supra* note 58, at *3.

⁷² See N.J.S. 2C:12-10(a)(4).

⁷³ Onofri, *supra* note 58, at *3.

⁷⁴ *Id.* citing 2 Final Report of the New Jersey Crim. Law Rev. Comm’n, Commentary at 41 (1971).

⁷⁵ Russo, *supra* note 45, at *2-3.

⁷⁶ Onofri, *supra* note 58, at *3.

The term “contagious disease” is defined in New Jersey’s statutes.⁷⁷ A “contagious disease” means an infectious disease that can be transmitted from person to person.⁷⁸ An “infectious disease” means a disease caused by a living organism or other pathogen, including a fungus, bacteria, parasite, protozoan, virus, or prion. An infectious disease may, or may not, be transmissible from person to person, animal to person, or insect to person.⁷⁹

- *For no lawful purpose*

To protect first responders and health care workers from culpability, and to address the concerns raised by stakeholders, the phrase “for no lawful purpose” has been added to section a.(4).

- *Aggravated Assault*

The current assault statute addresses attacks on individuals, including law enforcement officers.⁸⁰ In addition, N.J.S. 2C:12-1(b)(5)(h) provides protection for “...any Department of Corrections employee, county correctional police officer, juvenile correctional police officer, State juvenile facility employee, juvenile detention staff member, juvenile detention officer, probation officer or any sheriff, undersheriff, or sheriff’s officer acting in the performance of the person’s duties while in uniform or exhibiting evidence of the person’s authority or because of the status as a Department of Corrections employee, county correctional police officer, juvenile correctional police officer, State juvenile facility employee, juvenile detention staff member, juvenile detention officer, probation officer, sheriff, undersheriff, or sheriff’s officer...” against being assaulted.

The proposed modification to this statute identifies the same individuals as set forth in the proposed changes to N.J.S. 12-13. *supra*. An amendment to N.J.S. 2C:12-1(b)(5) to include paragraph (4) of subsection a. would protect a larger group of people from the prohibited behavior.⁸¹

Compare Pennsylvania Recklessly Endangering Another Person, 18 Pa.C.S. §2705 (2020), provides, “A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.” *Commonwealth v. Cordoba*, 902 A.2d 1280 (Sup. Ct. 2006), considered the statute in the context of a defendant infected with HIV at the time he engaged in sexual activity with the victim.

Compare Harassment in the First Degree, 11 AK ST. §11.61.118 (2020); Assault in the Fourth Degree, M.S.A. §609.2231 (2016); Battery Defined, 18 LSA-R.S. 14:33 (1978) (defining battery to include the intentional administration of a poison or other noxious liquid or substance to another). Aggravated Harassment of an Employee by an Inmate, 40 N.Y. Penal, Title N, § 240.32 (2013) (making it a class E felony if an inmate causes or attempts to cause such employee to come into contact with blood, seminal fluid, urine, feces, or the contents of a toilet bowl, by throwing, tossing or expelling such fluid or material).

⁷⁷ See N.J.S. 26:13-2.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See N.J.S. 2C:12-1 *et seq.*

⁸¹ Onofri, *supra* note 58, at *4.