

JURD7122 – Criminal Laws Reading Notes:

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Class 2 – Assault (Common Assault and Aggravated Forms of Assault):

Introduction:

- Public violence mainly occurs with men as offender and victim, whereas private violence often between man and female domestic partner.
- Patterns of Victimization:
 - High rate of under-reporting for violent crime.
 - Mainly occurs between people who are known to each other.
 - Confrontational violence refers to a social interaction that escalates into physical violence.
 - Disproportionate number of men from marginal socioeconomic backgrounds, with alcohol often being an ingredient, are involved in violence (Hogg).
- Social Context and Prevalence:
 - Context crucial to assault as minor contact with an intent for victim to apprehend violence may constitute assault whilst serious injury caused accidentally may not.
 - Assault becomes domestic violence if domestic relationship between offender and victim.
 - Alcohol plays massive role in violence as can increase aggression, heavy drinkers more likely to commit violent offences, offences tend to cluster around licensed premises and areas with high rates of alcohol consumption tend to have high rates of violence (Weatherburn).
- Criminal Offence Categories:
 - Non-fatal violence commonly classified into common and aggravated assaults.
 - Aggravated refers to range of assault offences regarded as more serious because of presence of additional aggravating factors.

Common Assault:

Crimes Act 1900 (NSW):

61 Common assault prosecuted by indictment

Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for 2 years.

- Assault is an act by which a person intentionally or recklessly causes another person to apprehend the immediate infliction of unlawful force upon him. There can be an assault without a battery (*Darby v DPP (NSW) (2004)*).
- *Edwards v Police (1998)* summarised elements of assault where no physical contact:
 - Actus reus of an assault where no physical contact is an act of defendant raising in mind of victim, fear of immediate violence to them, i.e. fear of unlawful physical contact.
 - Mens rea of such an assault is defendant's intention to produce that expectation in mind of victim.

- Alternative possibility of reckless assault, where defendant, whilst not desiring to cause fear, realises conduct may do so and continues with it.

Actus Reus of Assault:

Actus Reus for Assault:

The actus reus element for an assault is as follows:

1. An assault by way of application of force or apprehension of immediate violence **must be committed by an act not an omission.** (*Fagan v Commissioner of Metropolitan Police [1969]*).
2. It must be **without the consent** of the victim. (*Bonora (1994)*).

For assaults involving apprehension of immediate violence:

3. The victim must **actually be put in fear of imminent unlawful force.** (*Knight (1988)* and *Zanker v Vartzokas (1988)*).

Acts not Omissions:

Fagan v Commissioner of Metropolitan Police [1969] 1 QB 439:

Facts:

- Fagan convicted of assaulting police officer in execution of duty.
- Fagan was reversing motor car under the officer's instruction when he stopped with wheel on officer's foot.
- Officer instructed Fagan to get off his foot, which he didn't at first but then proceeded to drive off.
- Found that "knowingly, provocatively and unnecessarily" allowed the wheel to remain on the officer's foot and assault proved on this.

Judgement:

- Argued that no act on part of Fagan that should constitute actus reus of assault, but only omission or failure to remove wheel as soon as asked.
- Found that no distinction between actually laying hand on another and using an item to do it, an assault can be found in either case.
- Appeal dismissed.
- Noted that "to constitute the offence of an assault some intentional act must have been performed: a mere omission to act cannot amount to an assault.

Consent:

- "The term assault involves notion of want of consent. Thus, in general terms it may be said that an assault with consent is not assault at all" (*Bonora (1994)*).
- Crown does not have to negative the existence of consent.
- Sometime the absence of consent is referred to as an element of unlawfulness which may be satisfied by an absence of consent:
 - For there to be an assault the law requires an intentional application of force to person of another which is unlawful. For it to be an unlawful act there

must be no lawful justification for it. Consent in this case would be the lawful justification or excuse. (*Bonora (1994)*).

Apprehension of Immediate Infliction of Force:

Knight (1988) 35 A Crim R 314:

Facts:

- Knight convicted for assault under s 61 of Crimes Act and convicted of making false statements giving rise to apprehension for a person's safety.
- Made threatening and abusive phone calls to police officer, magistrate and judge.
- No other evidence to suggest assault besides calls.

Judgement:

- Threat of violence made over the phone could be a threat of immediate violence in given circumstances.
- Fear of immediate violence not always necessary and immediate can be stretched to perhaps cover events in future.
- Conviction was quashed as believed not enough evidence to satisfy assault charge.

Zanker v Vartzokas (1988) 34 A Crim R 11:

Facts:

- Young woman accepted lift in car of defendant, he offered her money for sexual favours once inside.
- She declined and requested to be dropped off, he accelerated.
- She threatened to jump out of vehicle and defendant said "I am going to take you to my mate's house. He will really fix you up".
- Appellant in fear jumped from car at 60km/h and suffered bodily injuries.

Judgement:

- For an assault, the feared physical harm does not have to be immediate, the threat could operate immediately on the victim's mind but in a continuing way so long as the unlawful imprisonment continued.
- The fear is a continuing fear in the mind of the victim, the utterance having as much effect in an hour as it does at time of utterance.
- Appeal allowed.

- The Victim's Apprehension:
 - Psychic assault is "constituted by an act which intentionally or recklessly causes another to apprehend immediate and unlawful violence (*DPP v JWH*).
 - Above cannot occur unless victim aware of accused actions (*Pemble v R (1971)*).
- Conditional Threats:
 - This is where person threatens to inflict violence only if certain circumstances occur.
 - If condition not one that could be lawfully imposed, may constitute assault (*Police v Greaves [1964]*).

Mens Rea of Assault:

- Generally constituted by intention to effect unlawful contact or to create apprehension of imminent unlawful contact in mind of another person.
- Recklessness to the above will also suffice.
- *Edwards v Police (1998)* summarised mens rea for assault in case where unlawful contact not involved:
 - Mens rea is defendant's intention to produce expectation of imminent unlawful violence in victim's mind.
 - Alternative possibility of reckless assault, where defendant, whilst not desiring to cause such fear, realises their conduct may do so but continues with it.
- Where recklessness is relied on, prosecution must prove foresight of possibility of inflicting physical contact or apprehension of imminent unlawful contact (advertent recklessness).

MacPherson v Brown (1975) 12 SASR 184:

Facts:

- Student convicted of assaulting lecturer during protests over CIA links of recently appointed senior administrator.
- Lecturer was prevented from leaving building for period of time but no physical contact made.
- Defendant held to be reckless and ought to have known conduct could have given reasonable grounds for apprehending infliction of physical force.

Judgement:

- Defendant must have actual knowledge that his actions might cause harm or give cause for belief of imminent harm to be charged with assault.
- Not enough to discuss what they ought to have known.

Coincidence between Actus Reus and Mens Rea:

- General principle of criminal law that actus reus and mens rea must coincide.
- However, for an assault involving a continuing act, mens rea does not need to be present at time of commencement of actus reus but can in effect be superimposed onto an existing (and continuing) act (*Fagan v Commissioner of Metropolitan Police [1969]*).

Class 3 – Assault (Aggravated Forms of Assault cont. and Domestic Violence):

Aggravated Assaults Reading from Class 1 (pages 618 – 625):

- Aggravated assault used to describe diverse range of assaults regarded as more serious because of additional aggravating factors such as harm caused, method used and status of victim.

Assault with Further Specific Intent:

- Aggravated by presence of further specific intent such as intent to commit murder or intent to resist lawful arrest.
- Prosecution must prove relevant specific intent.

Crimes Act 1900 (NSW):

33 Wounding or Grievous Bodily Harm with Intent

1) *Intent to cause GBH:*

A person who:

- a) Wounds any person, or
- b) Causes GBH to any person

With intent to cause GBH to that or any other person is guilty of an offence.

Maximum penalty is imprisonment for 25 years.

2) *Intent to resist arrest:*

A person who:

- a) Wounds any person, or
- b) Causes GBH to any person

With intent to resist arrest or prevent their lawful arrest or detention guilty of an offence.

Maximum penalty is imprisonment for 25 years.

*SNPP for these offences is 7 years.

Assaults Causing Particular Injuries:

- Where an assault causes or occasions actual injury to victim, it may be prosecuted as an aggravated assault.
- Injuries divided into 3 categories: actual bodily harm, wounding and GBH.

Crimes Act 1900 (NSW):

35 Reckless GBH or Wounding:

1) *Reckless GBH – in company*

A person who, in the company of another person/s:

- a) Causes GBH of another person or persons, and
- b) Is reckless as to causing actual bodily harm to that or any person

Is guilty of an offence.

Maximum penalty is 14 years' imprisonment.

2) *Reckless GBH*

A person who:

- a) Causes GBH to any person, and
- b) Is reckless to causing actual bodily harm to that or any person,

Is guilty of an offence.

Maximum penalty is 10 years' imprisonment.

3) *Reckless Wounding – in company*

A person who, in company of another person/s:

- a) Wounds any person, and
- b) Is reckless to causing actual bodily harm to that or any person,

Is guilty of an offence.
Maximum penalty is 10 years' imprisonment.

4) *Reckless Wounding*

A person who:

- a) Wound any person, and
 - b) Is reckless as to causing actual bodily harm to that or any other person,
- Is guilty of an offence.

Maximum penalty is 7 years' imprisonment.

5) *Alternative Verdict*

If on trial of person charged with offence against any subsection in this section the jury is not satisfied that offence proven but satisfied person has committed an offence against any other subsection of this section (that carries a lesser max penalty), jury may acquit person of offence charged and find guilty of an offence against other subsection.

59 Assault Occasioning Actual Bodily Harm:

- 1) Whosoever assaults any person, and thereby occasions ABH, shall be liable to imprisonment for 5 years.
- 2) Person guilty of offence under this subsection if person commits offence under subsection 1 in company of another person/s. A person convicted under this subsection is liable to imprisonment for 7 years.

*Section 35(1) has SNPP of 5 years, 35(2) and (3) have 4 years and 35(4) has 3 years.

Actual Bodily Harm:

- "Bodily harm has its ordinary meaning and includes any hurt or injury calculated to interfere with health or comfort of prosecutor. Need not be permanent but must not be more than merely transient and trifling" (*Donovan [1934]*).
- ABH can include psychological injury (*Chan-Fook [1994]*).
- Psychological injuries must go beyond merely transient emotions, feelings and states of mind to amount to ABH (*R v Cameron [1983]*).

Wounding:

- Wounding generally assumed to be "infliction of an injury which breaks continuity of skin" (*R v Newman [1948]*).
- Laceration must go down to dermis (*Smith*).

Grievous Bodily Harm:

Crimes Act 1900 (NSW):

Section 4

1) GBH includes:

- a) Destruction (other than in course of medical procedure) of the foetus of a pregnant woman, whether or not woman suffers any other harm, and
- b) Any permanent or serious disfiguring of the person, and

c) Any grievous bodily disease (in which case reference to infliction of GBH includes reference to causing person to contract a grievous bodily disease.

- GBH can also include injuries that are “really serious” (*DPP v Smith [1961]* and *Haoui [2008]*).

Assault During Public Disorder:

Crimes Act 1900 (NSW):

59A Assault During Public Disorder

- 1) Person who assaults any person during large-scale public disorder, although not occasioning ABH, is liable to imprisonment for 5 years.
- 2) Person who assaults any person during large-scale public disorder, and by the assault occasions ABH, liable to imprisonment for 7 years.

Domestic Violence and Legal Change:

- Still high rates of reported domestic violence despite the hidden nature of the crime.
- History:
 - Difficulty in separating a domestic violence relationship if wife is financially dependent on the spouse (Allen).
 - Previously resorted to family law to resolve domestic violence, only to criminal law if attack amounted to attempted murder or malicious wounding.

Apprehended Domestic Violence Orders (ADVO):

- Section 9 of the *Crimes (Domestic and Personal Violence) Act 2007* sets out objects of the Act, summarised below (see page 642):
 - Ensure safety and protection of all persons.
 - Reduce and prevent violence in domestic relationships.
 - Enact provisions that are consistent with international law.
 - Act aims to empower courts to make ADVO's.
 - Ensuring efficiency and affordability of courts.
- Grounds for making an ADVO:
 - Set out in section 16 of the Act.
 - Court has grounds to grant order if on balance of probabilities person has or had domestic relationship with another person has reasonable grounds to fear and in fact fears personal violence, intimidation and stalking.
 - Court doesn't have to be satisfied that person is in fear if they are a child, of below average intelligence or have been a victim before.
- Prohibitions and Restrictions in Orders:
 - Court has a non-conclusive list at its disposal which includes restricting approaches by defendant to protected person, prohibiting access to certain areas, prohibiting behaviour that might affect protected person etc.
 - It is an offence to contravene a prohibition in the ADVO.
- When must an order be made or applied for?
 - Make order when defendant pleads guilty or is found guilty of stalking or intimidation or a domestic violence offence.

- Police officer investigating domestic violence offence obliged to make ADVO application if suspects offence has been, being or likely to be committed.
- Interim, provisional and interstate orders:
 - Interim orders granted if deemed necessary by courts and provide immediate protection.
 - Senior police officers (above rank of sergeant) are able to make provisional ADVO and APVO.
- Expanded Police and Other Powers:
 - Police able to issue directions and detain people to enable provisional ADVO's to be made.
 - If person refuses to comply, police can then detain.
- Apprehended Personal Violence Orders (APVO):
 - Grounds for considered by court in making an APVO are same as for ADVO's.
 - Police officer has discretion to refuse to issue process of APVO if satisfied that complaint frivolous, vexatious, without substance or has not reasonable prospects of success.
- Growth of AVO Applications:
 - Massive spike in AVO applications in the 90's (38,446).
 - Claims that many were false claims, but reports show most were correct.
 - To deter from false claims for AVO's, made it an offence to make false or misleading applications for APVO's (section 49A *Crimes (Domestic and Personal Violence) Act 2007*).
- Policing of Domestic Violence:
 - Released new police Code of Practice to ensure officers have adequate training on how to respond in domestic violence situations.
 - After an audit of police responses to domestic violence, noted that there were inconsistencies in areas such as slow response rates, reporting of ADVO breaches may not be acted upon etc.
 - Increase in breaches of AVOs from 1998 to 2013.
 - Cannot be charged with aiding and abetting breach of AVO if you are protected person.
- Research Examining Effectiveness of AVOs:
 - Women who suffered more serious levels of violence were more likely to seek legal protection.
 - More likely if in de facto relationship and less likely if didn't live together.
 - Of women studied, about half were not assaulted after obtaining legal protection.
 - Contacting police and court more effective than just police.
 - Barriers to effectiveness included unhelpful police attitudes, paucity of evidence of long-term violence, ability of perpetrator to exploit woman's prior non-disclosure of abuse in order to escape accountability.
 - Described frustration at still fearing perpetrator and understanding threat still posed, but unable to extend AVO as no breach.
 - Mismatch in understanding of domestic violence between Police and women involved.
 - Reduced effectiveness of AVO when minimal contact with police prosecutors meant the AVO wasn't tailored specifically for the victim.

- Other Programs and Services:
 - Established two Domestic Violence Intervention Court Models.
 - Models incorporated into a Domestic Violence Justice Strategy that is applied across courts in NSW.
 - Domestic Violence Advocacy Service provides free legal advice and legal representation in some cases to victims.
 - NSW Government launched Domestic and Family Violence Action Plan to assist in prevention, early intervention, protection, safety and justice and data collection/research.
 - Commonwealth government established the National Council to Reduce Violence against Women and their Children to advise on measures to reduce incidence and impact of violence against woman and children.
- Patterns of Domestic Violence:
 - Incidence of domestic assault strongly linked with level of economic and social disadvantage in the area (People).
 - Prominent in indigenous communities with 25% of ATSI women experiencing violence.
 - Women with disabilities 40% more likely to be victims.
 - 36% of domestic assaults were alcohol-related.
 - Domestic violence costs Australia \$13.6 billion in 2008-09 (Australian government study).

Stalking and Intimidation:

- Section 13 of CDPVA 2007 makes stalking or intimidating another person with intention of causing to fear physical/mental harm an offence with max penalty of 5 years' imprisonment or 50 penalty units (page 655).
- Stalking defined in section 8 as the following of a person about or watching or frequenting of the vicinity of, or approach to, a person's place of residence, business, work or place person frequents for purposes of any social or leisure activity.
- Intimidation defined in section 7 as:
 - Conduct amounting to harassment or molestation of person, or
 - Approach made to person by any means (including technology) that causes person to fear his or her safety, or
 - Any conduct causing reasonable apprehension of injury to a person with whom has a domestic relationship with, or of violence or damage to any person or property.

Class 6 – Homicide (Murder):

The Legal Framework for Murder:

Crimes Act 1900 (NSW):

Section 18(1)

- a) Murder shall be taken to have been committed where act of accused, or thing by them omitted to be done, causing the death charged, was done or omitted with reckless difference to human life, or with intent to kill or inflict GBH upon some person, or in an attempt to commit, or during or immediately after the commission, by the accused or some accomplice with them, of a crime punishable by imprisonment for life or for 25 years.

b) Every other punishable homicide shall be taken to be manslaughter.

Section 18(2)

- a) No act or omission which was not malicious, or for which accused had lawful cause or excuse, shall be within this section.
- b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.

- Section 18(2)(a) only applies to definition of murder in section 18(1)(a) as proof of malice not an element of manslaughter (*Lavender [2005]*).
- Manslaughter left undefined so must turn to common law which provides 2 definitions:
 - Manslaughter by an unlawful act.
 - Manslaughter by criminal negligence.

Causation:

- Death must be caused by accused.
- If accused fails to cause death, must be acquitted of murder and manslaughter.

Murder and Involuntary Manslaughter:

- Distinction mainly drawn from differing mens rea requirements.
- Need some degree of actual awareness by accused of certain consequences which could result from their actions before labelled murderer.
- For involuntary manslaughter, jury imputes what a reasonable person placed in the defendant's situation would do (objective test as external to thought process of accused).
- Courts have held that reckless indifference to human life is a category of murder and requires proof that accused foresaw possibility of death.

Constructive Crime:

- Constructive murder occurs where the act or commission causing death done during commission of another crime punishable by life/25 years' imprisonment.

Voluntary Manslaughter:

- Successful self-defence category will take accused out of criminal homicide category and produced not guilty verdict.
- Mitigating factors of extreme provocation, substantial impairment, excessive self-defence and infanticide may reduce the accused who has mens rea for murder (intention to kill) to a charge of manslaughter.
- This known as voluntary manslaughter.

The Prosecution Process:

- Where murder charged, always an alternative verdict of manslaughter available (*Downs (1985)*).

Sentence:

Crimes Act 1900 (NSW):

19A

- 1) Person commits crime of murder liable to imprisonment for life.
- 2) Person sentenced to imprisonment for life for murder to serve sentence for term of natural life.
- 3) Nothing in this section affects operation of section 21(1) of *CSPA 1999*

19B

- 1) Court to impose sentence of imprisonment for life for murder of police officer if murder committed:
 - a) Whilst on duty.
 - b) As a consequence, or in retaliation for, actions undertaken by officer in execution of duty.

And if person convicted of murder:

- c) Knew or ought reasonably to have known person was police officer.
- d) Intended to kill police officer or engaged in criminal activity that risked serious harm to police officers.

24 Whosoever commits the crime of manslaughter shall be liable to imprisonment for 25 years: Provided that, in any case, if Judge of opinion that, having regard to all circumstances, a nominal punishment would be sufficient, Judge may discharge jury from giving any verdict, and such discharge shall operate as an acquittal.

Crimes (Sentencing and Procedure) Act 1999:

Section 21(1) If offender made liable to imprisonment for life, court may nevertheless impose a sentence of imprisonment for a specified term.

Section 61(1) A Court is to impose sentence of life imprisonment on person convicted of murder if satisfied that level of culpability in commission of offence is so extreme that community interest in retribution, punishment, protection and deterrence can only be met through imposition of life sentence.

Non-Parole Periods:

- SNPP for murder is 20 years where life sentence imposed.
- Can be raised to 25.
- No SNPP for manslaughter as range of culpability so broad.

Murder: Intent and Reckless Indifference

Crabbe (1985) 156 CLR 464

Facts:

- Defendant consumed substantial amounts of alcohol at a bar from which he was physically ejected.

- He then drove his prime mover into the bar killing 5 people and injuring others.

Judgement:

- Person guilty of murder if commits a fatal act knowing that it will **probably** cause death or GBH but (absent an intention to kill or cause GBH) is not guilty of murder if he knew only that his act might **possibly** cause death or GBH.
- Above state of mind comparable to intention to kill as if knows death is a probable outcome, does the act expecting death or GBH to be the likely result.

Application of Crabbe in NSW:

- *Royall (1991)* held that Crabbe should apply equally to interpretation of reckless indifference to human life in section 18 of Crimes Act under qualification prosecution had to prove foresaw probability of death.
- Foresight of GBH not sufficient mens rea for murder *Royall (1991)*.
- Defendant recklessly indifferent to serious bodily harm and not death guilty of manslaughter not murder (*Solomon [1980]*).

Probabilities and Possibilities:

- Probable equates to likely to happen (*Boughey (1986)*).
- Likely to happen means that the event is going to happen, will happen, although only as a matter of probability, not certainty (*Annakin (1988)*).

Irrelevance of Method Causing Death:

- Does not matter that the accused did not intend the precise way in which the death actually occurred (*Royall (1991)*).

Constructive Murder:

Ryan (1967) 121 CLR 205:

Facts:

- Accused was robbing a store and had gun loaded and aimed at attendant.
- Attendant made sudden movement and in alleged reflex action, shot attendant.
- Argued killing was accident.
- Convicted of murder but appealed.

Judgement:

- If act of accused causing death charged done by him before, during or immediately after commission of crime punishable by life imprisonment, convicted of murder.
- Only need to prove intent for base crime.

Munro (1981) 4 A Crim R 67:

Facts:

- Munro intended to rob an elderly man.
- Picked up man and asked where money was, and after saying he didn't have any Munro let him fall to the floor and punched him in the face.
- Injuries resulted in his death 2 days later.

Judgement:

- No need for a direct causal connection between injuries and death, only required that injuries were an operative and substantially contributing cause of his death.
- Not necessary for there to be any foresight that actions of the accused would cause death.

Constructive Murder, Mens Rea and a Voluntary Act:

- Conviction can be secured for constructive murder even if consequence of death was accidental.
- The act causing the death must be voluntary.

The Base Offence:

- Accidental wounding is sufficient actus reus for constructive murder as long as act causing wounding was voluntary.

“In an Attempt to Commit, or During or Immediately After...”

- Whether “immediately after” is a question of fact to be answered by the jury (*Hudd [2013]*).

Class 7 – Homicide (Manslaughter):**Manslaughter by Unlawful Act:****Wilson (1992) 174 CLR 313:****Facts:**

- Wilson hit deceased in face causing him to fall to the ground and to hit his head on concrete.
- Companion then smashed his head on concrete.
- Crown case suggested fall from punch main cause of death.
- Wilson convicted of manslaughter but appealed.

Judgement:

- Held that manslaughter by an unlawful act required proof of existence, objectively determined, of a likelihood or risk of injury such that it could be said that the act in question was dangerous.
- Must be an appreciable risk of really serious injury (*Holzer [1968]*).
- Look to see if unlawful act gives rise to belief on part of reasonable person that someone is being exposed to appreciable risk of serious injury.

Characteristic of the Reasonable Person:

- Circumstances relevant to question whether reasonable man would appreciate danger include physical features of situation and of action of accused man involved. Not including idiosyncrasies of accused man or emotional or mental state (*Wills [1983]*).
- Reasonable person must be placed in “accused’s position” (*Cornelissen [2004]*).