Criminal Laws

Genius Notes

Semester 1: 2018

UNSW

Burden of proof: legal and evidentiary **8**
Consent to harm **9**
Introduction to consent 9
Consent to medial treatment 10
Acceptable violence: corporal punishment of children 10
Corporal punishment of children in schools 11
Lawful correction 11
Violence in sport 11
Common assault and aggravated forms of assault **12**
Criminal offence categories 12
Common assault 12
Actus reus 12
Acts not omissions 12
Consent 13
Apprehension of immediate infliction of force 13
The victim's apprehension 14
Spitting 14
Mens rea 14
Coincidence between actus reus and mens rea 14
Aggravated assaults 15
Assault causing particular injuries 15
Actual bodily harm 15
Wounding 15
Grievous bodily harm 16
Grievous bodily harm: death of a foetus 16
Grievous bodily harm: causing a grievous bodily disease 16
Is specific intent required in relation to the type of injury caused? 17
Summary 17
Aggravated assault (continued) and domestic violence **19**
Aggravated intoxicated assaults 19
Apprehended domestic violence orders 19
Prohibitions and restrictions in orders 19
When must an order be made or applied for? 20
Interim, provisional and interstate orders 20
Expanded police and other powers 20
Apprehended personal violence orders ..... **Error! Bookmark not defined.**
Stalking and intimidation ..... **Error! Bookmark not defined.**
Amendment to the Crimes (Domestic and Personal Violence) Act 2007 ..... **Error! Bookmark not defined.**
Sexual assault ..... Error! Bookmark not defined.
Rape at common law ..... **Error! Bookmark not defined.**
Sexual reputation and history evidence ..... **Error! Bookmark not defined.**
Statutory reform ..... **Error! Bookmark not defined.**

Homosexuality offences and their repeal ..... **Error! Bookmark not defined.**
The current legislative framework ..... **Error! Bookmark not defined.**
The abolition of common law immunities ..... **Error! Bookmark not defined.**
Sexual assault: the physical elements ..... **Error! Bookmark not defined.**
Sexual intercourse: the conduct ..... **Error! Bookmark not defined.**
Consent: the circumstance ..... **Error! Bookmark not defined.**
A positive definition of consent ..... **Error! Bookmark not defined.**
Circumstances which negate consent ..... **Error! Bookmark not defined.**
Further grounds that may negate consent ..... **Error! Bookmark not defined.**
Sexual assault and related offences ..... Error! Bookmark not defined.
Sexual assault: the mental element ..... **Error! Bookmark not defined.**
Knowledge of consent ..... **Error! Bookmark not defined.**
Recklessness (advertent or inadvertent) as to consent ..... **Error! Bookmark not defined.**
No reasonable grounds for believing the other person was consenting ..... **Error! Bookmark not defined.**
Aggravated sexual assault and aggravated sexual assault in company ..... **Error! Bookmark not defined.**
Aggravated sexual assault in company ..... **Error! Bookmark not defined.**
Murder ..... Error! Bookmark not defined.
The legal framework ..... **Error! Bookmark not defined.**
Causation ..... **Error! Bookmark not defined.**
Murder and involuntary manslaughter ..... **Error! Bookmark not defined.**
Voluntary manslaughter ..... **Error! Bookmark not defined.**
Protecting the foetus ..... **Error! Bookmark not defined.**
Children born alive but dying because of earlier violence ..... **Error! Bookmark not defined.**
The prosecution process ..... **Error! Bookmark not defined.**
Sentence ..... **Error! Bookmark not defined.**
Non-parole periods ..... **Error! Bookmark not defined.**
Murder: intent and reckless indifference ..... **Error! Bookmark not defined.**
Irrelevance of method of causing death ..... **Error! Bookmark not defined.**
Constructive murder ..... **Error! Bookmark not defined.**
Constructive murder, means rea and voluntary act ..... **Error! Bookmark not defined.**
The base offence: constructive murder ..... **Error! Bookmark not defined.**
Summary: murder ..... **Error! Bookmark not defined.**
Summary: constructive murder ..... **Error! Bookmark not defined.**
Manslaughter ..... Error! Bookmark not defined.
Manslaughter by an unlawful act ..... **Error! Bookmark not defined.**
Manslaughter by an unlawful act: characteristics of the reasonable person ..... **Error! Bookmark not defined.**
The unlawful act ..... **Error! Bookmark not defined.**
Excluded unlawful acts ..... **Error! Bookmark not defined.**
Drug offences as unlawful acts ..... **Error! Bookmark not defined.**
'One-punch' legislation ..... **Error! Bookmark not defined.**
Assault causing death when intoxicated ..... **Error! Bookmark not defined.**
Manslaughter by criminal negligence ..... **Error! Bookmark not defined.**

Distinguishing manslaughter by unlawful act ..... **Error! Bookmark not defined.**
The degree of negligence required ..... **Error! Bookmark not defined.**
The reasonable person in the position of the accused ..... **Error! Bookmark not defined.**
Summary: manslaughter ..... **Error! Bookmark not defined.**
Causation and homicide by omission ..... Error! Bookmark not defined.
Actus reus: homicide by omission ..... **Error! Bookmark not defined.**
Duty of care ..... **Error! Bookmark not defined.**
Murder by omission ..... **Error! Bookmark not defined.**
Actus reus: causation ..... **Error! Bookmark not defined.**
Means of escape ..... **Error! Bookmark not defined.**
Medical intervention and breaking the chain of causation ..... **Error! Bookmark not defined.**
Liability of the medical profession ..... **Error! Bookmark not defined.**
Treating a patient against their wishes ..... **Error! Bookmark not defined.**
Respecting a patient's wish to continue treatment ..... **Error! Bookmark not defined.**
Withholding and discontinuing treatment ..... **Error! Bookmark not defined.**
Summary: homicide by omission ..... **Error! Bookmark not defined.**
Summary: causation and medical treatment ..... **Error! Bookmark not defined.**
Defences: mental illness ..... Error! Bookmark not defined.
Defences ..... **Error! Bookmark not defined.**
Distinction from 'negativing factors' ..... **Error! Bookmark not defined.**
Mental illness ..... **Error! Bookmark not defined.**
Summary proceedings ..... **Error! Bookmark not defined.**
Fitness to stand trial ..... **Error! Bookmark not defined.**
The mental illness defence: the M'Naghten Rules ..... **Error! Bookmark not defined.**
The elements ..... **Error! Bookmark not defined.**
The burden of proof ..... **Error! Bookmark not defined.**
Detention following a special verdict ..... **Error! Bookmark not defined.**
Forensic patients: review and release ..... **Error! Bookmark not defined.**
Summary: mental illness defence ..... **Error! Bookmark not defined.**
Defences: automatism and substantial impairment ..... Error! Bookmark not defined.
Automatism ..... **Error! Bookmark not defined.**
The causes of automatism ..... **Error! Bookmark not defined.**
Disassociation ..... **Error! Bookmark not defined.**
Hypoglycaemia/hyperglycaemia ..... **Error! Bookmark not defined.**
Epilepsy ..... **Error! Bookmark not defined.**
Sleepwalking ..... **Error! Bookmark not defined.**
Voluntariness and psychiatric evidence ..... **Error! Bookmark not defined.**
Distinguishing insanity from automatism ..... **Error! Bookmark not defined.**
The defence of substantial impairment: the statutory basis ..... **Error! Bookmark not defined.**
Abnormality of the mind ..... **Error! Bookmark not defined.**
The causes of the abnormality: 'underlying condition' ..... **Error! Bookmark not defined.**
Substantial impairment ..... **Error! Bookmark not defined.**

Reliance on medical and psychiatric evidence ..... **Error! Bookmark not defined.**
Self-induced intoxication to be disregarded ..... **Error! Bookmark not defined.**
Summary: automatism ..... **Error! Bookmark not defined.**
Summary: substantial impairment ..... **Error! Bookmark not defined.**
Defences: intoxication and self-defence ..... Error! Bookmark not defined.
Self-induced intoxication in NSW ..... **Error! Bookmark not defined.**
Intoxication and murder ..... **Error! Bookmark not defined.**
Availability of a lesser offence ..... **Error! Bookmark not defined.**
Intoxication which is not self-induced ..... **Error! Bookmark not defined.**
Summary: intoxication ..... **Error! Bookmark not defined.**
Self-defence ..... **Error! Bookmark not defined.**
The recent history of self-defence ..... **Error! Bookmark not defined.**
Current law: the statutory definition ..... **Error! Bookmark not defined.**
The nexus between the offence and the threat ..... **Error! Bookmark not defined.**
Defence of property ..... **Error! Bookmark not defined.**
Excessive self-defence ..... **Error! Bookmark not defined.**
Summary: self-defence ..... **Error! Bookmark not defined.**
Defences: extreme provocation ..... Error! Bookmark not defined.
Extreme provocation: a history ..... **Error! Bookmark not defined.**
The 1982 reforms ..... **Error! Bookmark not defined.**
Current law ..... **Error! Bookmark not defined.**
The provoking conduct ..... **Error! Bookmark not defined.**
Within the sight or hearing of the accused ..... **Error! Bookmark not defined.**
Can words qualify as the provoking conduct? ..... **Error! Bookmark not defined.**
Sexual advances ..... **Error! Bookmark not defined.**
Victim-incited provocation ..... **Error! Bookmark not defined.**
The subjective test: time and the loss of self-control ..... **Error! Bookmark not defined.**
The 'ordinary person' test ..... **Error! Bookmark not defined.**
Intoxication ..... **Error! Bookmark not defined.**
Fraud and dishonesty ..... Error! Bookmark not defined.
The method of the fraud: 'deception' ..... **Error! Bookmark not defined.**
The actus reus of deception: false statements ..... **Error! Bookmark not defined.**
The actus reus of deception: deception by conduct and silence ..... **Error! Bookmark not defined.**
The mens rea of deception ..... **Error! Bookmark not defined.**
The consequence of the fraud: obtaining property from another ..... **Error! Bookmark not defined.**
The means rea of obtaining property: intention to permanently deprive ..... **Error! Bookmark not defined.**
The consequence of the fraud: causing a financial disadvantage ..... **Error! Bookmark not defined.**
The mens rea of obtaining financial disadvantage or causing financial disadvantage ..... **Error! Bookmark not defined.**
Causation ..... **Error! Bookmark not defined.**
Dishonestly ..... **Error! Bookmark not defined.**
Criticisms of the Ghosh test ..... **Error! Bookmark not defined.**
Dishonesty and claim of right ..... **Error! Bookmark not defined.**

Summary: fraud ..... **Error! Bookmark not defined.**
Larceny ..... Error! Bookmark not defined.
Defining larceny ..... **Error! Bookmark not defined.**
Things capable of being stolen ..... **Error! Bookmark not defined.**
The need for property to be a thing: intangible property and money ..... **Error! Bookmark not defined.**
In the possession of another ..... **Error! Bookmark not defined.**
Asportation: taking and carrying away ..... **Error! Bookmark not defined.**
Taking without the consent of the possessor ..... **Error! Bookmark not defined.**
Implied license ..... **Error! Bookmark not defined.**
Intention to permanently deprive ..... **Error! Bookmark not defined.**
Intention to return the property ..... **Error! Bookmark not defined.**
Conditional appropriation? ..... **Error! Bookmark not defined.**
Exhausting the virtue of the property ..... **Error! Bookmark not defined.**
Changing the nature of the property ..... **Error! Bookmark not defined.**
Fraudulently or dishonestly ..... **Error! Bookmark not defined.**
Claim of right ..... **Error! Bookmark not defined.**
Claim of right and Indigenous defendants ..... **Error! Bookmark not defined.**
Summary: larceny ..... **Error! Bookmark not defined.**
Aggravated larceny and related offences ..... Error! Bookmark not defined.
Introduction ..... **Error! Bookmark not defined.**
Robbery ..... **Error! Bookmark not defined.**
Aggravated trespass offences ..... **Error! Bookmark not defined.**
Breaking/entering ..... **Error! Bookmark not defined.**
Computer data access, modification and communication impairment offences ..... **Error! Bookmark not defined.**
Receiving stolen property ..... **Error! Bookmark not defined.**
Procedural issues: recent possession ..... **Error! Bookmark not defined.**
Procedural issues: persons unknown ..... **Error! Bookmark not defined.**
Goods in custody ..... **Error! Bookmark not defined.**
Thing ..... **Error! Bookmark not defined.**
Custody ..... **Error! Bookmark not defined.**
Reasonable suspicion ..... **Error! Bookmark not defined.**
Defence of no reasonable grounds to suspect ..... **Error! Bookmark not defined.**
Complicity: joint criminal enterprise and extended joint criminal enterprise ..... Error! Bookmark not defined.
Introduction ..... **Error! Bookmark not defined.**
Complicity ..... **Error! Bookmark not defined.**
Joint criminal enterprise ..... **Error! Bookmark not defined.**
The presence requirement ..... **Error! Bookmark not defined.**
Proving agreement ..... **Error! Bookmark not defined.**
Withdrawal from a joint criminal enterprise ..... **Error! Bookmark not defined.**
Summary: joint criminal enterprise ..... **Error! Bookmark not defined.**
Extended joint criminal enterprise ..... **Error! Bookmark not defined.**
Foreseeability ..... **Error! Bookmark not defined.**

Summary: extended joint criminal enterprise ..... **Error! Bookmark not defined.**
Accessorial liability ..... Error! Bookmark not defined.
Introduction ..... **Error! Bookmark not defined.**
Mental element for accessorial liability: intention and knowledge ..... **Error! Bookmark not defined.**
Conduct amounting to 'aiding, abetting, counselling or procuring' ..... **Error! Bookmark not defined.**
Gang rapes ..... **Error! Bookmark not defined.**
Brawls ..... **Error! Bookmark not defined.**
Withdrawal ..... **Error! Bookmark not defined.**
Can a 'victim' be convicted of aiding and abetting? ..... **Error! Bookmark not defined.**
Assistance after the commission of a crime ..... **Error! Bookmark not defined.**
Summary: accessorial liability ..... **Error! Bookmark not defined.**
Conspiracy ..... Error! Bookmark not defined.
Introduction ..... **Error! Bookmark not defined.**
The elements of conspiracy ..... **Error! Bookmark not defined.**
The existence of the agreement ..... **Error! Bookmark not defined.**
The scope of the agreement ..... **Error! Bookmark not defined.**
Convictions of individuals for conspiracies ..... **Error! Bookmark not defined.**

Burden of proof: legal and evidentiary

- Legal burden of proof:
    - This is the normal 'burden of proof' in criminal law. It requires the persuasion of the jury to believe the allegation beyond all reasonable doubt.
- Evidentiary burden of proof:
    - An evidentiary burden of proof is a duty to show that there is sufficient evidence to raise an issue. It is not a full burden of proof like a persuasive burden of proof is; rather, it is merely a burden to produce some evidence which might dispute a presumption the court is under. Whether an evidentiary burden of proof has been satisfied is determined by the judge.
    - After such a determination, the prosecution will have a persuasive burden of proof to refute the contention (in other words, beyond all reasonable doubt).
    - The *Criminal Code (Cth)* defines an evidentiary burden as: 'The burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist': s 13.3 (6).

Consent to harm

See: Criminal Laws (Materials and Commentary on Criminal Law and Process of New South Wales), pp. 601-618.

Introduction to consent

- Consent can provide a defence to assault.
- *Brown* [1994] 1 AC 212 provides exceptions to the principle that a person cannot consent to harm: prize fighting, sparring and boxing, contact sports, surgery, lawful correction, dangerous pastimes, bravado, religious mortification, rough horseplay and prostitution.
- *Brown* [1994] 1 AC 212:
    - Five men were charged with counts of lawful assault and malicious wounding after it was discovered that they were engaging in homosexual, sadomasochistic activities. No victim complained but their actions were discovered when the police found a videotape of their activities during an unrelated police investigation. The House of Lords heard their appeal as it involved a point of law of general public importance; however, the appeals were dismissed.
    - Three of the co-accused appealed to the European Court of Human Rights. The issue before the court was whether this interference with 'necessary in a democratic society'. The court did not accept the contention that the behaviour formed a part of a private morality which is not the state's business to regulate because the activities involve a significate degree of injury of wounding.
    - For a lengthy discussion on consent to harm and assault, see pp. 601-607 of the textbook.
- *Stein* [2007] VSCA 300:
    - The case involved a bondage session between the accused, a prostitute and the deceased who was tied up and left gagged around the head and mouth. The deceased died after showing signs of distress with the accused in the room, who provided no assistance. The accused was convicted of unlawful and dangerous act manslaughter: the unlawful act being the assault, with there being no evidence of consent to the gag.
    - 'Nevertheless, even though it might be accepted that the deceased has consented to bondage activity, the application of a gag to his mouth, whether or not he had consented, involved exposure to the risk of serious physical injury to him… once the gag had been placed on him, he was totally in the hands of the applicant. Once that had occurred in the circumstances where a risk of serious injury arose, the issue of consent became irrelevant.'
- In the UK, however, a man was acquitted of a charge of assault occasioning actual bodily harm on the basis that the woman consented. Furthermore, a conviction for assault occasioning actual bodily harm *arising* out of the consensual branding (with a hot knife) of a husband's initials on his wife's buttocks was quashed in *Wilson* [1997] QB 47.
    - 'In our judgement, *R v Brown* is not authority for the proposition that consent is no defence to a charge where… actual bodily harm is deliberately inflicted. It is to be observed that the question certified for their Lordships in *R v Brown* related only to a 'sadomasochistic encounter'.
- There is a confused state of the law of consent.
    - *Simester and Sullivan* (2004) on the contrasting decisions in *Brown* and *Wilson*: 'Why violence perpetrated for sport, horseplay or ornamentation has an acceptability denied to sexual fulfilment lies beyond reason. All that can be done is to note and memorise the decisions of the courts as and when they arise.'

- In *Aitken* [1992] 4 All ER 54, some air force officers amused themselves in an after-dinner game by dousing each other with fuel and setting it alight (to test the fire-resistant properties of their flying suits). One of them suffered 'horrendous burns'. It was held that no offence was committed by this consensual act of 'horseplay'.
- Conversely, in *Emmett* (unreported, EWCA Crim, 18 June 1999), the conviction for assault occasioning actual bodily harm was upheld notwithstanding consent. A couple soon to be married had engaged in two episodes of consensual sexual risk-taking which caused actual bodily harm. The first incident involved intercourse with the woman's head enveloped in a plastic bag, after which medical attention was sought for bruising and bloodshot eyes. The second involved a third-degree burn caused by pouring lighter fluid on the woman's breast and setting it alight. The court held that these activities went 'well-beyond' the line beyond which consent becomes immaterial and distinguished *Wilson* as a tattooing case.
- *Brown* rejected the assertion that there must be an underlying element of 'hostility' in the law of assault, such that no offence of assault can be made out without 'hostile intent'. In *Broughey* (1986) 161 CLR 10, the High Court of Australia came to a similar conclusion.
    - 'It has never been the common law that actual hostility or his tile intent towards the person against whom force is intentionally applied is a necessary ingredient of an unlawful battery.'

Consent to medial treatment

- Medical examinations and surgical operations are only lawful where the procedure has been consented to by the patient. In practice, disputes about consent to medical or surgical procedures are usually the subject of civil disputes for damages rather than criminal prosecutions.
- *Richardson* (1998) 43 BMLR 21:
    - Richardson, a dentist, continued to treat patients after being suspended from practising and was charged with assault occasioning actual bodily harm.
    - The trial judge ruled that her patients' consent to treatment was vitiated by fraud. Upon appeal, it was held that under the criminal law only a mistake as to the nature of the act or the identity of the person doing it vitiates consent. The court also held that the consent of informed consent held no place in the criminal law and quashed the conviction.
- In *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, it was held that:
    - Prima facie, any physical contact or threat of it is unlawful, it is the right of the individual to choose what occurs with respect to his or her own person. Parental consent (when itself is effective) is an exception to the need for personal consent for a minor who, due to incapacity, cannot consent. This scope of parental power to consent diminishes as the child grows and can give an informed decision.
    - In decisions where 'the consequences of a wrong decision are particularly grave', determined by complexity of the question and the conflicting interests of parents or guardians, court authorisation is required

Acceptable violence: corporal punishment of children

- *W and DL* [2014] SASC 102 at [29]:
    - 'A parent has a lawful right to inflict reasonable and moderate corporal punishment on his or her child for the purpose of correcting the child in wrong behaviour, but there are exceedingly strict limits to that right...

the punishment must be moderate and reasonable… it must have a proper relation to the age, physique and mentality of the child… it must be carried out with a reasonable means or instrument.'

Corporal punishment of children in schools

- Section 35(2A) of the *Education Act 1990* provides that:
    - 'Guidelines and codes must not permit corporal punishment of students attending government schools'.
    - Under s 47(h), a registration requirement for non-government schools is that their official school policies relating to school discipline do not permit corporal punishment of students attending the school.

Lawful correction

- In NSW, the common law defence of lawful correction has been narrowed and codified.
- Section 61AA of the *Crimes Amendment (Child Protection – Physical Mistreat) Act 2001* incorporates the common law requirement of reasonableness but confined the level of force to excluded force applied to the head or neck or any part of the body if the force lasts for more than a short period.

Violence in sport

- It is often said that participants in sport consent to the 'rough and tumble' within the context of the rules of the game.
- Even where violence is in breach of the rules it will often be regarded as an acceptable risk and therefore not criminal in nature: *Re Jewell* (1987) 1 VAR 370.
- Although criminal prosecutions are extremely rare, the courts have emphasised that there is no blanket exclusion of sporting fields from the reach of the criminal law: *Billinghurst* [1978] Crim LR 553.
- *Stanley* (unreported, NSWCCA, 07 April 1995): The court unanimously upheld the conviction of a sentence imposed on a district rugby player who raised his elbow in a tackle and fractured the jaw of an opposing player: 'Players are not to be taken as consenting to the malicious use of violence intended or recklessly to cause grievous bodily injury. The policy of the law will not permit the mere occasion of a rugby league match to render innocent or otherwise excuse conduct which can discretely be found beyond reasonable doubt, to constitute a criminal offence' (Levine J).

Common assault and aggravated forms of assault

See: Criminal Laws (Materials and Commentary on Criminal Law and Process of New South Wales), pp. 585-601; 618-625.

Criminal offence categories

- Acts of non-fatal violence are commonly classified into 'common assaults' and 'aggravated assaults'.
- Section 61 of the *Crimes Act 1900* establishes that the maximum penalty for common assault if two years' imprisonment but does not define the offence. The term 'aggravated assault' does not appear in the *Crimes Act 1900*.

Common assault

- The common law originally contained separate offences of 'assault' and 'battery'.
- Assault was the crime of putting another person in fear or apprehension of an unlawful contact.
- Battery was the actual application of force without consent, awful excuse or justification.
- In the modern criminal law, these two offences are often described generally as 'assault' and the use of the word in offences within the *Crimes Act* includes both forms of assault.
- *Darby v DPP* (NSW) 61 NSWLR 558:
    - 'As assault is an act by which a person or intentionally or perhaps recklessly causes another person to apprehend the immediate infliction of physical force upon him; a battery is the actual infliction of unlawful force. There can be an assault without a battery, and there can be a battery without an assault. The distinction remains, and must be recognised.'
- In *Edwards v Police* (1998) 71 SASR 493, the elements of assault where no actual physical contact is suffered is summarised as follows:
    - The actus reus of an assault where there is no physical contact is an act of the defendant raising in the mind of the victim, where the fear of immediate violence to him or her, that is to say, the fear of any unlawful physical contact.
    - The mens rea of such an assault is the defendant's intention to produce that expectation in the victim's mind. There is an alternative possibility of a reckless assault, where the defendant, whilst not desiring to cause such fear, realises that his or her conduct may do so, and persists with it anyway.
- Thus, the elements of assault involving physical contact are as follows: the actus reus element is an application of force without consent, and the mens rea is either intent to apply physical contact or recklessness, where the defendant foresaw the risk of the application of force and went ahead anyway with his or her conduct.

Actus reus

- An assault, whether by way of application of force or apprehension or immediate violence, must be committed by an act not an omission, and must be without the consent of the victim.
- For assaults involving the apprehension of immediate violence, there is an additional requirement that the victim must be put in fear of immediate unlawful force.

Acts not omissions

- In *Fagan v Commissioner of Metropolitan Police*, Fagan was sat in his car when he was approached by a police officer who told him to move the vehicle. Fagan did so, reversed his car and rolled it on to the foot of the police officer. The officer forcefully told him to move the car off his foot at which point Fagan swore at him and refused to

move vehicle and turned the engine off. Fagan was convicted of assaulting a police officer in the execution of his duty. Fagan subsequently appealed the decision.

- ‘To constitution the offence of an assault some intentional act must have been performed: a mere omission to act cannot amount to an assault’: *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439.

Consent

- ‘The term assault involves the 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) 25 NSWLR 74.
    - Not a factor that the Crown must negative and there is generally no obligation to call evidence in order to do so.
- ‘For there to be an assault the law requires an intentional application of force to the person of another which is unlawful. For it to be an unlawful act of the accused there must be no lawful justification for it. Consent in this case would be a lawful justification or excuse’: *Bonora*.

Apprehension of immediate infliction of force

- Where the assault involves an act causing the victim to apprehend the immediate infliction of unlawful force, questions arise as to whether the threat of harm is sufficiently imminent to satisfy the actus reus requirement.
- *Knight* (1988) 35 A Crim R 314:
    - The appellant made threatening and abusive phone calls to a police officer, a magistrate and a judge. Apart from the phone calls, which were traced to the appellant at a considerable distance from the targets, there was no evidence in relation to assault charges.
    - The court referred to *Fagan v Metropolitan Commissioner of Police*, which defined assault as ‘an act which intentionally – or possibly recklessly – causes another person to apprehend immediate and unlawful personal violence.’
    - The court rejected the argument in *Barton v Armstrong*, holding that ‘immediate’ should have a more literal interpretation (i.e. ‘mere words’ can constitute a threat per *Barton v Armstrong*, but there must be an element of immediacy). Threats need to be imminent and immediate; generalised threats of future conduct will not suffice.
    - In this case, there wasn't such an immediate connection and the conviction is therefore quashed.
- *Zanker v Vartzoka* (1988) 34 A Crim R 11:
    - The plaintiff accepted a lift from the defendant, after which the defendant offered her money in exchanged for sexual favours, which she refused. Consequently, the defendant accelerated whilst the plaintiff demanded to be let out. The defendant stated ‘I am going to take you to my mate’s house; he will really fix you up’. The plaintiff then jumped out of the car, which was travelling at 60km/h, and injured herself. The plaintiff claimed that the defendant’s behaviour constituted assault and thereby caused her to apprehend immediate harm. The defendant argued that the violence threatened was not immediate but instead violence in the ‘indefinite future’ and therefore did not constitute assault.
    - ‘The young woman reasonably believed in the defendant’s intention and power to inflict violence, and in due course with the help of his ‘mate’. Further, the facts in the present appeal indicate that the violence threatened would be more immediate and likely than *Barton v Armstrong*… once the assault was proved, the bodily harm was ‘occasioned’ in fact whether or not the defendant foresaw that’s he would jump out and

injure herself. I remit the matter back to the magistrate with the direction that he record a conviction for assault.'

The victim's apprehension

- For a physic assault, the victim must be put in fear of immediate unlawful contact.
- A physic assault is 'constituted by an act which intentionally causes another to apprehend immediate and unlawful violence': *Pemble v R* (1971) 124 CLR 107.
- The 'reasonableness of the apprehension may or may not be necessary': *McPherson v Beath* (1975) SASR 174.

Spitting

- Spitting was held to be an assault in *DPP v JWH* (unreported, NSWSC, 17 October 1997): 'The offence of battery on the other hand involves the actual infliction of unlawful force on another, be it ever so small.'
- 'Spitting on, or any touching of, the cloths of a person, constitutes an assault': *Stenecker v Police* [2014] SASC 68.

Mens rea

- The mens rea of common assault is generally constituted by the intention to effect an unlawful contact or to create an apprehension of imminent unlawful contact in the mind of another person.
    - Recklessness will suffice.
- Debelle J found in *Edwards v Police* (1998) 71 SASR 493 that the mens rea for assault (where no unlawful contact was involved) is:
    - The defendant's intention to produce that expectation (imminent unlawful violence in the victim's mind).
    - There is an alternative possibility of a reckless assault, where the defendant, whilst not desiring to cause such fear, realises that his or her conduct may do so, and persists with it.
- This is a summary of the principles per *MacPherson v Brown* (1975) 12 SAR 184:
    - A student was convicted of assault (as in creating apprehension) of a lecturer, during a protest in which the lecturer was prevented from passing a group of students who caused him to fear for his personal safety. A special magistrate held that the defendant had been reckless and 'ought to have known' that his conduct could have given reasonable grounds for apprehending an infliction of physical force. In the court of appeal disagreed saying that the standard of the reasonable man is meant for tort law and not criminal law.
    - 'It is contrary to fundamental principles and the whole tenor of modern thought to judge a man in a criminal court… not by his actual intention, but by what a reasonable and prudent man would have intended… actual knowledge is necessary.'

Coincidence between actus reus and mens rea

- It has been held that for an assault involving a 'continuing act' the means rea does not need to be present at the time of the actus reus but can, in effect, be superimposed onto an existing (and continuing act).
- *Fagan v Commissioner of Metropolitan Police*: 'The mens rea is the intention to cause that effect. It is not necessary that means rea should be present at the inception of the actus reus; it can be superimposed upon an existing act.'
    - *Fagan*: 'On the facts found, the action of the appellant may have been initially unintentional, but the time came when knowing that the wheel was on the officer's foot the appellant (1) remained seated in the car so that his body through the medium of the car was in contact with the officer, (2) switched off the ignition of the car, (3) maintained the wheel of the car on the foot and (4) used words indicating te intention of keeping

the wheel in that position… there was an act constitution a battery which at its inception was not criminal because there was no element of intention but which became criminal from the moment the intention was formed to produce the apprehension which was flowing from the continuing act.'

Aggravated assaults

- An assault may be 'aggravated' by the presence of one or more factors:
    - The harm caused; where the person intents the cause a level of harm; the method used (for example, a gun, poison or other intoxicating substance); the status of the victim (i.e. child, police officer); and the setting (for example, a school, in company or during a 'public disorder').
- A number of offences are 'aggravated' by the presence of further specific intent:
    - ss 227 and 29 of the *Crimes Act* contain offences which amount to assault with intent to commit murder.
    - ss 33-33B contain offences which amount to assault with the intent to do grievous bodily harm.
- The prosecution must prove the further specific intent. For example, for an offence under s 33(1), the prosecution must prove that the accused wounded or caused grievous bodily harm to the victim and at the time had a specific intent to 'cause grievous bodily harm.'

Assault causing particular injuries

- Common assault under s 61 deals with unlawful contact, which may be slight but not trivial and excludes causing actual bodily harm.
- An assault that causes or 'occasions' actual injury to the victim may be prosecuted as an aggravated assault, which carries a higher penalty.
- The common law divides injuries (short of death) into three basic categories:
    - Actual bodily harm (s 59).
    - Wounding (s 35).
    - Grievous bodily harm (s 35).

Actual bodily harm

- 'Bodily harm' (s 59) takes on an ordinary meaning and includes and hurt or injury calculated to interfere with the health or comfort of the prosecutor: *Donovan* [1934] 2 KB 498.
- Actual bodily harm can include psychiatric injury: *Chan-Fook* [1994] 2 All ER 552.
- In *Ireland and Burstow* [1998] AC 147, the House of Lords upheld *Chan-Fook* and held that bodily harm includes recognisable psychiatric illnesses. Chan-Fook was also applied in *Lardner* (unreported, NSWCCA, 10 September 1998).
- *McIntyre* [2009] NSWCCA 305:
    - 'Actual bodily harm… need not be permanent, but must be more than merely transient or trifling – it is something less than 'grievous bodily harm', which requires serious physical injury, and 'wounding', which requires breaking of the skin. The distinction between grievous bodily harm and actual bodily harm involves the assessment of the degree of harm done, with one being more serious than the other: *R v Overall*.'

Wounding

- Wounding requires an incision or puncture in the skin.

- ‘A wounding is generally assumed to be the ‘infliction of an injury which breaks the continuity of the skin’: *Shepherd* [2003] NSWCCA 351.
- ‘A split lip or, as here, upper and lower lips, inflicted by a punch, is a ‘wounding’ only in the most technical sense’: *Shepherd* [2003] NSWCCA 351.

Grievous bodily harm

- Assault offences involving grievous bodily harm are sound in ss 33 and 25(1) and (2) of the *Crimes Act*.
- Section 4(1) defines grievous bodily harm as:
    a) The destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm, and
    b) Any permanent or serious disfiguring of the person, and
    c) Any grievous bodily disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease).
- ‘Grievous’ means ‘really serious’: *DPP v Smith* [1961] AC 290.
- Grievous bodily harm need not require that the injuries are permanent or that the consequences of the injury are long-lasting, or life threatening, but it does require that the injury is a really serious one: *Haoui* [2008] NSWCCA 209.
- In *Haoui*, the accused was found guilty of the offence of dangerous driving occasioning grievous bodily harm contrary to s 52A(3)(b) of the *Crimes Act*. The accused, who was speeding, struck a utility turning out of the driveway and the passenger in the utility (a 67-year-old man), who suffered ‘a sub-conjunctival haemorrhage of the right eye and a depressed right cheek fracture with bone deformity in the collision’. He required surgery to elevate the bony fragment and a titanium plate.
    - Beazley JA: ‘It is not difficult to determine cases at the more serious end of the scale. The following cases fall within that category: complex skull fractures: *R v Remilton*; several multiple fractures to a leg and nerve damage to the right side of the face, a closed head injury and facial neurological damage, as well as severe injuries to a knee: *R v Shannon*; rib fractures to a child: *BJR v R*. However, there are other injuries, which although ‘really serious injuries’, are nonetheless less severe than those to which I have just referred. Examples include: a fracture to the left orbit received in a violent kicking incident where it was said that the victim was ‘seriously injured’, that he had suffered a ‘significant injury’, and where the offence was described as involving ‘gratuitous cruelty’.’
    - In *Haoui*, it was found that the injury did amount to grievous bodily harm, albeit at the ‘low end of that scale’.

Grievous bodily harm: death of a foetus

- Until recently, the common law and legislation have regarded situations concerning harm to both a foetus and to a mother as only an injury to the mother: *King* [2003] NSWCCA 399.
- This is now no longer the case (see s 4(1) of the *Crimes Act* above).

Grievous bodily harm: causing a grievous bodily disease

- In 1990, the offence of maliciously causing (or attempting to cause) another person to contract a ‘grievous bodily disease’ was enacted in s 36 of the *Crimes Act*. The maximum penalty was penal servitude for 25 years.

- In 2007, s 36 was repealed and grievous bodily disease was incorporated into the definition of grievous bodily harm in s 4(1) of the *Crimes Act*.

Is specific intent required in relation to the type of injury caused?

- A 2007 amendment to the *Crimes Act* inserted the phrase 'recklessly cause' into s 35 (concerning grievous bodily harm).
- In 2012, parliament passed the *Crimes Amendment (Reckless Infliction of Harm) Act 2012* to overcome the perceived difficult of prosecuting such matters to the *Blackwell* standard: that is, proof that the accused foresaw some possibility of grievous bodily harm rather than simply some injury. The amendments now require proof that the accused caused grievous bodily harm and expressly require that he or she was reckless as to causing actual bodily harm.
- Similarly, a person is guilty of the offence of recklessly wounding if the person wounded another is reckless as to causing actual bodily harm.

Summary

- Common assault is the act of assaulting a person (s 61 of the *Crimes Act 1900*). Examples can include a range of different behaviours like kicking, pushing, punching and spitting, but to be defined as common assault, there must be no actual physical harm caused, or only a very small amount (Wilson [1997] 1 QB 439).
- Common assault need not involve physical contact: *Donovan* [1934] 2 KB 498.
- Common assault cannot arise from an omission, only an act: *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439.
- Common assault and battery are used interchangeably, but the distinction must be maintained: *Darby v DPP* (NSW) 61 NSWLR 558.
- For a physical act, the actus reus element is an application of force without consent, and the mens rea is either intent to apply physical contact or recklessness, where the defendant foresaw the risk of the application of force and went ahead anyway with his or her conduct (*MacPherson v Brown*).
- For it to be an unlawful act of the accused there must be no lawful justification for it: *Bonora* (1994) 25 NSWLR 74.
- The mens rea for assault (where no unlawful contact was involved) is the defendant's intention to produce that expectation (imminent unlawful violence in the victim's mind). There is an alternative possibility of a reckless assault, where the defendant, whilst not desiring to cause such fear, realises that his or her conduct may do so, and persists with it: *Edwards v Police* (1998) 71 SASR 493. The threat must be imminent: *Knight* (1988) 35 A Crim R 314 and *Zanker v Vartzoka* (1988) 34 A Crim R 11.
- If an assault results in the sustaining of an injury as a result, then this is assault occasioning actual bodily harm: *Donovan* [1934] 2 KB 498. The injuries don't have to be serious for a charge of actual bodily harm; scratches and bruises are enough.
- Injury can also include psychological trauma and mental health issues arising because of an assault: *Chan-Fook* [1994] 2 All ER 552.
- The difference between actual (s 59) and grievous bodily harm (s 35) involves an assessment of the harm done: *R v Overall*.
- Wounding requires the breaking or puncture of the skin (s 35): *Shepherd* [2003] NSWCCA 351.
- 'Grievous' means 'really serious': *DPP v Smith* [1961] AC 290.

- Grievous bodily harm need not require that the injuries are permanent or that the consequences of the injury are long-lasting, or life threatening, but it does require that the injury is a really serious one: *Haoui* [2008] NSWCCA 209.

EXAM NOTE: For aggravated assault, only the following offences need to be referred to in the problem question in the final exam: wounding or grievous bodily harm with intent (s 33), reckless grievous bodily harm or wounding (s 35), causing grievous bodily harm (s 54), assault occasioning actual bodily harm (s 59) and common assault prosecuted by indictment (s 61).

Aggravated assault (continued) and domestic violence

See: Criminal Laws (Materials and Commentary on Criminal Law and Process of New South Wales), pp. 634-637; 642-656.

Aggravated intoxicated assaults

- In 2014, the NSW government attempted to introduce a new category of assault; namely, assaults that were committed when the offender was 'intoxicated in public'.
- A Bill was introduced to tackle 'alcohol fuelled' violence and sought to introduce 11 new aggravated versions of existing assault offences. Five of the aggravated offences would have increased the maximum penalties of the basic offence by two years, and six provided for mandatory minimum sentences.
- The Bill passed the Legislative Assembly on 06 March 2014, but the Legislative Council sought significant amendments, which the Legislative Assembly refused to pass.

Apprehended domestic violence orders

- The grounds on which an ADVO may be made out are set out in s 16 of the *Crimes (Domestic and Personal Violence) Act 2007*: see pp. 642-643 of *Criminal Laws (Materials and Commentary on Criminal Law and Process of New South Wales).*
- A domestic relationship is defined in s 5 to include:
    - Spouses (including de facto spouses and same-sex relationships);
    - Intimate personal relationships (whether sexual or not);
    - Persons living (or who have lived) in the same household or residential facility;
    - Persons in a relationship of ongoing, dependent care; and
    - Relatives.
- The duration of the ADVO is determined by the court.
- In determining whether to make an ADVO, the court must consider 'the safety and protection of the protected person and any child directly or indirectly affected by the conduct of the defendant alleged in the application of the order' (s 17(1)).

Prohibitions and restrictions in orders

- The prohibitions and restrictions that may be contained in an AVO are listed in s 35:
    - Section 35(1): When making an apprehended violence order, a court may impose such prohibitions and restrictions on the behaviour of the defendant as appear necessary or desirable to the court and, in particular, to ensure the safety and protection of the person in need of protection and any children from domestic or personal violence.
- For a list of prohibitions and restrictions, see p. 643 of *Criminal Laws (Materials and Commentary on Criminal Law and Process of New South Wales).*
- All ADVOs also contain conditions prohibiting intimidation and stalking (s 36) and an order also extends to other persons with whom the protected person has a domestic relationship (s 36).
- Provisions prohibit the publication of names of children involved in the proceedings (s 45) and allow the court to direct the prohibition of the publication of names of other people involved, including the protected person (s 45).

When must an order be made or applied for?

- The court must make an order when the defendant pleads guilty of stalking or intimation: s 39.
- The court must make an order when the defendant pleads of a domestic violence: s 39.
- The court must make a provisional order on the commencement of proceedings for a domestic violence offence or stalking or intimidation offence: s 27.
- A domestic violence offence includes personal violence committed against persons in a defined domestic relationship: s 11.
- A police officer investigation a domestic violence offence or an offence of stalking or intimidation or an offence relating to child abuse is obliged to make an application for an ADVO if he or she suspects that such an offence has been, is being, or is likely to be committed, against the person for whose protection the order would be made: s 49(1). The legislation provides for when a police officer would not need to apply for an order, including where the victim intends on making an application: s 49(4).

Interim, provisional and interstate orders

- Part 6 of the *Crimes (Domestic and Personal Violence) Act 2007* allows for the granting of interim orders 'if necessary and appropriate': s 22.
- In 2014, The *Crimes (Domestic and Personal Violence) Amendment Act 2013* inserted new powers into the *Crimes (Domestic and Personal Violence) Act 2007* to allow senior police officers to issue provisional ADVOs.
    - A 'senior police officer' is a 'police officer of or above the rank of sergeant': s 3(1).
- Such an application may be made if:
    - An incident occurs involving the person against whom the provision order is sought to be made and the person who would be protected by the provisional order; and a police officer has good reason to believe a provisional order needs to be made immediately to ensure the safety and protection of the person who would be protected by the provisional order or to prevent substantial damage to any property of that person (s 26(1)).

Expanded police and other powers

- The *Crimes (Domestic and Personal Violence) Amendment Act 2013* also expanded the power of police officers to issue directions and detail people to enable provisional AVOs to be made and served.
- Under s 89(1), a police officer applying for a provisional APVO may direct a person to 'remain at the scene where the incident occurred that was the reason for making the application' or, if the person has left the scene, 'to remain at another place where the police officer locates the person'.
- A person may be so directed (under ss 89 or 89A) may be directed to remain at a place for 'as long as is reasonably necessary' for the relevant purpose (s 90A). Thus, under s 90A(1)(a), a person can be detained for long enough for the application for the provisional order to be made and the provisional order to be served.
    - Such detention should not exceed two hours: s 90(A)(2)(b).
- Section 9A of the former *Bail Act 1978*, the presumption in favour of bail was removed for most domestic violence offences; the *Bail Act 2013* grants bail based on a model of 'unacceptable risk'. One consideration of 'unacceptable risk' is the existence of current or past apprehended violence orders.