

4. ASSAULT

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Type of harm	Offence
No injury	Common assault (s 61)
	Stalking or intimidation (s 13 C(D&PV) Act)
ABH	Assault occasioning ABH (s 59)
Wounding or GBH	[Intent to cause GBH] Wounding or GBH with intent (s 33)
	[Reckless as to cause ABH] Reckless GBH or wounding (s 35)
	[Negligent] Causing GBH (s54)

4.1 Common assault

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4.1.1 Crimes Act

Under s 61.

Punishment: 2 years.

4.1.2 Onus of proof

P has the evidentiary and legal burden to establish all elements beyond reasonable doubts.

4.1.3 Assault by force

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(A) Physical element

Application of force to the body of another person (without consent).

- (1) Unlawful contact: merest physical touch may be sufficient (*JWH (1997)*: spitting)
- (2) Omission unlikely to be sufficient (*Fagan (1969)*: not omission: no difference between stepping on to a person's toe and maintaining that position.) (exception: Causing GBH under s 54)
- (3) Irrelevant whether the battery is inflicted directly by the body or through the medium of some weapon or instrument (*Fagan (1969)*)
- (4) Unlawful: assumes that force is without consent.
 - (a) Consent to every contact is presumed (*JWH (1997)*)
 - (b) Common assault to which victim consents is not assault (*Brown (1994)*)
- (5) Intoxication
 - (a) Was A intoxicated
 - (b) Was the intoxication self-induced
 - (i) Yes: cannot be taken into account in determining whether the conduct is voluntary (s 428G(1))
 - (ii) No: can be taken into account in determining whether the conduct is voluntary (s 428G(2))

(B) Mental element

Intending to use unlawful force on another person or being reckless as to the use of such force (*MacPherson (1975)*).

(1) Intention / recklessness

- (a) Intention: A means to use force on V
- (b) Recklessness: foresight of possibility that act would make unlawful contact with V. Must be advertent recklessness (*MacPherson (1975)*; *Coleman (1990)*; *Aubrey (2017)*)

Detailed notes

16. SIAM

16.1 Context

16.1.1 Used to be called 'diminished responsibility'

16.1.2 Partial defence

Reduces murder to manslaughter.

23A Substantial impairment by abnormality of mind

(1) A person who would otherwise be guilty of murder is not to be convicted of murder if:

...

(b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.

(A) Elements for murder must be made out

(B) 'voluntary manslaughter'

16.1.3 Burden of proof

A has evidential and legal onus

23A Substantial impairment by abnormality of mind

(4) The onus is on the person accused to prove that he or she is not liable to be convicted of murder by virtue of this section.

16.1.4 1998 reform

s23A based on NSWLRC recommendations following comments by Gleeson CJ in *Chayna* (1993)

16.1.5 Controversy

Key concept of 'abnormality of mind' lacks scientific basis

A is partly responsible for actions but partly 'mad'

16.2 Elements

At the time of the act causing death, A must:

- be suffering from abnormality of the mind that substantially impairs capacity to
 - understand events or
 - to judge when conduct is right or wrong or
 - to control self, and
- That arises from an underlying condition, and
- Impairment is so substantial as to warrant reducing murder to manslaughter

16.2.1 Abnormality of mind

Abnormality of mind that substantially impairs A's capacity to understand events or to judge when conduct is right or wrong or to control self

(A) Jury decides what constitutes AM, based on medical & other evidence (*Byrne* (1960))

***R v Byrne* [1960] 2 QB 396**

Facts: Byrne admitted strangling a young woman and mutilating her dead body. Medical evidence classified him as a sexual psychopath, suffering from uncontrollable violent perverted sexual desires from time to time, although he may be normal at other times.

Held: (Lord Parker CJ) abnormality of mind, contrasted with defect of reason, means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It is **wide** enough to cover the **mind's activities in all its aspects**, not only the **perception** of physical acts and matters, and the **ability to form a rational judgement** as to whether an act is right or wrong, but also the **ability to exercise will power to control physical acts** in accordance with rational judgement.

The next question is whether the abnormality was such as substantially impaired his mental responsibility for his acts. This is a question of degree and essentially one for the jury.

In a case where abnormality is one which affects the self-control, the step between "he did not resist his impulse" and "he could not resist his impulse" is one which is incapable of scientific proof. The jury can only approach in a broad, common sense way.

Inability to exercise will power to control physical acts, provided that it is due to abnormality of mind, is sufficient to entitle the accused to the benefit of the section. It is for the jury to decide whether such inability or difficulty has been established, and in the case of difficulty, whether it is so great as to amount to a substantial impairment of the accused's mental responsibility.

- (B) Was A's capacity for rational thinking substantially impaired and is there a causal link between that impairment and the conduct? NSWLRC (1993)
- (C) Impairment must be substantial, can be less than total but must be more than trivial: Lloyd (1967)
- (D) s23A(3) Effects of self-induced intoxication at time of offence disregarded

23A Substantial impairment by abnormality of mind

(3) If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was self-induced intoxication (within the meaning of section 428A), the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section.

- (1) A intoxicated at time but also had underlying condition of alcohol-related brain damage (which made him more susceptible to effects of alcohol); establishing the defence will depend on whether the impairment from underlying condition was substantial when not intoxicated (*Goodridge* [2014])

Goodridge

Facts: Goodridge and the victim had been drinking heavily together. Goodridge started to make sexual advances towards the victim that were unwelcome. He became angry and sexually assaulted her, causing profuse bleeding from which she subsequently died. Goodridge was suffering from alcohol related brain damage and alcohol dependence and abuse disorder.

Held: a comparison between the impairment caused by the accused's underlying condition, and the impairment caused by intoxication. If the impairment was substantial even when the intoxication is disregarded, then he can establish substantial impairment. However if the impairment was not substantial unless he was intoxicated, then he cannot establish.

- (2) Under common law, if AM arises from voluntary use of drugs/alcohol may be relevant if there has been a protracted use that has produced brain damage: Tandy (1984); R v Whitworth (1989); Sanderson (1994)
- (E) This partial defence might apply to psychopaths/sociopaths.

16.2.2 **Underlying condition**

- (A) This underlying condition must cause the abnormality of mind
- (B) A pre-existing mental or physiological condition, other than a transitory condition

23A Substantial impairment by abnormality of mind

(8) In this section:

underlying condition means a pre-existing mental or physiological condition, other than a condition of a transitory kind.

- (C) Need not be permanent (*Tumanako* 1992) but does not include transitory or 'disabling passions of an ephemeral kind' (*Purdy* 1982)
- (D) Examples

Yes	No
severe depression (<i>Chayna</i> 1993); post-traumatic stress disorder (<i>Neilson</i> 1990); some personality disorders (<i>Whitworth</i> 1989)	emotions such as anger, jealousy, bad temper, attitudes/prejudices of upbringing have been held to not count (<i>R v Whitworth</i> (1989), <i>Hinz</i> (1986))

16.2.3 **Impairment is so substantial as to warrant murder being reduced to manslaughter**

- (A) Expert evidence of an opinion on this point is inadmissible