

SAMPLE – Criminal Law HD Exam Scaffold

SEXUAL ASSAULT -s 61I Crimes Act

'Basic' sexual assault:

- Actus reus: the Crown must prove BRD both of the following limbs:
 1. **The accused must have had sexual intercourse with the victim.**
 - Sexual penetration of vagina or anus of person and that penetration needn't have been achieved by inserting a body part. Can also be an object and that will amount to sexual intercourse or any sexual connection between genitalia and mouth (or the continuation of any of these such acts): **s 61H**
 - **61H(1)(b)**: Fellatio (oral simulation of one's penis)
 - **61H(1)(c)**: Cunnilingus (stimulation of the female genitals using the tongue or lips)
 - **61H(1)(d)**: Continuation of any of those acts (fellatio, cunnilingus or penetration of vagina/anus) amounts to sexual intercourse.
 2. **Without the victim's consent.**
 - Consent must be freely and voluntarily given: **s 61HA(2)**
 - The lack of actual physical resistance does not automatically signify consent: **61HA(7)**
 - There will be no consent if the victim **61HA(4)**
 - Doesn't have the capacity to consent (eg, because of age or mental disability): **61HA(4)(a)**
 - Doesn't have the opportunity to consent (eg, because unconscious or asleep): **61HA(4)(b)**
 - Consented under threats (whether to them or to another): **61HA(4)(c)**
 - Consented because they are unlawfully detained: **61HA(4)(d)**
 - Person **will not have consented** to intercourse where their consent was given under one of 3 types of mistaken belief: **61HA(5)**
 - is under the mistaken belief as to the identity of the accused: **61HA(5)(a)**
 - is under the mistaken belief that the accused is married to the person: **61HA(5)(b); Papadimitropoulos**
 - is under the mistaken belief that the sexual intercourse is for medical or hygienic purposes (or under any other mistaken belief about the nature of the act induced by fraudulent means): **61HA(5)(c)**
 - If one of the mistaken beliefs arises, it will be deemed that the accused knew that the complainant was not consenting (knows non-consent, reckless as to consent, or has no grounds for believing in consent) within the meaning of s **61HA(3)**
 - The court may establish that there was no consent on the grounds that: **61HA(6)**
 - the victim was substantially intoxicated. **61HA(6)(a)**
 - the victim was intimidated or coerced (does not necessarily involve the use or threat of force) **61HA(6)(b); Aiken**
 - the victim had intercourse because of an abuse of a position of authority or trust **61HA(6)(c)**

Only where there is a non-violent threat, it is for jury to determine whether consent was granted (**Aiken**)

- **Mens rea: Knowing the victim was not consenting**
 1. **Intended** to have sexual intercourse and
 2. Had **knowledge** of a lack of consent. Knowledge of a lack of consent occurs when (any of the following) **61HA(3)**
 1. Actual knowledge that there is no consent **61HA(3)(a)**
 2. Recklessness as to whether the victim consents **61HA(3)(b)**
 - Includes inadvertent recklessness (where the accused didn't even consider whether there was consent or not although the risk of non-consent was obvious): **Tolmie**
 - Includes advertent recklessness (accused is proved to realised the possibility of non-consent or that there was a risk of relevant circumstance existing or consequence ensuing); **Hemsley; Banditt**
 3. Lack of reasonable grounds for believing there is consent (**objective** test, will apply even if the accused honestly believed there was consent) **61HA(3)(c)**
 4. Consent was obtained because the victim was under a mistaken belief (see above), and the accused was aware of the mistaken belief: **61HA (5)**
 - Note: steps taken by the accused to ascertain consent are to be considered. Self-induced intoxication is not taken into account: **61HA (3)**.

Max sentence: 14 years imprisonment.

SAMPLE – Criminal Law HD Exam Scaffold

AGGRAVATED ASSAULT

The Crown must prove BRD...

Assault occasioning ABH: s 59 Crimes Act

Max penalty: 5 years - **59(1)** (7 years if in company **59(9)** – aggravating factor - **59(2)**)

- Actus reus: common assault + the occasioning of ABH.
 - **Common Assault Actus Reus:** application of force or creating the apprehension of an immediate application of force (**Fagan**)
 - **Mens Rea:** intending to apply force, or creating the apprehension or recklessness (foresee the possibility that the force will be applied or foresee the possibility that the accused will create an apprehension of immediate application of force – **R v Coleman**)

+ **ABH (Actual Bodily Harm)**

1. Any hurt or injury calculated to interfere with the health or comfort of the complainant. Needs not be permanent but must be more than ‘merely transient or trifling’ – **R v Donovan**
ex) bruises, scratches of the victim – McIntyre; Swan v R
2. **Additional Mens Rea:** no need for specific intent to do actually bodily harm (absolute liability) – **R v Coulter**

Wounding/GBH with intent to cause GBH: s 33 Crimes Act

Not probably seen as aggravating offences because you don't have to prove common assaults elements.
25 years max penalty

- **Actus reus:** wounding or GBH
- **Mens rea:** intent to cause GBH (same as murder) or intent to resist arrest.
 - Note: specific intent offence. Intoxication is relevant.

Wounding or GBH recklessly OR in company: s 35 Crimes Act

Max penalty is 10 years, 14 years in company

- **Actus reus:** GBH or wounding - **Swan**
- **Mens rea:** advertent recklessness (for lesser crimes than murder) as to cause ABH – S 35 (accused must foresee the possibility of ABH) – **R v Coleman; Swan**

Recklessly

35(2): reckless GBH

35(4): reckless wounding

In company

35(1): reckless GBH in company

35(3): reckless wounding in company

s 35 means rea requirement is less demanding: foresight or possibility not probability. If you are doubtful about mens rea (hard to prove intention) for s 33, you go to s 35.

If cannot prove neither s 33 & 35 -> 54 or 59

SAMPLE – Criminal Law HD Exam Scaffold

Definitions – CONSIDER THIS BOX FIRST!

What is wounding?

Wounding or cutting the interior layer of skin – *R v Shepherd, DPP v Smith*

Injury to the person by which the skin is broken – *R v Vallance (Windeyer J)*

Injury does not need to be long-lasting or permanent - *DPP v Smith, Haoui v R, Swan*

Remember for exam! If the skin is cut open & **bleeding**, that is a wound – can be charged with s 33.

What is GBH?

GBH is a jury Q- “is it really serious harm” - they don’t get a lot of directions about that - *Haoui v R*

Defined non-exhaustively in s **4 of the Crimes Act**:

A. destruction of a pregnant woman’s fetus

B. any permanent disfiguring of the person

C. any grievous bodily disease

Really serious harm or injury – *DPP v Smith, Haoui v R, Swan*

Factors like, **surgery required/ how complex surgery is** (necessary for a **plate to be inserted**) and **in hospital (period of recuperation being long)** for a couple of days, it was open to the jury to find beyond reasonable doubt that was a serious injury - *Haoui v R*

Some injuries clearly constitute GBH - Haoui v R

1. complex skull fracture

2. severe multiplex fracture to a leg

However, GBH covers a wide range of injuries (man being put in a wheelchair, or someone far less serious – broken leg, or any of the non-exhaustive things in s 4 of the Crimes) - *Haoui v R*

Swan – didn’t constitute GBH

- *No surgery was required*
- *No permanent injury was suffered (however, injury need not be permanent to amount to GBH)*
- *Was in hospital for 48 years (like in Haoui, only there for a short period of time)*
- *Doctor described the injury as minor*
- *Required no further treatment after discharge*

Questions to ask:

- ➔ Was there a surgery?
- ➔ If so, how complex was it?
- ➔ Did the person stay in the hospital? Then how long?
- ➔ How long did it take the person to fully recover from the surgery

'Defences' - application of force will not constitute assault if:

1. There is a lawful excuse.
2. There was consent on behalf of the victim.
 - However, consent is immaterial in unlawful situations or situations which the degree of harm is very severe (such as ABH inflicted during a sadomasochistic sex): **Brown**
 - However, whether consent is an answer to an assault occasioning ABH/GBH/wounding depends upon the circumstances: **Brown**
 - Lawful branding initials with hot knife onto wife’s butt with consent was an answer to a common assault- **Wilson**– **consent is an answer to a common assault**
 - Where risk of harm is great, consent is no answer to the charge (sex with plastic bag over the woman’s head and powering lighter fluid on breasts) - **Emmett**

SAMPLE – Criminal Law HD Exam Scaffold

MURDER

S 18(1)(a) of the Crimes Act provides:

Murder is taken to have been committed where the act of the accused, or a thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, with intent to kill or cause grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

Clearly identify what the act or omission is

The Crown needs to prove BRD:

Actus Reus - *S 18(1)(a)*

- Act or omission
 - Act must be voluntary, causing death, and accompanied by the mens rea (*Royall; Ryan*)
 - To prove murder by omission, a duty of care must be proved by the Crown (*R v BW and SW*)
- Causing death

Mens Rea - *S 18(1)(a)*

- With an intent to kill or cause death (or reckless indifference) or inflict GBH or with reckless indifference to human life or in circumstances that bring the constructive murder rule into play (must have been during/immediately after).
- Intent to kill or inflict GBH ('permanent or serious disfiguring of the person': *s 4 Crimes Act 1900 (NSW)*)
 - Grievous bodily harm is a really serious injury or harm (*Haoui v R*).
 - Injury does not have to be long-lasting or life-threatening (*Haoui v R*).
 - Can infer intent from what the accused says and does at the time of the relevant conduct OR in the aftermath of that incident (*Matthews, Zaburoni v R*)
 - Confessions relevant because they infer an intent to kill or cause GBH (*Zaburoni v R*)
- Reckless indifference to human life. This means:
 - The accused foresaw the probability (*Crabbe*) of death (It is not enough that the accused foresaw the probability of GBH *Royall*).
 - Foresight of the risk of harm is distinct in law from intentions to produce that harm (*Zaburoni v R*)
 - In a case of intentional murder, the accused clearly means to bring out the result of death or GBH (*Campbell*)
 - *Stabbing, killing, pushing someone off the cliff*
 - In a case of reckless indifference murder, the accused foresaw the probability of killing, but does not intend the result of death (*Khan*)
 - *But if you get someone setting a fire on someone's premises, knowing that there will be an explosion and knowing people in the unit above him (Khan).*
- Constructive murder rule (*S 18(1)(a)*) - no mens rea requirement if a homicide was committed (by the accused OR an accomplice) during the commission of a crime (*Ryan*)
 - If you do an act causing death in an attempt to commit, during, or immediately after committing an offence punishable by 25 years of imprisonment, at least then you are guilty of murder.
 - Does not matter if the consequence was accidental (*Ryan*)

SAMPLE – Criminal Law HD Exam Scaffold

Causation

Occasionally, the Crown needs to prove causation to prove murder. A novus actus interveniens breaks the chain of causation between the accused's act/omission and the deceased's death.

Controversial Causation Q is for the jury to resolve (*Evans and Gardiner (No. 2)*)

1. If it is unclear to identify the relevant act/omission
 2. Where there is a novus actus interveniens
- By applying the substantial and operating cause test (*Smith*)
 - Q is whether the original act is the substantial and operating cause of death
 - If the jury finds that if the first cause was merely the setting in which the second cause operates, no causation is established
 - For the causal chain to be broken, the second cause must be so overwhelming as to make the original act a part of history.
 - **Intervening act/omission of a third party (*Evans and Gardiner, Jordan, Cheshire*)**
 - Jury must have been notoriously reluctant to find that the subsequent medical treatment is a novus actus interveniens that breaks the chain of causation between the accused's act and the deceased's death. (*Evans and Gardiner, Cheshire*)
 - Medical treatment does not have to be quite serious/reckless to break the chain of causation- it is conceivable that negligent medical treatment can break the chain of causation – which all depends on the jury's assessment of the substantial and operating cause test (*Cheshire*)
 - **Intervening act of nature**
 - Ordinary natural cause does not break the chain of causation whereas extraordinary natural cause does (*Hallett v R*)
 - **Intervening of the victim**
 - The actus novus of refusal of medical treatment (*Blaue*) or rejection of medical advice (*Bingapore*) raises no controversial causation issue arises because the accused must take the victim as he/she finds him – does not break the chain of causation.
 - Where the actus novus is the self-preservation (*Royall*)
 - Only if the victim's response was unreasonable and disproportionate, the chain of causation will be broken (Deane, Dawson, Toohey, Gaudron JJ)
 - If the victim's response was reasonable, then the accused's act will be a substantial and operating cause of death (Deane, Dawson, Toohey, Gaudron JJ)
 - Supply of drugs does not break the chain of causation as the act of taking was a voluntary and informed one (*Burns*) – irreconcilable with *Blaue & Bingapore*

Miscellaneous

- A series of acts (loading, presenting, firing the gun), as long as some of the acts were done voluntarily, it is enough to prove the requisite mens rea (*Ryan, Thabo Meli*)
- **Temporal coincidence rule (*Myers; Thabo Meli*):** the accused must possess mens rea at the time of committing the actus reus
 - It may be sufficient if the mens rea is manifest at some point during:
 - Series of facts (*Thabo Meli*) – mistakenly believed V dead after striking, disposed of body over cliff, died of exposure
 - Continuing act (*Fagan*) – refused to remove car off officer's foot
 - Same sequence of events (or wrongful acts) (*Le Brun*) - struck wife during argument, dropped her while trying to cover up the assault- she hit head on pavement and died.

Sentencing

- Maximum sentence - life imprisonment: s 19A Crimes Act 1902 (NSW).
- There is a standard non-parole period of 20 years, raised to 25 years in some instances.
 - The judge can vary this as he wishes: s 61 Crimes (Sentencing Procedure) Act 1999.

If the above elements are proved beyond reasonable doubt, and there are no defences, the defendant will be convicted of murder.

SAMPLE PAGES ARE NOT IN ORDER